ENVIRONMENTAL REGULATIONS, THE ECONOMY, AND JOBS

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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[1] Mr. Lutter did not respond to submitted questions for the record.
[2] Ms. Steinzor did not respond to submitted questions for the record.

ENVIRONMENTAL REGULATIONS, THE ECONOMY, AND JOBS

TUESDAY, FEBRUARY 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE
Washington, D.C.

The subcommittee met, pursuant to call, at 1:04 p.m., in room 2322 of the Rayburn House Office Building, Hon. John Shimkus [Chairman of the Subcommittee] presiding.

Members present: Representatives Shimkus, Murphy, Whitfield, Pitts, Bono Mack, Bass, Latta, McMorris Rodgers, Harper, Cassidy, Gardner, Barton, Upton, Green, Butterfield, Barrow, Pallone, Capps, and Waxman (ex officio).

Staff present: David McCarthy, Counsel; Jerry Couri, Senior Environment Policy Advisor; Peter Kielty, Senior Legislative Clerk; Chris Sarley, Senior LA; Alex Yergin, Legislative Clerk; Elizabeth Lowell, Legislative Clerk; Jacqueline Cohen, Minority Counsel; Alison Cassady, Minority Professional Staff Member; Caitlin Haberman, Minority Policy Analyst; and Abigail Pinkele, Legislative Director, Rep. Green.

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

Mr. SHIMKUS. We will call the subcommittee to order. Again, first of all, apologies for being a few minutes late. We just finished a vote in the full committee, so people will be meandering up here. Also, we are supposed to have a recorded vote around 1:15 to 1:30, so our intent is to start getting the testimony, opening statements out of the way, and then hopefully we can move expeditiously.

And I will begin. I would like to welcome everyone to the first hearing of the Environment and the Economy Subcommittee for the 112th Congress. I am honored to serve as the chairman of the subcommittee and excited about the opportunity to work with members from both sides of the aisle. I particularly want to welcome and congratulate Mr. Green on being named ranking member. We have already spoken numerous times. We are friends from many years, more than we would like to mention, and I have enjoyed working with him in the past and look forward to doing so in our future capacities on this subcommittee.

From taking a shower in the morning to turning off the lights before bed, our daily lives are constantly touched by environmental regulations under the jurisdiction of this subcommittee. That might be obvious from its name, but what might not be so clear is the

important nexus with the "economy" portion of the title. Due to environmental regulations, families have to pay higher rates to turn on those lights or water, and there is also the great impact that these higher costs have a consequence.

We heard from Timberland last week of forcing jobs overseas when overbearing regulations stifle the marketplace. It is a necessary and healthy exercise to review regulations to make sure congressional intent is being followed and the best interests of our nations are protected. We cannot just look at regulations in individual silos.

People don't have the luxury of being able to comply with regulations in the abstract or singularly. Rather, they must face all regulations together at the same time. That is why I think we need to weigh the benefits compared to the collective burdens placed on businesses trying to navigate through a struggling economy to keep jobs here at home.

More to the point, while one regulation alone may not close a business, the cumulative effect could be devastating, resulting in death by 1,000 cuts. Since 2009, when President Obama took office, the U.S. Environmental Protection Agency has finalized 928 rules and proposed 703 others. As we overload the nation with these proposed and finalized regulations, we need to ensure that in an effort to do a good thing, our government is not creating unintended consequences.

According to the U.S. Chamber of Commerce, the problem is not simply the EPA is issuing a lot of regulations, rather it is that it has significantly increased the number of major rules. That is to say rules costing the regulating community more than $100 million. These regulations typically ensnare multiple industry sectors and have economy-wide costs usually measuring in billions or even trillions of dollars, making their economic impact so widespread that multiple sectors of the economy must face substantial compliance costs.

This is not sustainable for our economy. Regulating existing businesses into the ground on the hope that better ones will come later is irresponsible. Policies like those have starved free enterprise, bankrupting many larger States. We must protect jobs that exist now while working to open the doors for new opportunity to do business in the United States.

It is also no secret that our federal budget problem is also infringing on the ability of private persons to access capital to expand their businesses. For this reason, our regulations should attack the worst problems first, doing so in a way that avoids broad brushstrokes that insist on expensive but nonproductive requirements that take resources away from businesses that would otherwise be growing our economy. There is a finite pot of resources that the Federal, State, local and private interests can bring to bear on any particular problem. Once those resources are committed to a problem, they are gone, leaving that much less to attack the remaining problems we face.

Let me be clear. We are not seeking to strip basic public health and safety protections. Public health should be protected in a way that encourages all public welfare. A climate that welcomes development and encourages reinvestment creates a kind of wealth and

fairness that needs to be encouraged. As chairman of this subcommittee, I work to make certain any environmental policies deride from this subcommittee will promote the public welfare as a whole while sustaining and creating new jobs and growth in our economy by letting valid, objective and repeatable science drive the debate.

This is a critical aspect EPA has strayed from in recent years, and Congress must work with the Administration to refocus this attention. Today's hearing, Environmental Regulations: The Economy and Jobs, is a fitting start to this mission and will provide the subcommittee a solid foundation to build.

Our first panel will give us a broad view of the economics regulations and processes issued by EPA to understand where they are causing exasperate economic problems, or in other cases, where gaps might exist. Witnesses on the second panel will give us a direct perspective on EPA regulations that are affecting small businesses and possible consequences moving forward.

I particularly would like to welcome Leonard Hopkins from the Southern Illinois Power Cooperative for being here today. Through the co-op, Mr. Hopkins helps supply power with reasonable utility rates to constituents in my district. Unfortunately a proposed coal combustion residue regulation may put their ability to serve over 250,000 customers in rural Illinois in jeopardy.

It is unrealized stresses like these that make it essential we understand the full spectrum of effects regulations may have. All of our witnesses here today are valuable to our understanding, and I would like to thank them all for taking the time to be here. Their testimony and participation with questions will help us better understand the jobs and economic growth and the relationship to our regulatory framework.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

The subcommittee will now come to order. I'd like to welcome everyone to the first hearing of the Environment and the Economy Subcommittee for the 112th Congress. I'm honored to serve as the Chairman of this subcommittee and excited about the opportunity to work with members from both sides of the aisle. I particularly want to welcome and congratulate Mr. Green on being named our Ranking Member. I have enjoyed working with him in the past and certainly look forward to doing so in our capacities on this subcommittee.

From taking a shower in the morning to turning off the lights before bed, our daily lives are constantly touched by environmental regulations under the jurisdiction of this subcommittee. That might be obvious from its name, but what might not be so clear is the important nexus with "economy" portion in the title. Due to environmental regulations families have to pay higher rates to turn on those lights or water. And, there is also the grave impact that these higher costs have the consequence, as we heard from Timberland last week, of forcing jobs overseas when overbearing regulations stifle the marketplace.

It is a necessary and healthy exercise to review regulations to make sure congressional intent is being followed and the best interests of our nation are protected. We cannot just look at regulations in individual silos. People don't have the luxury of being able to comply with regulations in the abstract or singularly. Rather, they must face all regulations together at the same time. This is why I think we need to, weigh the benefits compared to the collective burdens placed on businesses trying to navigate through a struggling economy to keep jobs here at home.

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All our witnesses here today our valuable to our understanding and I'd like to thank all of them for taking the time to be here. Their testimony and participation with questions will help us better understand jobs and economic growth and their relationship to our regulatory framework.

Mr. SHIMKUS. And with that, I will stop, and I will yield time to the ranking member Mr. Green from Texas.

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

Mr. GREEN. Thank you, Mr. Chairman. I want to thank you for calling the hearing today because we all share an interest in ensuring appropriate balance between the cost and benefits in environmental regulation. I would also like to thank all our witnesses, not only on the first panel, but also for the second for taking their time to be here today.

I also want to thank Chairman Shimkus for favorably responding to the request, mine along with Ranking Member Waxman's written request that two additional minority witnesses on the second panel, our county attorney for Harris County, Houston, Texas, Vince Ryan, and Wendy Neu of the Hugo Neu Corporation.

The addition of these witnesses to today's panels will present a balance discussion. I hope that for future hearings this committee will continue to strive for fair and balanced panels to allow a real examination of the important issues.

I would also like to take a moment to describe some of the benefits and potential benefits of environmental regulation that I hear when I meet with companies in green industries, like Hugo Neu Corporation, which is leading the way on recycling electronic waste. My staff and I have worked with many stakeholders in recycling companies such as the one owned by Wendy Neu as we introduced legislation year and have been developing revised legislation for electronic waste. It is my hope that we can have a hearing on the legislation when we introduce and hear from some of the green businesses that will welcome the new economic benefit of the new e-waste regulations.

I also hear about the benefits of environmental regulations from my constituents who know all too well that environmental regulation can have significant economic benefits in the form of avoided cost. For years, I have been working with local officials in Harris County, Texas to address a significant threat from a Superfund site near our district, the San Jacinto Waste Pits.

In the 1960s, a paper mill in our district dumped dioxin containing waste into a waste pit on a sand bar in the San Jacinto River. Unfortunately, the Resource Conservation Recovery Act did not yet pass, and regulations for disposal of the dioxin waste from paper mills were not yet developed. If these regulations had been in place, the waste would not have been dumped where they were, and the Superfund site would not have to be created. Now that the San Jacinto River has reclaimed that sandbar, the contamination is widespread and cleanup will be very costly.

Harris County officials and EPA have been working hard to ensure that taxpayers don't bear the cost of that cleanup, and they are continuing to fight. Proper waste regulations could have avoided these cleanup costs and these litigation costs and could have protected the people of our district.

With that, I would like to thank the witnesses again for appearing today, and particularly thank Wendy Neu and Vince Ryan who are appearing on very short notice. Mr. Ryan is our Harris County attorney, and his office has worked diligently on the San Jacinto Waste Pits for several years. And I know the Houston area and our district particularly appreciate it.

Mr. Chairman, I look forward to working with you, and I appreciate the first hearing.

Mr. SHIMKUS. Thank you, Mr. Green. Now I would like to recognize Chairman Emeritus Barton for 2 minutes.

Mr. BARTON. Thank you, Mr. Chairman. I will submit the full subject for the record. I want to thank our witnesses for attending today's hearing. Your subcommittee, Mr. Chairman, is the third subcommittee of the Energy and Commerce Committee to hold a

hearing on the promulgation of the regulations and the economic impact that those regulations have on our economy. We have heard from the Environmental Protection Agency and the Office of Regulatory Affairs of the Obama Administration with the other two subcommittees.

Today we are going to hear from the private sector and see how these regulations impact the economies in their parts of the country. Unemployment is over 9 percent, Mr. Chairman. The mantra on both sides of the aisle is jobs, jobs, jobs. The Obama Administration says that they want their regulations to pass some sort of a cost-benefit analysis. But we know, especially at the Environmental Protection Agency, that they tend to pay only lip service to that. So in today's hearing, I am sure we are going to hear from the private sector how those regulations impact them, and we are also going to hear probably some good input on what kind of a cost-benefit and economic analysis should be done.

With that, Mr. Chairman, I yield back, and I look forward to your chairmanship of this vital subcommittee.

[The prepared statement of Mr. Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON

Thank you Mr. Chairman. Today's hearing marks the third hearingthis committee has held related to this topic: the lack of economic impact considered by the Obama Administration and its agencies when promulgating regulations. The Oversight and Investigations and the Energy and Power subcommittees held hearings highlighting the disastrous effects to our economy and domestic job market brought on by of overly burdensome, redundant, and rushed regulations. The Administrators from the Office of Information and Regulatory Affairs and the Environmental Protection Agency testified and they both assured us that their agencies and the Obama Administration do not want to suppress economic growth with unnecessary regulations.

I hear what their saying, but I want them to make me, and theAmerican public, believe it by what they are doing. With unemployment at over 9 percent and American companies and jobs moving overseas at a rapid rate we must do something now to get our economy growing again. As members of Congress it is our responsibility to make sure that our small businesses and job creators are not stifled by overregulation, but are encouraged and rewarded for being conscientious corporate citizens that find and maintain the balance between profits and pollution control, earnings and environmental clean-up, revenues, and recycling.

I have and will support legislation and regulations that protect our public's health and environment, but I will not support legislation and regulations that do more economic harm than good at little to no benefit to the public. Over the last 2 years, I have sent letters to the EPA, the Department of Health and Human Services, the Department of the Interior, and President Obama asking the Administration and its agencies to review passed and proposed regulations and conduct a cost-benefit analysis on these regulations. Several of the witnesses today will emphasize the need for this type of analysis and explain how new regulations have negatively impacted their ability to help our economy recover and help the environment. I look forward to their testimony.

Mr. SHIMKUS. The gentleman yields back his time. Now, the chair recognizes the chairman of the Full Committee, Mr. Upton from Michigan.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you Mr. Chairman. I am sorry I am a moment late from being downstairs. This is an important hearing. Your testimony is crucial to helping us understand what improve-

ments are needed in the regulatory process to ensure that it allows for economic prosperity.

Somehow we have lost our way. Those small businesses and manufacturers who should be driving our economic recovery are choking from burdensome red tape, weathering in an agency-wide regulatory epidemic that seems bent on accomplishing a single-minded purpose without regard to fixing the economy and protecting jobs. Not to mention environmental regs also substantially raise costs on the public sector, and these costs are not easily absorbed.

Just this past December, EPA published guidelines for preparing economic analyses. This document is to govern EPA's regulatory actions. It states "regulatory-induced employment impacts are not in general relevant to the benefit-cost analysis." The bureaucratic insensitivity towards those folks in Michigan and across the nation who are struggling to make ends meet is stunning. It is guidelines like this that have catapulted the country into a perpetual state of soaring unemployment and economic uncertainty. The time has come to stop asking the American family, the American small business, the innovators, and the risk takers to bear any burden and pay any price.

Many of our constituents who are struggling to compete in this tough economy say that government regs are like a piano on their back. Despite executive orders from a number of presidents calling for economic impact analyses or job impact analyses, the relief never seems to come. We have to focus the government on serving the people instead of hamstringing them.

Mr. Chairman, these values and principles should drive the president in all federal agencies. No one here today is saying don't regulate. We are simply saying regulate only when the good it will accomplish clearly outweighs the harm. Today's hearing is a positive step forward on that journey to help the executive branch develop a conscience and an understanding about the impact on the economy and jobs and families for every regulation it pursues. So let us get going. Thank you. Yield back.

Mr. SHIMKUS. The gentleman yields back his time. I now recognize Mr. Gardner from Colorado for 30 seconds.

Mr. GARDNER. Thank you, Mr. Chairman. In the short time that I have been in this Congress, I have had an incredible number of people come into my office and talk about the effect that regulations have or may have on their business. Our country is still fighting its way out of a recession, and our government's response many times seems to be adding more handcuffs than solutions.

We have an obligation to our environment, to our children, and future generations, but it is time we do so in a common sense way driven by the interests of the people and not the special interests.

[The prepared statement of Mr. Gardner follows:]

PREPARED STATEMENT OF HON. CORY GARDNER

Mr. Chairman, in the short time that I have been in Congress I have already had an incredible number of employers come to my office to explain how the government is regulating them out of business. Those who are not already feeling the pinch from over-regulation are worried about the vast array of regulatory proposals. Our country is still fighting its way out of a recession. And our government's response to the

situation has been to handcuff the very entities that are trying to lead us out of it.

Today we are here to address environmental regulations in particular. With Colorado's extensive energy and agriculture industries, this is an area of great concern to me. This Committee has a duty to examine sweeping federal rule changes that have the potential to cripple various sectors of our economy and negatively affect Colorado businesses and I am happy to see that we are taking that step today.

EPA has consistently acted to accelerate its rulemaking processes leading to legally dubious, poorly conceived, and arbitrary regulations that are not only hurtful to businesses but often have little to no environmental benefit. The laws that comprise the basis for many of these new rules have not changed in years, sometimes decades. The words on the pages have not changed, and yet EPA is constantlyfinding new authority under those same laws.

We know that EPA rarely, if ever, does a true cost benefit analysis of its actions. One that considers job loss and economic damage. Given that EPA has decided that it does not need to concern itself with such things, I am encouraged that Congress has decided to take up the cause and I am proud to be here today as our committee holds this hearing on behalf of the hard working Americans who are affected by these policies. I would like to thank all of the witnesses for being with us, and I look forward to hearing the witness's answers to many of our questions on how the government's efforts have affected private industry.

Thank you, Mr. Chairman. I yield back my time.

Mr. SHIMKUS. The gentleman's time has expired. To the chairman emeritus—we only have 30 seconds left. I will give you a chance to get situated, and then we will recognize Cathy McMorris Rodgers for 30 seconds right now.

Ms. MCMORRIS RODGERS. Thank you, Mr. Chairman. I thank you for holding this important hearing, and I thank all the witnesses for taking time out of their schedules to be here. I wanted to give a special welcome to Joe Baird, president of the Northwest Mining Association for being here today.

Despite effective safeguards, the EPA has decided that it needs to step in and add regulations that will all but certain drain the mining industry of its capital, making us more dependent upon other countries for important minerals.

I mentioned on the floor last week this is not what America is about, and I look forward to hearing from our witnesses on how we can keep the dream alive.

[The prepared statement of Ms. McMorris Rodgers follows:]

PREPARED STATEMENT OF HON. CATHY MCMORRIS RODGERS

Mr. Chairman, I would like to thank you for holding this important hearing and our witnesses for taking time out of their schedules to be here today.

I would like to give a special welcome to Joe Baird, President of the Northwest Mining Association, for being here today.

Joe's testimony will demonstrate first hand EPA's unbridled power grab. Despite effective safeguards implemented by states, the EPA has decided that it needs to step in and add regulations that will all but certain drain this industry of its capital—forcing businesses to cut jobs, jobs that could benefit communities experiencing unemployment rates well above the national average—and force the only cobalt mine in this country to close - making us even more dependent upon other countries for this important mineral.

As disturbing, Mr. Baird's testimony describes the current statutory and regulatory framework under which mineral exploration and operation on federal lands must operate. Let me just read a few of the statutes and regulations: the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the National Environment Policy Act, the Toxic Substances Control Act, the Resources Conservation and Recovery Act, the Endangered Species Act, in addition to a plethora of surface management regulations issued by BLM and USFS just for mining.

As I mentioned on the floor last week, regulation is not what this nation is about. America is about entrepreneurialism, innovation, and preserving the American

Dream. I look forward to hearing from our witnesses as to how we can keep the dream alive.

I yield back the balance of my time.

Mr. SHIMKUS. I thank the gentlewoman, and now I recognize Mr. Waxman for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman. Today's hearing is entitled Environmental Regulations: The Economy and Jobs. I think this is a worthy topic for discussion if we do it right. Unfortunately, I am concerned that today's hearing may simply be a platform for complaints about our landmark laws designed to protect taxpayers and the public health.

We will hear complaints about Superfund, The Resources, Conservation and Recovery Act, The Toxic Substances Control Act. We will hear complaints about laws outside of this subcommittee's jurisdiction like the Clean Air Act. The environmental laws we will discuss today form the cornerstone of public health protections. Before Superfund and RCRA, there was Love Canal, a New York neighborhood built atop of thousands of tons of toxic waste, carelessly disposed of in a ditch.

Before The Safe Drinking Water Act, the American public had no assurances that the water coming from their tap was free of cancer-causing chemicals and dangerous bacteria. Today we will hear precious little about the benefits of protecting the public health from these toxic exposures. Instead the subcommittee is likely to focus solely on the economic costs of environmental regulations. I have no objection to discussing the economics of environmental regulation, but any fair and balanced discussion should include both sides of the equation, the economic benefits as well as the costs.

Environmental regulations protect the economy as well as society from the devastating cost of pollution. In the absence of sound regulation, when polluters are allowed to pollute, the costs of that pollution don't simply disappear. Instead, innocent parties have to pick up the tab. Our health care system has to bear the weight of asthmatic children and more adults with cancer. Businesses have to absorb the costs of employees who miss work due to chronic illness.

Municipalities have to cover the costs of cleaning up toxic pollution before it reaches drinking water supplies. Environmental regulations protect the public from these impacts. They can also spur economic growth and job creation. Expenditures for environmental compliance spur investment in the design, manufacture, installation, and operation of equipment to reduce pollution.

EPA recently estimated that The Clean Air Act's total benefit to the economy is projected to hit $2 trillion by 2020, outweighing costs by 30 to 1.

It is a tenet of our society that we hold people accountable for their actions and that we offer protection to those who can't protect themselves. When a coal-burning power plant fails to invest in new pollution control equipment to reduce its toxic mercury emissions, it damages the way our children think and learn. That is why the

responsible party, in this case the coal plant, has an obligation to control its emissions.

As I have said previously, let us put aside the false and hyperbolic claims about regulations killing jobs. No one supports unnecessary or duplicative regulations. But let us also not hesitate to regulate when needed to protect our economy and public health.

Thank you, Mr. Chairman. Yield back the time.

Mr. SHIMKUS. And I thank the gentleman. Now I would ask unanimous consent that all members of the subcommittee have 5 legislative days to submit opening statements for the record. Without objection, so ordered.

Now, I would like to welcome our first panel, and you will be recognized for 5 minutes. Your full statement will be submitted for the record. If you can do, you know, a brief, executive summary, and then we will go into questions.

I would like to thank you for coming. I would like to first recognize Randall Lutter, Ph.D., visiting scholar from Resources for the Future. Sir, you are recognized for 5 minutes.

STATEMENTS OF RANDALL LUTTER, VISITING SCHOLAR, RESOURCES FOR THE FUTURE; KAREN HARNED, EXECUTIVE DIRECTOR, NFIB LEGAL CENTER; CHRISTOPHER DEMUTH, D.C. SEARLE SENIOR FELLOW, AMERICAN ENTERPRISE INSTITUTE; AND RENA STEINZOR, PRESIDENT, CENTER FOR PROGRESSIVE REGULATION, UNIVERSITY OF MARYLAND SCHOOL OF LAW

STATEMENT OF RANDALL LUTTER

Mr. LUTTER. Thank you very much, Mr. Chairman, honorable members of the committee. I am pleased to appear today to offer my views on Environmental Regulation: The Economy and Jobs, an important topic because both the environment and——

Mr. SHIMKUS. Sir, if you could just pull your mike down a little bit further.

Mr. LUTTER. Are important to Americans. As an economist, I believe that careful analysis of the effects of regulations can help in designing regulations to offer clear net benefits to Americans and to avoid unnecessary burdens. Careful regulatory analysis can also help promote both public understanding of regulatory decisions and accountability for the regulators.

I speak as an economist who has been involved in regulatory policy for more than 2 decades. I have had the privilege of serving Democratic and Republican presidents, including positions at the Federal Office of Management and Budget, the President's Council of Economic Advisors, and the Food and Drug Administration. I am currently visiting scholar at Resources for the Future, a nonprofit, nonpartisan organization that conducts independent research on environmental energy, natural resource, and environmental health issues. I have conducted research at the American Enterprise Institute and the AEI Brookings Joint Center for Regulatory Studies. I have no conflicts of interest to report, and I emphasize that the views I present today are mine alone. RFF takes no institutional position on legislative, judicial, regulatory, or other public policy matters.

An important concern these days is employment. The commissioner of the Federal Bureau of Labor Statistics recently announced the unemployment rate declined from 9.4 to 9 percent in January. Nonfarm employment, now about a million over the low of a year ago, is 7.7 million below the highest level of the last decade, nearly 138 million jobs. Plus nonfarm employment needs strong and sustained growth to match levels seen before the recent recession. Cyclical transit employment and unemployment are, however, a macroeconomic phenomenon best addressed through fiscal and monetary policy and sound financial regulation topics beyond my scope today.

The consensus view among economists about the role of economic analysis and environmental regulation is that it is an exceptionally useful framework for consistently organizing disparate information, and in this way, it can greatly improve the process and the outcome of policy analysis and deliberations. This idea has become part of a centralized process of regulatory review outlined in Executive Order 12866, which President Clinton issued in '93, replacing an earlier Executive order of comparable scope signed by President Reagan.

Executive Order 12866 does not mention employment or jobs in its 12 principles, but it directs agencies to conduct an assessment including the underlying analysis of costs anticipated from the regulatory action, such as any adverse effects on the efficient functioning of the economy including productivity, employment, and competitiveness.

President Obama's January 18 Executive Order 13563 on improving regulation and regulatory review reaffirms the earlier one and mentions the promotion of job creation under general principles.

I turn to how the Environmental Protection Agency has analyzed and considered possible effects of its regulations on employment. I have looked at several regulatory impact analyses of proposed major rules recently released by the agency and found a variety of practices. For two regulations, coal combustion and ozone, EPA provided no information and no explanation for the lack of analysis. One of these, a proposed standard for ozone, is very likely to have adverse effects on local labor markets because of the difficulty of achieving cuts in emissions of 90 percent or greater. EPA has estimated positive but statistically insignificant effects on employment for one regulation, industrial boilers, and modest negative effects for another, Portland Cement.

Evaluating these different approaches to employment effects is difficult because ONB's guidance implementing Executive Order 12866 does so little to clarify how agencies should assess effects on employment. Recently, however, EPA has released a new guidance on this issue.

My own recommendations, regulatory agencies first should issue regulations only where the benefits demonstrably justify the cost, and they should take full advantage of statutory authority to use market-based regulatory mechanisms.

In addition, the Office of Management and Budget should issue an addendum to A4 about how agencies should analyze effects of regulations on employment, but only after soliciting and consid-

ering public comment and genuinely independent expert advice. The focus of such guidelines should be on identifying what employment can be quantified reliably and what quantifications procedures are appropriate, and the guidelines should reconsider excluding from benefit-cost analysis the cost of job losses induced by regulations.

The guidelines should also provide for distributional analyses of effects on those workers who are at significant incremental risk of job loss and who would face barriers to finding another job.

I understand my written testimony will be part of the record, and I will be, of course, available for questions.

[The prepared statement of Mr. Lutter follows:]

RESOURCES
FOR THE FUTURE

Testimony of Randall Lutter,
Visiting Scholar, Resources for the Future

Prepared for the
House Committee on Energy and Commerce,
Subcommittee on Environment and the Economy

On

Environmental Regulation, the Economy and Jobs

Submitted February 15th, 2011

1616 P Street NW, Washington DC 20036-1400
Tel: 202-328-5000; www.rff.org

Mr. Chairman: I am pleased to appear before this committee today to offer my views on environmental regulation, the economy and jobs, an important topic because both the environment and prosperity are important to Americans. As an economist, I believe that careful analysis of the effects of regulations can help in designing regulations so they offer clear net benefits to Americans and do not impose unnecessary economic burdens. Careful regulatory analysis can also promote both public understanding of regulatory decisions and accountability for the regulators who make them. A theme of my testimony today is that the debate about the environment, the economy and jobs could benefit from more careful analysis and research.

I speak as an economist who has been involved in regulatory policy for more than two decades. I have had the privilege of serving Democratic and Republican Presidents, including positions at the federal Office of Management and Budget (OMB), the President's Council of Economic Advisers and the Food and Drug Administration. I am currently visiting scholar at Resources for the Future (RFF), a nonprofit and nonpartisan organization that conducts independent research – rooted primarily in economics and other social sciences – on environmental, energy, natural resource and environmental health issues. I have conducted research at the American Enterprise Institute and the AEI-Brookings Joint Center for Regulatory Studies. I emphasize that the views I present today are mine alone. RFF takes no institutional position on legislative, judicial, regulatory, or other public policy matters.

An important concern to the public and to policy makers these days is employment and in particular the relatively poor performance of the economy in providing jobs to people who want to work. The Commissioner of the federal Bureau of Labor Statistics (BLS) announced earlier in February that the unemployment rate declined from 9.4 to 9.0 percent in January, and that nonfarm payroll employment changed little, (+36,000), having increased by 1.0 million since a recent low in February 2010.[1] It is worth noting that the current level of nonfarm payroll employment, 130,265,000 is about 7.7 million jobs below the highest level of the last decade, nearly 138 million jobs, achieved in January, 2008.[2] Thus nonfarm employment needs to experience strong and sustained growth to catch up to levels seen before the recent recession. Cyclical trends in employment and unemployment are, however, a macroeconomic phenomenon best addressed through fiscal and monetary policy and sound financial regulation—topics beyond my scope and that of today's hearing.

My testimony today focuses on likely effects of environmental regulations on jobs and employment. I provide a brief background on benefit cost analysis as conducted by regulatory agencies and review highlights of the relevant economics literature. I then discuss some recent regulatory impact analyses, paying special attention to what the Environmental Protection Agency's analyses say about the likely

[1] See the BLS Commissioner's Statement on the Employment Situation, February 4th, 2011, http://www.bls.gov/news.release/pdf/jec.pdf
[2] See BLS data from the Current Employment Statistics survey (National) at http://data.bls.gov/pdq/SurveyOutputServlet?request_action=wh&graph_name=CE_cesbref1

employment effects. I also review existing federal guidelines about how to conduct such analyses and find them lacking. In the absence of guidelines about how to conduct such analyses, there is little clear basis for evaluating the quality of any given analysis, so I conclude with recommendations about what the Office of Management and Budget should do to strengthen the analysis of the effects of regulations on jobs and employment.

Regulations and Benefit Cost Analysis: a Thumbnail Overview

The consensus view within the economics profession about the role of economic analysis in environmental, health and safety regulation is that it is an exceptionally useful framework for consistently organizing disparate information, and that in this way it can greatly improve the process and the outcome of policy analysis and deliberations.[3] This idea has become part of a centralized process of regulatory review, outlined in Executive Order 12866, which was signed by President Clinton in 1993 to replace an earlier Executive Order of comparable scope signed by President Reagan.[4] E.O. 12866 requires agencies to conduct an economic analysis of the benefits and costs of regulations before they are issued either as proposals or as final rules.

Executive Order 12866 articulates a basic regulatory policy principle--regulations should be issued only "upon a reasoned determination that the benefits of the

[3] See Arrow et al., 1996.
[4] President Clinton. 1993. "Executive Order 12866: Regulatory Planning and Review", FR 58(190) 51735:51744, October 3rd, 2011. www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866.pdf

intended regulation justify its costs."[5] Acceptance of this principle, which I fully support, has helped promote consideration of efficiency implications during rulemakings. The analyses that regulatory agencies conduct to satisfy E.O. 12866 have also helped to increase public understanding and accountability for regulatory decisions, at least in instances where these analyses are conducted rigorously enough to meet standards of reliability.

While Executive Order 12866 does not mention employment or jobs in its twelve principles, it directs agencies to conduct[6]

> "[A]n assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as . . . any adverse effects on the efficient functioning of the economy, private markets (including productivity, ***employment***, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs". (emphasis added)

President Obama's January 18th E.O. 13563, Improving Regulation and Regulatory Review, reaffirms E.O. 12866 and mentions job creation under general principles of regulation. It states, "Our regulatory system must protect public health, welfare,

[5] See E.O. 12866, Section 1(b)(6).
[6] See E.O. 12866, Section 6(a)(3)(C)(ii).

safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[7]

To aid in the implementation of E.O. 12866, the federal Office of Management and Budget issued guidelines to agencies about how to conduct economic analysis of regulations. In 2003 OMB issued guidelines called Circular A-4, replacing a 2000 guidance that formalized a best practices document that had been issued in 1996.[8]

As described in Circular A-4, the best practice is for analysts to estimate costs based on the opportunity cost of the resources used or the benefits forgone as a result of the regulatory action. Opportunity costs include, but are not limited to, private-sector compliance costs and government administrative costs. Thus the costs of an environmental regulation requiring a given level of abatement or control typically include the full costs of all of the resources and all of the changes in operations or procedures necessary to comply with the regulation. The amount of labor needed to comply with the regulatory requirements, valued at market rates, is included in these cost estimates.

Conventional methods of calculating the benefits of environmental regulations focus on the value to people of reductions in the risks of disease or death, or

[7] See President Obama. 2011. "E.O. 13563, Improving Regulation and Regulatory Review" 76 FR 3821, January 21, 2011, http://www.archives.gov/federal-register/executive-orders/2011.html

[8] See OMB (2003). Full disclosure: in 2003 while working at FDA, I co-chaired a group of federal regulatory economists advising OMB on a draft version of Circular A-4. I drafted sections of the 1996 best practices document that preceded Circular A-4.

improvements in environmental amenities such as visibility, improved quality of surface water, or reduced risk of extinction for endangered species. Thus consideration of the effects of a regulation on employment has historically been separate from analysis of benefits and costs. When analyzed at all, employment effects have typically considered as a possible impact rather than as a cost or benefit.

Selected research on environmental regulation and jobs

Perhaps surprisingly, there has been relatively little scholarly, empirical economics research about the effects of environmental regulations on employment. I would like to highlight just two key articles, noting that more research would be valuable and appropriate.

Michael Greenstone, now with MIT, studied differences in economic activity between plants located in counties that met the national ambient air quality standards and those located in counties that did not.[9] In his 2002 paper, he reported that during the first 15 years after the Clean Air Act Amendments became law (1972-87), the counties that were out of attainment and subject to more stringent regulations, relative to the other counties, lost approximately 590,000 jobs, $37 billion in capital stock, and $75 billion (1987 dollars) of output in polluting industries. This paper did not address, however, the extent of any shift in jobs or

[9] See Greenstone, M. 2002. "The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufactures." *Journal of Political Economy*. 110(6):1175-1219.

other measures of economic activity toward the attainment areas—areas of cleaner air and less stringent regulation. Thus these estimates probably overstate the national loss of activity due to the nonattainment designations. Moreover, the applicability of the quantitative results to current air quality regulations is unclear.

Another important article, published in 2002 by my RFF colleagues Richard Morgenstern, William Pizer and Jhih-Shyang Shih, studied employment effects of spending on pollution controls in four industries subject to environmental regulations. The researchers identified three different mechanisms for increases in spending on pollution control to affect employment in a specific industry. They noted that the effects of pollution control spending on employment in a given industry do not need to be negative and could be positive. For example, if demand does not fall very much with increases in price, and if new spending to reduce pollution is relatively labor-intensive, then employment in the regulated industry would rise and not fall with mandatory increases in pollution control spending. Morgenstern, Pizer and Shih estimated their model and found small, statistically significant, positive associations between spending on pollution control and employment for the plastics industry and the petroleum industry. They did not find any evidence of large negative associations in the other industries. The applicability of their specific quantitative results to current regulations is unclear because U.S. markets have become more open to foreign competition and control requirements have become more stringent in the two decades since the last year of their study. In addition, the Morgenstern analysis uses a proxy for the stringency of environmental

regulation--spending on pollution controls--that likely does not reflect all opportunity costs related to environmental regulation. In particular, regulations that require permit approval before firms can increase emissions may delay or deter profitable improvements in operations. Morgenstern and his team lacked data to estimate such effects—which are generally of unknown magnitude.

EPA's consideration of employment or jobs in recent regulations

How has the Environmental Protection Agency analyzed and considered the possible effects of its regulations on employment? To address this question, I have examined several regulatory impact analyses recently released by the agency. I find that there are a wide variety of practices and no clear explanation about why EPA estimates some effects and not others.

1. EPA issued in June of 2010 a multi-billion dollar proposed regulation for Coal Combustion Residues generated by the electric utility industry under the Resource Conservation and Recover Act. It reports

> "The RIA for this proposed rule does not include either qualitative or quantitative estimation of the potential effects of the proposed rule on economic productivity, economic growth, employment, job creation, or international economic competitiveness."[10]

[10] See p. 443, Appendix for Regulatory Impact Analysis For EPA's Proposed RCRA Regulation Of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003.1

2. In April of 2009, EPA issued a proposed regulation for emissions standards for hazardous air pollutants for Portland cement manufacturing. It reports

> "Other consequences include reduced demand for labor. Employment falls by approximately 8 %, or 1167 employees."[11]

In this instance, EPA had fairly specific information about the effects on individual plants. EPA"identified six domestic plants with negative operating profits and significant utilization changes that could temporarily idle until market demand conditions improve".[12]

EPA does not appear to have incorporated into its cost estimates any costs associated with the reduced demand for labor or the possible plant closures.

3. In April of 2010, EPA issued a proposed regulation setting national emissions standards for hazardous air pollutants from industrial boilers. Applying earlier research by Morgenstern and colleagues, EPA estimated that the net effect on employment is four thousand additional jobs, with a large

[11] See p. 3-8, Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, http://www.epa.gov/ttnecas1/regdata/RIAs/portlandcementria_4-20-09.pdf

[12] See p. 3-10, Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, http://www.epa.gov/ttnecas1/regdata/RIAs/portlandcementria_4-20-09.pdf

confidence interval encompassing zero.[13] This analysis includes a detailed discussion about the applicability of the earlier results of Morgenstern and colleagues.

4. In January of 2010 EPA issued a new proposal for the national ambient air quality standard for ozone that contained no analysis of jobs, employment or work. This omission seems material because EPA reported that meeting one of several proposed standards (60 parts per billion ozone), would require reductions in emissions of nitrogen oxide of more than 90 percent in California's South Coast Air Basin, in the greater Chicago-land area stretching from Wisconsin to Indiana, and in Houston, Texas. [14]

   EPA's decision not to analyze effects on jobs, employment or work, however, followed a well-established precedent. For example, the final rule it issued on national ambient air quality standards for ozone in March 2008, though less stringent than the 2010 proposed rule, was also silent on these same questions.[15] These ozone standards, however, are much more stringent than the standards studied by Greenstone in his analysis showing adverse employment effects.

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[13] See Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, http://www.epa.gov/airquality/combustion/docs/boilerria20100429.pdf,

[14] See EPA. 2010. "Summary of the updated Regulatory Impact Analysis (RIA) for the Reconsideration of the 2008 Ozone National Ambient Air Quality Standard (NAAQS)". Table S2.2 http://www.epa.gov/ttnecas1/regdata/RIAs/s1-supplemental_analysis_full.pdf

[15] See EPA. 2008. "Final Ozone NAAQS Regulatory Impact Analysis". http://www.epa.gov/ttnecas1/regdata/RIAs/452_R_08_003.pdf

In summary, this snapshot review of four recently proposed regulations suggests that the agency's analysis of effects of these regulations on employment or jobs varies significantly. For two regulations EPA provided no information and no explanation for the lack of analysis. One of these regulations, dealing with ozone, is very likely to have adverse effects on local labor markets because of the difficulty of achieving cuts in emissions of 90 percent or greater. EPA has estimated positive (but statistically insignificant) effects on employment for one regulation and modest negative effects for another.

Standards for evaluating effects on employment

Ordinarily, when confronted with questions about agency's estimates of economic effects of pending regulations, one judges the quality of the estimates by evaluating whether the agency's analysis adheres to established standards.

OMB's Circular A-4, however, does little in 48 pages to clarify *how* agencies should assess any adverse effects on employment. In particular, A-4 does not develop any standards about how to perform the assessment of effects on employment described in E.O. 12866.[16]

[16] The Circular mentions "time in work, leisure and/or travel settings" in a recommendation that regulatory agencies should include various effects in their analysis and provide estimates of their monetary values when they are significant. See p. 37, OMB Circular A-4.

Although OMB's Circular A-4 is essentially silent about how to analyze the effects of regulation on employment, EPA has recently issued a guidance on preparing economic analyses that addresses this issue.[17] EPA's guidance states (page 9-10)

> "The chapters on benefits (Chapter 7) and costs (Chapter 8) point out that regulatory induced employment impacts are not, in general, relevant for a benefit-cost analysis. For most situations, employment impacts should not be included in the formal benefit-cost analysis. However, if desired, the analyst can, as part of an economic impact analysis, assess the employment impacts of a regulation. If this task is undertaken, the analyst needs to quantify all of the employment impacts -- positive and negative -- to present a complete picture of the effects.

Recommendations

Regulatory agencies should issue regulations only where the benefits demonstrably justify the costs and should take full advantage of statutory authority to use market-based regulatory mechanisms.

To ensure credible regulatory analysis of the effects of regulations on employment, the OMB should issue guidelines about how agencies should conduct such analysis but only after soliciting and considering public comment and genuinely independent expert advice. OMB followed such a process before issuing Circular A-4 in 2003.

[17] See EPA, Guidelines for Preparing Economic Analyses, December 2010. http://yosemite.epa.gov/ee/epa/eed.nsf/pages/Guidelines.html

Indeed the controversy over the effects of regulations on employment suggests there is value in having an independent non-federal entity convene experts to develop consensus standards for such analysis. OMB should work with regulatory agencies and other government bodies to support further independent economic research into this area. My own suggestions regarding the content of such OMB guidelines are as follows.

- The focus should be on identifying what employment effects can be quantified reliably and what quantification procedures are appropriate. They should avoid pitfalls associated with simply counting the number of "net" jobs—such as an inappropriate implicit preference for regulatory options associated with more jobs of low pay.

- The guidelines should reconsider the practice of excluding from benefit-cost analysis the costs of job losses induced by regulations. Losses due to regulation include the adjustment costs associated with the shifting of resources to new sectors. People who lose jobs lose valuable human capital that is specific to their employer or to their industry. This human capital, typically acquired through specialized classroom or on-the-job training or work experience, is often the basis for compensation greater than earned by workers just out of school.

- The guidelines should provide for distributional analyses of effects on those workers who are at significant incremental risk of job loss and who face

barriers to finding another job. Such barriers might be related to age, since many workers around age 50 have difficulty retraining, or live in locations that lack comparable work opportunities. The EPA's new guidelines do not mention the need for any analyses of effects on such workers.[18]

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Office of Management and Budget. 2003. Circular A-4, Regulatory Analysis. September, 17th, 2003. http://www.whitehouse.gov/omb/circulars_default/

[18] See, however, EPA, p. 10-1.

Mr. SHIMKUS. Thank you, Dr. Lutter. Now I would like to recognize Ms. Karen Harned, executive director, NFIB Legal Center. Welcome, and you have 5 minutes.

STATEMENT OF KAREN HARNED

Ms. HARNED. Thank you. Good afternoon, Chairman Shimkus and Ranking Member Green. NFIB, the Nation's largest small business advocacy organization, appreciates the opportunity to testify on the importance of assessing small business impact in the regulatory process. Overzealous regulation is a perennial cause of concern for small business owners and is particularly burdensome in times like these when the Nation's economy remains sluggish.

According to a recent study, regulation costs the American economy $1.75 trillion a year. More concerning, small businesses face an annual regulatory cost of $10,585 per employee, 36 percent more than the regulatory cost facing businesses with more than 500 employees. Job growth in America remains stagnant. Although small businesses create two-thirds of the net new jobs in this country, the NFIB research foundation's most recent addition of "Small Business Economic Trends" revealed in the next 3 months, 12 percent of respondents planned to increase employment, while 8 percent plan a reduction in workforce.

Small business owners consistently cite government regulation as one of their primary problems in running their business. In its most recent addition of SBET, the NFIB research foundation found that 17 percent of small business owners describe government regulations and red tape to be their single most important problem. Only taxes and poor sales were more commonly cited. In fact, for the past 26 months of the survey, regulation and red tape has been in the top three of problems. This is not a recent trend either.

NFIB surveys demonstrate that overzealous government regulation has ranked in the top 10 of problems facing small businesses since 1991. Reducing the regulatory burden will go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

Recently, the Administration acknowledged that excessive and duplicative regulation has a damaging effect on the American economy. NFIB believes that it has been a long time coming for small business owners to hear the Administration emphasis the harmful effects of overregulation on small business and job creation. We will be watching closely to see if last month's directive leads to real regulatory reform. Moreover, NFIB hopes that the president's order causes agencies to more closely follow the letter and spirit of the Administrative Procedures Act.

When agencies do not follow the procedures of the APA, they frequently enact one-size-fits-all rules that are not sensitive to the unique circumstances of small businesses. An important tool in the arsenal to ensure that federal regulations are developed in a way that considers small business impact is the Small Business Regulatory Enforcement and Fairness Act. SBREFA requires federal agencies to analyze the impact of proposed of regulations on small firms and as a result, give small businesses a voice in the federal rule-making process. SBREFA, when followed correctly, can be a

valuable instrument for agencies to identify flexible and less burdensome regulatory alternatives.

SBREFA and its associated processes, such as the Small Business Advocacy Review Panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts small business, and how the agency can develop simple and concise guidance materials.

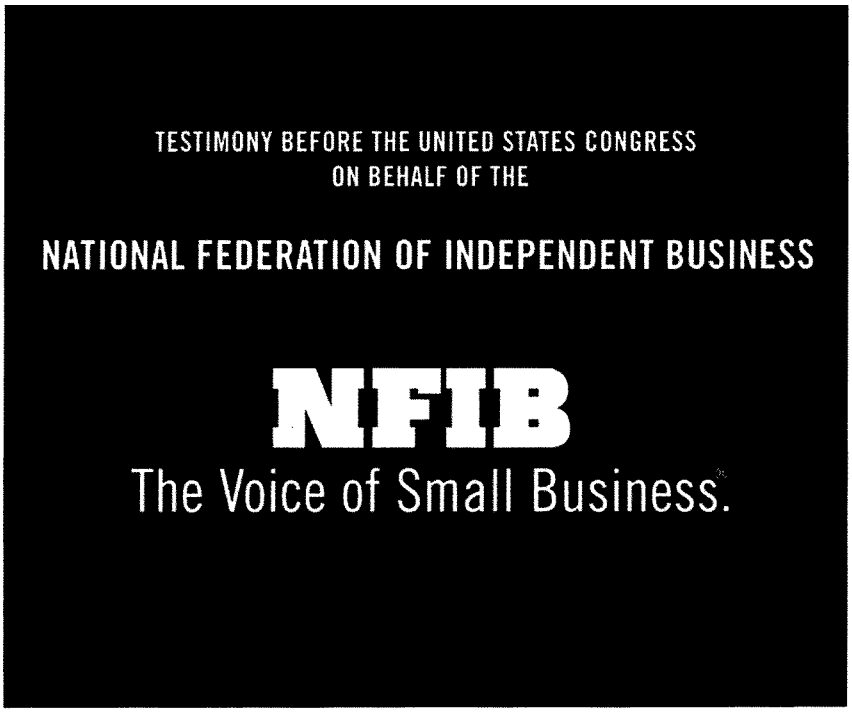
While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended, the agencies must make good faith efforts to comply with it. By following the letter and spirit of SBREFA, agencies like EPA would avoid many of the unnecessary burdens and costs of regulations small businesses experience.

Unfortunately for small businesses, however, through the years, a number of EPA regulations have failed to account for the unique characteristics of small business. For example, EPA's lead-based paint renovation, repair, and painting rule has been problematic for small businesses that engage in renovation and construction work. The rule requires small businesses to pay for expensive certification and training for each of their employees. Certification begins at $304 for renovators and $550 for painting activities or both painting and renovating. Fees could cost thousands of dollars per firm depending on the number of employees they have.

Although Superfund was enacted in 1980, NFIB has heard from members with businesses that have been named as a potentially responsible party in a third-party lawsuit. They have been forced to spend thousands of dollars and an excessive amount of time defending themselves when they did nothing wrong or illegal or do not have the records to prove their innocence.

When EPA and other agencies follow the procedures for evaluating small business impact of regulations before they are promulgated. It is a win-win for the economy, the public, and small business. Thank you for holding this important hearing. I look forward to your questions.

[The prepared statement of Ms. Harned follows:]



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

on the date of

February 15, 2011

on the subject of

"Environmental Regulations, the Economy, and Jobs"

Chairman Upton and Ranking Member Waxman,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record testimony for the Committee on Energy and Commerce, Subcommittee on Environment and the Economy, in the hearing entitled, "Environmental Regulations, the Economy, and Jobs."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts.

Overzealous regulation is a perennial cause of concern for small business owners, and is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy (Office of Advocacy) found that the total cost of regulation on the American economy is $1.75 trillion per year.[1]

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

Job growth in America remains stagnant. Although small businesses create two-thirds of the net new jobs in this country, the NFIB Research Foundation's most recent edition of Small Business Economic Trends[1] revealed in the next three months 12 percent of respondents plan to increase employment while 8 percent plan a reduction in workforce.[2]

Small business owners consistently cite government regulation as one of their primary problems in running their business. In its most recent edition of SBET, the NFIB Research Foundation found that 17% of small business owners describe government regulations and red tape to be their single most important problem.[3] Only taxes and poor sales were more commonly cited. In fact, for the past 26 months of the survey,

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[1] The NFIB Research Foundation has collected Small Business Economic Trends data with quarterly surveys since 1974 and monthly surveys since 1986. Survey respondents are drawn from NFIB's membership. The report is released on the second Tuesday of each month.

[2] NFIB, Small Business Economic Trends, Page 1, February 2011.

[3] NFIB, Small Business Economic Trends, Page 18, February 2011.

regulation and red tape has been in the top three of problems. This is not a recent trend either. NFIB surveys demonstrate that overzealous government regulation has ranked in the top ten of problems facing small business since 1991.[4] Reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

Last month, President Obama issued an executive order directing agencies to follow certain processes "to improve regulation and regulatory review." I share the view of Susan Dudley, a former administrator of the Office of Information and Regulatory Affairs (OIRA). Dudley wrote: "Whether the President's actions signal a real recognition that regulations can place unreasonable burdens on economic growth remains to be seen. Over the first two years of his term, the federal government issued 132 economically significant regulations (defined as having impacts of $100 million or more per year). That averages out to 66 major regulations per year, which is dramatically higher than the averages issued by [the previous two administrations]."[5]

NFIB believes that it has been a long time coming for small business owners to hear the administration emphasize the harmful effects of overregulation on small business and job creation. We will be watching closely to see if last month's directive leads to real regulatory reform.

Moreover, NFIB hopes that the President's order causes agencies to more closely follow the Administrative Procedures Act and regulate only within their legislative purview. When agencies do not follow the procedures of the APA they frequently enact rules that are not sensitive to the unique circumstances of small businesses. For example, notice and comment periods and regulatory impact analyses allow the agencies to interface with stakeholders to measure benefits and burdens of rules before they are enacted. Foregoing that necessary step in the rulemaking process leads to the enactment of "one size fits all" rules that unduly burden small businesses and often lead to unintended consequences.

An important tool in the arsenal to ensure that federal regulations are developed in a way that considers small business impact is the Small Business Regulatory Enforcement and Fairness Act,[6] which amended the Regulatory Flexibility Act.[7] SBREFA requires federal agencies to analyze the impact of proposed regulations on small firms and, as a result, gives small businesses a voice in the federal rulemaking process.

For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[8] the Environmental Protection Agency is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the

[4] NFIB, Small Business Problems and Priorities, Table 5, June 2008.
[5] Dudley, Susan E. *President Obama's Executive Order: Improving Regulation and Regulatory Review*, January 2011. http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf
[6] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).
[7] 5 U.S.C. § 601, et. seq.
[8] See 5 U.S.C. § 609(a), (b).

proposed rule on small entities,[9] and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by the SBA's Office of Advocacy. Agencies also must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.[10]

SBREFA – when followed correctly -- can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts small businesses, and how the agency can develop simple and concise guidance materials.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended the agencies must make good-faith efforts to comply with it. By following the letter and spirit of SBREFA, agencies, like EPA, would avoid many of the unnecessary burdens and costs of regulations small businesses experience.

When EPA and other agencies follow the procedures for evaluating small business impact of regulations before they are promulgated, it's a "win-win" for the economy, the public and small business.

An example of such a regulatory "success" story concerned an EPA rule to reduce pollution from non-road diesel engines, like tractors, early in the last Administration. Prior to issuing the rule, EPA convened a SBAR as required by SBREFA.

According to former Office of Advocacy Chief Counsel Tom Sullivan, during the dialogue between EPA and small entities, it became clear that EPA had not considered how a tractor hood could fit over a new device EPA was proposing to require be placed in all tractor engines in order to filter emissions. As a result, EPA went back and re-tooled its proposal. When EPA finalized the rule June 29, 2004, it contained flexibility that allowed small manufacturers additional time to meet new engine/equipment design requirements.[11] With a phased-in approach, the new technology becomes less expensive, more efficient and any design flaws are able to be remedied.

Even with the small business flexibilities, the rule was set to reduce emissions from non-road diesel engines by up to 90 percent. That was expected to yield $78 billion in

[9] Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction "that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

[10] 5 U.S.C. § 604, as amended by the Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

[11] U.S. EPA, Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958 (June 29, 2004).

benefits by preventing premature mortality and non-fatal heart attacks.[12] SBA's Office of Advocacy estimated that the small business flexibilities minimized the impact on small firms by $1.38 billion annually.[13]

Unfortunately for small businesses, however, there have been recent instances where EPA has not taken the regulatory steps needed to gather small business input or rejected that input altogether.

EPA recently determined that six greenhouse gases, including carbon dioxide, pose a danger to public health and could be regulated under the Clean Air Act.[14] The agency then extended its regulation of GHGs from motor vehicles to stationary sources.[15] Subsequently, EPA issued a series of decisions that required state and local agencies to issue permits to these sources of GHG emissions.

Multiple states and business groups, including NFIB, have challenged these regulations. EPA's finding that GHGs pose a danger to human health has been challenged as being "arbitrary and capricious" because, among other things, EPA failed to provide an independent analysis and failed to consider the offsetting benefits of GHGs. EPA's extension of regulation from mobile sources to stationary sources leads to absurd results because of the administrative backlog created by the fact that already overburdened state and local authorities now need to issue millions of new permits.

NFIB believes that each of the GHG rulemakings could have a significant impact on its members. Although EPA was obligated under the RFA to convene SBAR panels to ascertain the impact of GHG rulemakings on small businesses, and explore less burdensome alternatives, it did not. As a result, small business stakeholders were left out of the discussion.

The GHG regulations are not the only rules from EPA to impose heavy burdens on small businesses. Two separate rules, one affecting pre-1978 housing (finalized in 2008) and one affecting public and commercial buildings (tentatively expected to be proposed in Dec. 2011), are having an impact on small contractors and construction companies.[16] The 2008 rule, the purpose of which is to reduce the amount of lead dust in home renovations and repairs, requires small businesses to pay for expensive certification and training, and conduct costly testing that drives up the price of projects. Although lead abatement is a worthy objective, EPA failed to explore other less costly alternatives and refused to limit the scope of the rule to the most vulnerable populations – homes with pregnant women and children under the age of six. Moreover, EPA's

[12] Id. at 38,961.
[13] Office of Advocacy, Small Business Administration, "Report on Regulatory Flexibility Act, FY 2004, February 2005.
[14] U.S. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
[15] U.S. EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31, 514 (June 3, 2010).
[16] U.S. EPA, Lead; Renovation, Painting and Repair Program; Lead Hazard Information Pamphlet; Notice of Availability; Final Rule, 73 Fed. Reg. 21,692 (Apr. 22, 2008).

inability to adequately enforce the rule has decreased the likelihood that a compliant small business can compete for work since non-certified firms – by doing the work illegally – can charge lower prices.

In June EPA's proposed a rule to reduce emissions from boilers by requiring businesses to implement the most expensive control technology standard for boilers. [17] Rather than set limits based on levels of emissions that harm public health, as recommended by the SBAR panel that studied the issue, EPA sought to establish a standard based on technology that few, if any, current boilers can attain. This higher standard would provide little, if any, additional benefit to the public over the health-based standard. One study places the cost of the rule at $20 billion. Using a health-based standard could cut that price tag in half.

EPA also has issued a notice of proposed rulemaking affecting commercial and industrial solid waste incineration (CISWI) units.[18] Similar to the area source boiler rule, this proposal will broaden the regulated community, impose excessively stringent emissions requirements, and increase the paperwork burden on small business owners.

Small businesses are the engine of our economy. Unfortunately, they also bear a disproportionate weight of government regulation. While this regulation is well-intentioned, many rules are unnecessary, or overbroad. The effects of overregulation require an enormous expense of money and time to remain in compliance. The effort required to follow these regulations prevent small business owners from growing and creating new jobs.

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

Sincerely,

Karen R. Harned

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

[17] U.S. EPA, National Emissions Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 75 Fed. Reg. 31,896 (June 4, 2010).
[18] U.S. EPA, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 75 Fed. Reg. 31, 938 (June 4, 2010).

CORE VALUES

We believe deeply that:

Small business is essential to America.

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

Small business is threatened by government intervention.

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

Members determine the public policy positions of the organization.

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

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

NFIB

The Voice of Small Business.

Mr. SHIMKUS. Thank you, Ms. Harned. And for my colleagues, I am going to try to get both opening statements done prior votes. I think we can get both in. If I gavel you, it will be for that, for our ability to hear. But that is just for information for my colleagues.

Next I would like to recognize Mr. Christopher DeMuth, D.C. Senior—Searle Senior Fellow, American Enterprise Institute. Sir, you have 5 minutes. There is a button there.

STATEMENT OF CHRISTOPHER DEMUTH

Mr. DEMUTH. Thank you for having me here today, and in light of the time, I will give a brief opening statement.

Environmental policy and employment policy are two central concerns. Americans like high levels of clean air and water, and they like high levels of unemployment. These two values sometimes clash, and they are clashing today.

To the economists, taking jobs as the metric of the costs of environmental policy is a little bit crude. It is certainly important to the elected representative. It is what the general public cares about, but one could imagine a good environmental rule that had negative employment effects, and one could imagine and sometimes sees bad environmental rules that have positive employment effects.

When we regulate, we are buying something: cleaner air and water. Just like everything we buy privately, it has a cost, and the costs can be higher prices, or they can be less good product quality, or they can be lower employment. The question of whether it is a good rule or not is a larger one than the one of employment.

In general, environmental regulation has been a great success story for America. It has had very large economic benefits since our first modern statutes were passed in the early 1980s, but we know now that it has been much less cost effective than it could have been. We could have gotten much more environmental improvements for the money we have spent, or we could have gotten the same amount of environmental improvements for vastly less money, or a little bit of both.

There is evidence that EPA regulations have been becoming less cost effective over time, following the huge improvements that were gained in the 1970s. There is a wide variation in the effectiveness of different statutes, and we could revise the statutes to get much more environmental gains and much fewer costs of the kind the committee is worried about. In my view, the reasons for the problems that the committee, your subcommittee is focusing on today are two.

The first is that environmental—that regulatory costs are off budget. EPA's budget is a tiny sliver of the billions of dollars of costs that its rules impose. But it does not have natural incentives to economize on those costs. They are not costs to the agency. They are costs to the private sector or municipalities or schools or whatever.

The costs are relatively insensible to the public. They take the form of higher prices or plants that aren't built or sometimes plants that are shut down, and as a result, agencies often go too far. The regulatory agency will get a 90 percent elimination of

some risk or pollution level. It will then want to go for another 8 percent, and it will then want to go for 1-and-a-half percent. And it will keep pushing and pushing. The laws are being made by single purpose agencies operating largely without a budget constraint, and their incentive will be to push until the human cry becomes so great, such as from the Congress that they back off.

The second is the very wide delegations that the Congress gives in many environmental statutes so that the really tough choices are made by the agencies. The specialized agency goes back over a century. EPA is a classic example of it. The original idea was expertise, and certainly there are many areas of pollution control that are highly technical and that technicians could handle better than generalist legislators.

But as the controversies before this committee today illustrate, these are not merely technical questions. They are highly important political and economic ones, but we have gotten ourselves into a situation where the legislator can vote for clean air and clean water and leave the hard and contentious decision making to the agencies and then criticize after the fact. And the agencies will in this situation often go too far until they are criticized.

There are two proposals, as I understand it, before the Congress today for general regulatory reform. They are addressed to the two problems I have identified. Senator Warner is working on a proposal that would put the agencies on a budget of the expenditures that their rules force. It is sort of a pay-go idea where to issue a new regulation, you would have to eliminate some old ones. That is addressed to the problem of unbudgeted, off-budget costs. The so-called Reins Act, introduced by Congressman Jeff Davis and now introduced in the Senate by Senator DeMint, is the proposal for Congress to take back some considerable degree of the discretion it has delegated to the agencies.

My testimony says some good things and identifies some problems with both approaches. In my view, neither of them would be as worthwhile as the Congress's returning to many areas of the environmental statutes where it has delegated too much and where much more specific standards could resolve some of the problems that we are facing today. Thank you, sir.

[The prepared statement of Mr. DeMuth follows:]

Statement of Christopher DeMuth
D.C. Searle Senior Fellow
American Enterprise Institute for Public Policy Research

before the

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

at a hearing on
Environmental Regulations, the Economy, and Jobs

February 15, 2011

Chairman Shimkus, Ranking Member Green, thank you for inviting me to testify before your committee on environmental regulation and the economy.

In the forty years since the Environmental Protection Agency was established, EPA regulations have imposed enormous costs on the American economy and purchased enormous benefits. Some of the costs and benefits have been in the form of jobs lost and gained—the favorite political metric of economic impact. But many other consequences have been important as well. On the cost side, these include higher prices; the loss of many good things outside the realms of environmental quality and employment, such as the quality and reliability of some products and services; and an increase in litigiousness and the uncertainties and delays of the legal system, translating in many cases into lower property values. On the benefits side, they include substantial improvements in public health; recreational values and opportunities; the amenity and aesthetics of life, especially in cities and industrial areas, translating in many cases into higher property values; and the quality and diversity of fish, plants, and wildlife.

A simple but fair summary of the economic record of environmental regulation, based on a large literature of academic research, is as follows:

- Environmental regulation has been one of the success stories of American government, producing large and palpable public benefits;
- But it has been, in retrospect, much less cost-effective than it could have been—we could have achieved the same environmental quality at lower cost or more environmental quality at the same cost (or some or each);
- It has generally become less rather than more cost-effective over time;
- There is a wide variation in the effectiveness of EPA's various authorizing statutes for controlling air, water, and land pollution; and
- Based on what we have learned, we could revise the EPA statutes to greatly improve their environmental and economic results.

To understand these propositions and what might be done to improve current policies, it is useful to consider two singular features of government regulation, features of environmental regulation and also of many other programs of health, safety, energy, and economic regulation. The first is that the costs of regulation are largely "off budget." Almost all of the costs of environmental regulation are realized in the private sector in response to EPA mandates (the agency's budget is a tiny sliver of the costs of complying with its rules). These

very large expenditures, incurred privately but for government purposes, are subject to none of the political and managerial disciplines that apply to direct government spending—authorization, appropriation, budgeting, and taxing or borrowing to raise the funds. In an era of hundred-billion dollar spending authorizations and trillion dollar budget deficits, one may wonder whether the formal spending restraints amount to much anymore. Yet large spending bills, deficits, and debt are often front-page political controversies—they played a large and probably decisive role in the 2010 elections—while regulatory costs seldom receive equivalent attention. The costs of environmental policies are, as a political matter, relatively stealthy: they take the form not of taxes or scary headlines about public spending, but rather of higher prices for private goods and services and foregone employment and other opportunities. And these costs, while they may be estimated in the aggregate, are usually invisible to citizens and voters. The higher prices are not revealed in the way that (say) sales taxes are, and the lost opportunities are usually completely insensible. The exception is when specific plants are closed in response to environmental edicts—which is why such cases are so controversial and why EPA avoids them whenever possible. Plants that are never built in the first place, or that slowly decline as production moves to other nations with less costly environmental rules, may involve equivalent costs but will attract little political attention.

That regulatory costs are largely unbudgeted is an important reason why single-purpose agencies such as EPA often "go too far," or otherwise take insufficient account of costs, in pursuing their statutory goals. The regulatory agency's institutional interest in economizing on the resources at its disposal is much more attenuated than that of the spending agency, whose resources are fixed by appropriations and budget controls. This also helps explain the curious phenomenon that regulatory programs may become incrementally less rather than more effective over time. Consider the Transportation Security Administration's new, highly intrusive airport pat-down procedures. One would think that, with a decade's experience following 9/11, TSA would have discovered new and better ways to ensure airplane safety at less delay and inconvenience to passengers. Instead it is moving in the opposite direction: it takes much less account of the billions of dollars of costs its procedures impose on travelers than if it had to fight for those resources at its appropriation committees and the Office of Management and

Budget. Similarly, EPA regulations appear to have been much more cost-effective in the 1970s and 1980s—when its initial rules were achieving massive reductions in air, water, and land pollution from a high "baseline"—than in more recent years. In both cases, the single-purpose agency, having achieved (say) a 90-percent reduction in risk or pollution, will then wish to tackle another 8 percent, then another 1.5 percent, and so on. But without much of a budget constraint, the agency has little counterbalancing incentive to consider the increasing marginal costs, and decreasing cost-effectiveness, of pursuing ever greater levels of its assigned goal. In other words, it will be disinclined to take account of the claims of social goods other than those it is responsible for promoting (which is the economic function of budgeting). And so it pushes ever onward until the political hue and cry generates sufficient legislative resistance to slow things down. The current, unusually heated controversies over EPA's efforts to tighten many of its pollution standards yet another notch are probably a reflection of these tendencies. Although the criticism of these proposals has focused on their employment and other costs at a time of high unemployment, an equally striking feature is their very low benefits relative to those of earlier initiatives.

Every President since Richard Nixon has required that agency regulations be reviewed for their economic effects by an office within the Executive Office of the President, originally the Council of Economic Advisors and the Domestic Policy Council.[1] Since 1981, when Ronald Reagan took office shortly after passage the Paperwork Reduction Act of 1980, these reviews have been governed by an explicit cost-benefit standard and conducted by the Office of Information and Regulatory Affairs in the Office of Management and Budget. President Obama's Executive Order 13563, issued last month, is the latest to elaborate on standards, procedures, and goals for this process. The process is intended to mimic OMB budget controls in the "off budget" regulatory context, but it is vastly less precise and constraining. Obama Administration OIRA reports assert, as did those of previous administrations, that federal regulations in the aggregate are yielding very large net benefits (benefits minus costs) for the

[1] The timing of the onset of central regulatory review was no accident. The early 1970s was the time EPA was established, the first modern air and water pollution statutes were enacted, and several other regulatory agencies were established as well—the National Highway Traffic Safety Administration, Occupational Safety and Health Administration, Consumer Product Safety Commission, and others.

economy. But most of the currently reported net benefits come from just two categories of rules—EPA rules reducing already low levels of fine-particulate air emissions to even lower levels, and the spate of energy efficiency regulations being issued under the Energy Independence and Security Act of 2007. The enormous benefits projected for these rules are the result of assumptions that are, at a minimum, subject to wide ranges of uncertainty—regarding the actual health benefits of further reductions in fine particulates, and the actual life spans of new energy-saving products such as compact fluorescent light bulbs. In addition, the benefits estimates for energy efficiency rules rely heavily on discount-rate arbitrage: they paternalistically assume that consumers, in weighing higher initial product prices against lower future energy expenses, systematically and irrationally over-discount the future energy savings. So these benefits are simply a matter of the government's saying that people spending their own money attach too much importance to current savings relative to future savings. Modest changes in these assumptions could turn the rules from net winners to net losers for the economy as a whole. Just recognizing the broad range of uncertainties would lead to the conclusion that we don't know whether the rules will be beneficial or not. Budget controls on agency spending do not depend on judgments such as these, which are irreducibly subjective to some degree.

The second distinctive feature of regulatory policy is that it involves large-scale delegation of lawmaking authority from the Congress to the Executive Branch. There are instances of precise regulatory standards laid down by statute; examples are the minimum wage, the CAFE motor vehicle fuel economy standards, and new light bulb energy standards. But for the most part regulatory statutes provide very general standards—"safe and effective" drugs, "reasonably available" or "best practicable" or "best available" pollution control technology, "reasonable progress" toward meeting regulatory goals. And here is the latest, the mandate of the new Consumer Financial Protection Bureau: "ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." Standards such as these give regulatory agencies wide discretion to make trade-offs among competing goods. Such trade-offs are the essence of lawmaking—except that, in the case of regulation, they are made

not by elected representatives of diverse regions, interests, and opinions, but rather by single-purpose agencies unconflicted in their pursuit of one social goal above all others.

The original, formal rationale for broad regulatory delegation was "expertise." The idea was that regulation involved choices that were primarily technical rather than political, and that specialized agencies could make more informed judgments on such matters than generalist legislators. But the practice soon acquired a powerful political dynamic of its own: elected representatives could vote foursquarely for healthful air, swimmable water, safe products, and fair financial practices while leaving the hard and contentious decisions—that is, the real policymaking—to the agencies. Legislators could then take a wait-and-see attitude, approving or attacking the agencies' eventual decisions, routinely as individual members and occasionally through actual legislation. There are very few instances in domestic spending programs of such free-wheeling Executive Branch discretion (individual National Institutes of Health research grants are one example, but these are cabined by elaborate academic review procedures and are much less politically salient than environmental and most other forms of regulation).

Regulatory delegation has acquired a second important political function: it has permitted the Congress to accommodate the never-ending political demands for government intervention to a far greater degree than legislation alone could have accomplished. Hierarchical organizations can make decisions at a much faster pace and in much greater profusion than legislatures. Moreover our Constitution imposes deliberately cumbersome procedures on the Congress while saying little about the organization of the Executive Branch, which adds to the Executive's comparative advantage in high-volume lawmaking. The size, scope, reticulation, and minuteness of the modern "nanny state" is an artifact of regulatory delegation: it could not have been achieved and it could not be managed through direct legislation.

Regulatory delegation has reached new extremes in recent years. During the financial crisis of 2008, Members of Congress watched in amazement as the Treasury Department and Federal Reserve Board arranged multi-billion dollar private financial transactions with little evident statutory authority, and made de facto appropriations of hundreds of billions of dollars with no formal congressional involvement. Congressional exasperation reached its peak in

October 2008, shortly after Congress had finally and reluctantly gotten into the act with a major piece of legislation and huge spending authorization—the $700 billion Troubled Asset Relief Program. At this point the Bush Administration announced that it would use the law and money for entirely different purposes than intended—to make equity investments in selected financial institutions rather than purchasing their "troubled assets". But the initial congressional outrage (which of course was thoroughly bipartisan) has since cooled. Congress has ratified the TARP turn-around through supporting legislation and, more generally, has continued to acquiesce in the Executive Branch's decision-making superiority in dramatic fashion. The 2010 Dodd-Frank Act and Affordable Care Act have launched hundreds of new rulemaking proceedings, often with extraordinarily vague and open-ended statutory standards.

And Congress is now crossing a new constitutional Rubicon by ceding taxing authority along with lawmaking authority. Dodd-Frank's new Consumer Financial Protection Bureau is funded by the profits of the Federal Reserve Banks rather than by legislative appropriations. That is the third time in recent years that Congress has created a regulator of independent means. The Public Company Accounting Oversight Board, established by the Sarbanes-Oxley Act of 2002, is funded by a corporation tax that PCAOB itself calculates, imposes, and revises as convenient. The Telecommunications Act of 1996 established a grant program administered by the Federal Communications Commission funded by a tax on telecommunications firms that the Commission itself calculates, imposes, and revises as convenient. These innovations have profound implications for the further erosion of constitutional structure and legislative accountability. The Constitution requires that the House—the chamber closest to the people—originate and therefore take responsibility for "all bills for raising revenue," but the courts have so far declined to enforce the requirement (the judiciary also gains authority when Congress delegates policymaking to the Executive). Budget autonomy could easily be extended from financial and communications regulation to environmental regulation. Indeed it already has: the $20 billion Deepwater Horizon oil-spill compensation program, organized and administered by the White House and funded by BP, is another example of unilateral Executive Branch taxing-and-spending—this time without any congressional warrant to begin with.

The current state of regulatory policy summarized above is now producing a significant backlash in the Congress. The 2010 election is one important source. Many new Members were elected on promises to reduce the size of the federal government by reducing spending, and are now discovering that a large share of federal spending is accomplished through regulations beyond their immediate influence. But much of the congressional angst predates and is independent of last November's election results. Even before passage of the Affordable Care and Dodd-Frank Acts, the regulatory agencies—especially EPA and the Department of Energy—had launched a highly ambitious series of rulemaking proceedings, many aimed at establishing new or tightened controls at very high cost. Coming at a time of high unemployment and great uncertainty about the direction of the economy, these proposals have raised concerns on both sides of the aisle whether the regulators have become oblivious to the nation's most urgent economic priorities. An egregious instance of regulatory *inaction*—the Interior Department's de facto continuing moratorium on deepwater oil drilling in the Gulf of Mexico—is now adding to the impression. And one of the new regulatory initiatives, EPA's effort to control emissions of carbon dioxide and other greenhouse gasses under the Clean Air Act, has raised additional issues of agency autonomy and legality. In these proceedings, EPA is proposing to do by regulation what the Congress recently declined to do following extensive deliberation, and the EPA proposals depend on interpretations of the Act that would bend statutory language and expand its own discretion in breathtaking ways. Finally, the Obama Administration's appointment of powerful policy "czars" and commissions of unclear legal authority (such as the oil-spill compensation program) has dramatized the trend toward unilateral Executive government.

There are currently two leading proposals for restoring a degree of balance and discipline to the regulatory process. The first is the "regulatory pay-go" proposal associated with Senator Mark Warner, which would require regulatory agencies to eliminate regulations already on their books before issuing new ones of equivalent cost. The procedure would be complementary to the "retrospective analysis" procedure established by President Obama in Executive Order 13563—except that it would have legal teeth, putting the agencies on a budget with current compliance costs as the baseline. The second is the so-called REINS (Regulations

from the Executive in Need of Scrutiny) Act, conceived and introduced by Congressman Geoff Davis and since introduced by Senator Jim DeMint. The REINS Act is modeled on the Congressional Review Act but changes the default rule: major new regulations could not take effect until approved by a joint resolution of the Congress and signed by the President, with expedited procedures guaranteeing up-or-down floor votes promptly after regulations were issued.

Notice that these two reforms are aimed at the two regulatory problems I have identified here: the Warner proposal at off-budget regulatory spending, the REINS Act at excessive lawmaking delegation. These are fresh approaches to regulatory reform, going well beyond the reform bills considered by earlier Congresses, which would have codified the cost-benefit and procedural standards in the successive regulatory review Executive Orders. Both proposals present complicated issues of political incentives, institutional capacity, and administrative feasibility. But they go to the heart of problems that lead to regulatory excesses such as those that your Subcommittee is hearing about today. The two approaches are complementary rather than competitive, and both are worthy of earnest consideration.

A great virtue of the Warner approach is that it focuses on regulatory costs, which are generally easier to estimate than benefits. (As I have noted, many of the benefits of environmental rules, such as aesthetic improvements of clean rivers and lakes and the distant-future benefits of improved land disposal practices, are intrinsically highly subjective.) By placing regulators on a compliance-cost budget, it would leave it to them to decide which among their established and prospective rules are providing the greatest marginal benefits in their areas of responsibility. It would also counter the tendency of regulators to conceive of their rules as ends in themselves—as bodies of controls to be continuously expanded and embellished, rather than as a means for achieving certain results in the real world. Finally, if the process was effective, it could ameliorate the problem of declining cost-effectiveness over time, as regulators were led to weigh the *benefits* of new proposals against those of established rules. But assessing the actual costs of established rules is itself a costly undertaking (more demanding than estimating the costs of proposed rules), and no matter how well done will involve many uncertainties and opportunities for budgetary gamesmanship. A particularly

difficult issue will be who has the final word on cost estimates. If it is the agencies themselves, the procedure will quickly degenerate into a paperwork exercise with little real constraint. If it is OMB, there will be objections that the agency has acquired more authority over regulatory decisions than it exercises over spending decisions.

A great virtue of the REINS Act is that it would establish interbranch political accountability for major regulatory initiatives on a par with taxing-and-spending accountability. And, although the point is open to argument and speculation, I believe that such accountability would eventually result in a corpus of environmental (and other) regulations that was at once (a) smaller and (b) more focused, robust, and effective than the one we have today. Although the regulatory agencies are more efficient than the Congress in generating and issuing laws, this advantage comes at a price in what might be called "democratic quality." Freedom from legislative process means that agency rules are less likely to reflect a consensus of public sentiment. They are therefore more likely to be too aggressive—when an agency, lacking a budget of regulatory expenditures, pursues its mission too single-mindedly or self-righteously, or with too little regard for the competing public concerns of the day (the latter an obvious problem with EPA's current rulemaking surge amidst hard economic times). But they may also be too timid. Environmental initiatives are often highly popular, and EPA, beset as it always is by interest groups whose métier is exaggeration and alarmism, may find it difficult to see past the lobbying fog: it may underestimate as well as overestimate popular support in a way that constituency-minded legislators would not. And agency rules may contain subtle flaws, affecting their acceptability and durability, that the legislative gauntlet would have exposed.

By subjecting major rules to the test of attracting two legislative majorities, the REINS procedure would, at a minimum, cull out extremes of regulatory overreaching—almost certainly more reliably than the internal Executive Branch review procedures have done. At the same time, rules written with the aim of securing congressional approval could reveal areas of broad political support for certain initiatives. In all events, REINS-approved rules would treated with greater deference and less second-guessing over time by courts, regulated parties, lobbying groups, and the general public. Some of the most effective and durable regulations (in terms of achieving their purposes, whether worthy or not) have been statutory regulations and

those written by agencies according to specific statutory directives. Examples include EPA controls on toxic water pollutants, automobile emissions (including unleaded gasoline requirements), acid-rain producing power plant emissions, and stratospheric ozone destroying chemicals.

But it is well to acknowledge that REINS is much more than an incremental rebalancing of rulemaking prerogatives or an expression of Republican opposition to Obama Administration regulatory ambitions. It is rather a frontal challenge to the central development of modern government in America and other politically advanced nations—the migration of policymaking authority from elected legislatures to special-purpose boards and agencies. The migration began in the United States with the creation of the first regulatory commissions during the Progressive and New Deal eras. It then resumed dramatically beginning in 1970, with the creation of EPA and other new regulatory agencies mentioned earlier. We now seem to be at a further stage in the evolution of legislature-free government, with the appearance of specialized mini-governments with increasingly comprehensive power to tax, spend, and regulate, and under leadership whose appointments are increasingly distant from legislative review and approval. These developments have been thoroughly bipartisan, with the greatest advances occurring during the Nixon and George W. Bush Administrations before more recent gains in the Obama Administration. And they have many analogues in other nations, including the proliferation of "quangos" ("quasi-autonomous national government organizations") in the United Kingdom and, in Europe, the migration of policy authority from national governments to the unelected commissions, councils, committees, and directorates of the European Union.

A shift in government structure so pervasive and continuous must reflect powerful political, economic, or technological forces. For Congress to reclaim the final say over dozens or scores of regulations each year is to throw itself athwart those forces, whatever they may be, in a central area of government policy. I do not know whether Congress will be willing to take this step, but do know that the debate over the measure is bound to be beneficial in its own right. When one asks the question, "Should elected representatives be required to stand and be counted on $100 million government initiatives?", it is difficult to avoid the affirmative answer. But when one turns to questions of legislative capacity and incentives, and the effect of the

procedure on the substance of policy and the size and scope of government, one encounters the dilemma of the modern "democracy deficit" in the starkest of terms. If Congress decides to take a pass on the REINS proposal, this will itself be evidence of the intractable nature of the trend I have described, and will give the trend further momentum. If Congress adopts and makes good use of the proposal, that could be the beginning of a democratic Restoration.

The debate over the REINS bill would be greatly improved by complementary steps to demonstrate that Congress is willing and able to reenter the regulatory fray in substance as well as in process. REINS supporters must believe that there are established and proposed regulations that could not survive a vote of both houses. It would be most impressive if Congress were able to demonstrate this on its own. Determined efforts to repeal just one or two specific regulations, either under the Congressional Review Act or standard legislation, would be a vivid display of congressional seriousness about participating in regulatory policy as decision-maker rather than bystander-critic. Even more impressive would be if Congress began now the arduous process of rewriting the organic environmental statutes, which are dozens of years old and in many cases seriously out of date. The most well-developed, broadly supported proposals are those of the Breaking the Logjam project (www.breakingthelogjam.org). They are based precisely on the notion that Congress should enact basic regulatory standards of its own rather than leaving them to EPA—and combine them with economic reforms, such as performance standards and tradable permits, that have been championed by EPA under administrations of both parties but have run aground on court interpretations of the existing statutes.[2] The Warner and REINS proposals are excellent ideas but, at least in the area of the environment and the economy, are no substitute for reforming the underlying statutes.

# # #

[2] The Breaking the Logjam proposals are focused on the Clean Air and Clean Water Acts, but the principles of legislated standards and market-based reforms could also be applied to such statutes as the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) with tremendous environmental and economic benefits.

Mr. SHIMKUS. Thank you, Mr. DeMuth. Now I would like to turn to Ms. Rena Steinzor, president of the Center for Progressive Regulations, University of Maryland School of Law. Welcome, and you are recognized for 5 minutes.

STATEMENT OF RENA STEINZOR

Ms. STEINZOR. Thank you for the opportunity to testify today on the mistaken belief that environmental protection kills jobs. No matter how many times this fatally flawed argument is repeated, empirical evidence supporting the claim is scant and not credible. Instead, the evidence shows that environmental regulations save lives, preserve irreplaceable natural resources, and not incidentally, create jobs.

In fact, if we pull the camera back and look at the economy as a whole, the primary cause of the economic recession and its devastating effect on jobs is underregulation, not overregulation. Everything from the tarp bailouts to the underwater mortgage crisis can be traced back to excessive corporate corner-cutting unchecked by an effective regulatory system.

Too often regulatory costs are envisioned as putting money in a pile and setting it on fire. Environmental protections reduce health care costs, keep families intact and productive, let workers stay on the job and preserve resources for future generations. Not incidentally, taking the remedial steps that they require, especially when capital investments are involved, creates jobs. Pollution control equipment must be designed, manufactured, and installed. People must be hired to construct and operate highly engineered landfills that can safely contain hazardous waste and treat sewage and drinking water. Even if we restrict the analysis of regulatory impacts to monetary investments and do not consider the ethics of preserving life, health, and nature, the money that is not spent treating cancers, asthma, or neurological disease can be used in other, more productive ways.

Two relevant and closely related examples make this case. As Chairman Emeritus Waxman pointed out, regulations implementing the Clean Air Act saved 164,300 adult lives in 2010 and will save 237,000 lives by 2020. Costs of compliance in the year 2020 will be $65 billion, but the regulatory controls, the benefits of those controls will be $2 trillion.

As we have gotten better at preventing pollutants from going up and out of the stack, we have created other equally pressing problems because these pollutants do not vaporize but rather fall out of the scrubbers into fly and bottom ash. Utilities generate about 145 million tons of coal ash annually, more than three times the amount of hazardous chemical waste.

Half of this ash is dumped in so-called surface impoundments which is a euphemism for an unlined pit in the ground. The highly toxic heavy metals present in coal include arsenic, beryllium, chromium, and lead. Burning coal concentrates these contaminants to dangerous levels.

In the aftermath of a spill in Kingston, Tennessee of one billion gallons of sludge, coal ash sludge, when an impoundment run by TBA burst, this spill in sheer volume exceeded the Gulf oil spill that transfixed us this summer. EPA began a rule making to com-

pel the safe disposal of coal ash. Electric utilities have made killing this rule a top priority. If President Obama succumbs to this pressure or Congress intervenes, regulatory benefits of $102 billion over the next several decades could be lost.

If anything, our regulatory system is dangerously weak, and Congress should focus on reviving it rather than eroding public protections. The destructive convergence of funding shortfalls, political attacks, and outmoded legal authority have set the stage for ineffective enforcement and unsupervised industry self-regulations. From the Deepwater Horizon spill in the Gulf of Mexico to the disaster at West Virginia's Big Branch Mine with the death toll of 29, the signs of regulatory dysfunction abound.

The latest free-for-all against regulation frames a fundamental question for Congress. Will we do what we must to make sure that the environment we leave the next generation of Americans is clean enough for them to live their lives free of the health risks from environmental hazards, or will we squeeze the last penny of monetary profit out of the planet's resources at the cost of leaving behind a scarred landscape, polluted air and water, and enough toxics in the food we eat to pose serious risks to our children and their children?

[The prepared statement of Ms. Steinzor follows:]

TESTIMONY OF

Rena Steinzor
Professor, University of Maryland School of Law
and
President, Center for Progressive Reform (www.progressivereform.org)

before the

Energy & Commerce Committee's
Subcommittee on Environment and Economics
U.S. House of Representatives

Hearing on Environmental Regulations, the Economy, and Jobs

February 15, 2011

Mr. Chairman, ranking member Green, and members of the subcommittee, I appreciate the opportunity to testify today on the mistaken belief that environmental protection kills jobs.

No matter how many times this fatally flawed argument is repeated, empirical evidence supporting this assertion is scant and not credible. Instead, the evidence shows that environmental regulations save lives, preserve irretrievable natural resources, and—not incidentally—create jobs.

In fact, if we pull the camera back and look at the economy as a whole, we must conclude that the primary cause of the economic recession causing so much suffering in this country is under-regulation, not over-regulation. Everything—from the TARP bailouts to the "underwater" mortgage crisis that has pushed so many out of their homes—can be traced back to excessive corporate corner-cutting unchecked by an effective regulatory system.

I am a law professor at the University of Maryland School of Law and the President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/). Founded in 2002, CPR is a 501(c)(3) nonprofit research and educational organization comprising a network of sixty scholars across the nation who are dedicated to protecting health, safety, and the environment through analysis and commentary. I joined academia mid-career, after working for the Federal Trade Commission for seven years and this committee for five years, and serving as outside counsel for a wide variety of small and mid-sized businesses for seven years. My work on environmental regulation includes four books, and over twenty-seven articles (as author or co-author). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, which I co-authored with Professor Sidney Shapiro of Wake Forest University's School of Law, analyzes the state of the regulatory system that protects public health, worker and consumer safety, and natural resources, concluding that these agencies are under-funded, lack adequate legal authority, and are undermined by political pressure motivated by special interests. I have served as consultant to EPA and have testified previously before Congress on regulatory subjects on numerous occasions.

My testimony today makes four points:

1. Environmental regulations have saved millions of lives, preventing chronic respiratory illness and heart attacks in cities across the country. These rules protect children from irreversible neurological damage, save billions of dollars in cleanup costs, and preserve water quality in lakes, rivers, and streams.

2. If anything, our regulatory system is dangerously weak, and Congress should focus on reviving it rather than eroding public protections.

3. Fanciful studies, including and especially the analysis prepared for the Small Business Administration (SBA) by Nicole and Mark Crain, are the shaky foundation for the false claims that excessive regulation is at the root of the nation's problems. These claims are fomented by large companies seeking to escape regulation, with

small businesses shoved to the front of the crusade in an effort to put a friendlier face on this self-serving agenda.

4. The American people have always supported environmental protection with great enthusiasm and the results of the mid-term elections did not confer a popular mandate for these kinds of attacks.

Saving Life and Natural Resources

EPA regulations save lives, avoid injuries, and preserve finite natural resources, all goals that are important to the society for ethical, social, practical, and economic reasons. These protections reduce health care costs, keep families intact and productive, let workers stay on the job, and preserve resources for future generations. Not incidentally, taking the remedial steps that they require, especially when capital investments are involved, creates jobs. Pollution control equipment must be designed, manufactured, and installed. People must be hired to construct and operate highly engineered landfills that can safely contain hazardous waste and treat sewage and drinking water. Even if we restrict the analysis of regulatory impacts to monetary investments, and do not consider the ethics of preserving life, health, and nature, the money that is not spent treating cancers, asthma, broken limbs, or neurological disease can be used in other, more productive ways. It is very difficult to project all these alternatives out in a mathematically accurate way, especially with respect to regulations across the economy. But ignoring them does not make them disappear.

Two relevant and closely related examples make this case.

Regulations implementing the Clean Air Act saved 164,300 adult lives in 2010, and will save 237,000 lives by 2020. EPA estimates that the economic value of Clean Air Act regulatory controls will be $2 trillion annually by 2020; costs of compliance in that year will be $65 billion. Air pollution controls saved 13 million days of work loss and 3.2 million days of school loss in 2010. By 2020, they will save 17 million work loss days and 5.4 million school loss days.

EPA's estimates are based on extraordinarily conservative assumptions regarding regulatory benefits that, if anything, low-ball these figures. For example, EPA says that when Clean Air Act protections prevent a non-fatal heart attack in a person 0-24 years old, the incident is worth only $84,000 and an avoided emergency room visit to treat an asthma attack is worth only $363 per incident—hospitals don't give you a plastic ID bracelet for that little! The reason we are able to develop reliable cost and benefit estimates for the Clean Air Act, of course, is that EPA has spent 40 years developing an effective system. Before a rule goes into effect, it is much harder to predict how much its requirements will cost, and any such estimates—typically based on information provided by potentially regulated industries—overstate costs significantly.

Another ramification of Clean Air Act protections is that, as we have gotten better at preventing pollutants from going up and out of the stack, we have created other equally pressing problems because these pollutants do not vaporize, but rather fall out of the scrubbers into fly and bottom ash. And, in turn, that ash is land-disposed. One place where this phenomenon has developed into an acute environmental problem is with the disposal of coal ash by electric

utilities. The highly toxic heavy metals present in coal include antimony, arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, silver, and thallium; burning coal concentrates these contaminants to dangerous levels.

Utilities generate some 145 million tons of coal ash annually, more than three times the amount of hazardous chemical waste produced by the manufacturing sector. About half of this ash is dumped in so-called "surface impoundments," a euphemism for unlined pits in the ground, many of which are located adjacent to the bodies of water that power plants depend upon to cool giant turbines and other equipment. Some 31 percent of landfills and 62 percent of surface impoundments devoted to coal ash disposal lack liners to contain leaching of hazardous constituents into underground aquifers, while 10 percent of such landfills and 58 percent of such impoundments did not have any system for monitoring leaks. About one-third of these impoundments were constructed without consulting with a professional engineer and, as they grew in size to accommodate growing volumes of waste, they ended up depending on a jury-rigged system of retaining walls and dams, making each one of them a disaster waiting to happen.

In the early morning hours of December 22, 2008, an earthen dam holding back a 40-acre surface impoundment at a Tennessee Valley Authority (TVA) power plant burst, releasing one billion gallons of inky coal ash sludge across Kingston, Tennessee. The flood of sludge crossed a river, destroying twenty-six houses, and infiltrated several streams that bisected the area, lifting one house off its foundation and moving it forty yards downhill and covering 300 acres in four to five feet of sludge and mud. Miraculously, no one was killed.

In the aftermath of this catastrophe, which in sheer volume exceeded the Gulf oil spill that transfixed the nation this past summer, EPA began a rulemaking to compel the safe disposal of any such coal ash that is not "beneficially reused," another euphemism that in this case embraces some reuses that are by no means proven to be beneficial—spreading coal ash on fields without testing it first for toxicity, for example. Despite EPA's decision not to even think about regulating how coal ash is reused, leaving it up to utilities to sell their ash to any taker, electric utilities—the vast majority of which are very large businesses—have made this minimal rule a top priority target in the myopic crusade against regulation that has monopolized the House in recent weeks. If President Obama succumbs to this pressure or Congress intervenes, regulatory benefits of $102 billion over the next several decades could be lost.

Regulatory Dysfunction

A series of catastrophic regulatory failures have focused attention on the indisputably troubling condition of crucial regulatory agencies assigned to protect public health, worker and consumer safety, and the environment. The destructive convergence of funding shortfalls, political attacks, and outmoded legal authority have set the stage for ineffective enforcement and unsupervised industry self-regulation. From the Deepwater Horizon spill in the Gulf of Mexico that killed eleven and caused grave environmental and economic damage, to the worst mining disaster in 40 years at the Big Branch mine in West Virginia with a death toll of 29, the signs of regulatory dysfunction abound. Peanut paste tainted by salmonella, glasses imprinted with the Shrek logo contaminated by cadmium and sold at McDonald's, Code Red smog days when

parents are warned to keep their children indoors, the Vioxx recall—at the bottom of each well-publicized event is an agency unable to do its job and a company that could not be relied upon to put the public interest first.

British Petroleum (BP) is the infamous example of the decade, although concluding that it is rogue, or unique, would be wishful thinking. In the half decade before the Gulf spill, its executives presided over multiple, extraordinarily serious, and undoubtedly chronic violations of American health and safety laws throughout its North American operations. If regulators had sufficient funding and the unequivocal mandate to be sure that worker and environmental safety were top priorities, not simply nuisance items to be dealt with on the path to massive profits, these tragedies could have been avoided, sparing the Gulf region and the people who live there all the damage the spill has caused.

An accident involving superheated water killed two workers at BP's Texas City refinery on September 2, 2004, triggering soul-searching at the plant but indifference at corporate headquarters. Six month later, a massive explosion at the Texas City plant killed fifteen people on March 25, 2005, in part because of a decision not to make a $150,000 investment to upgrade equipment that was state-of-the-art in the 1950s and that government inspectors had instructed the company to change out. Later that summer, BP's $1 billion Thunder Horse facility in the Gulf of Mexico collapsed, on July 11, 2005, when a valve designed to prevent the huge platform from flooding in severe weather failed because it was installed backwards. The platform was righted and now produces oil, although it is plagued by construction problems, including a welding job so shoddy that it left underwater pipelines brittle and full of cracks. The following year, a BP pipeline operating in Prudhoe Bay ruptured on March 2, 2006, releasing 267,000 gallons of oil, the largest spill ever on Alaska's North Slope. The spill occurred two years after a whistleblower warned an EPA attorney that the company was systematically neglecting pipeline maintenance and falsifying inspection reports.

Regulators were not exactly sitting silent during these events, but the penalties they meted out to BP for health, safety, and environmental violations were little more than a nuisance to the company, akin to tossing a marble at the side of a battleship as it steams out of port. BP subsidiaries—as opposed to executives--were convicted of environmental crimes three times in Alaska and Texas. Two of the cases involved felony charges brought by EPA for harm to the environment and public health, one under the Clean Air Act and the second under the Clean Water Act, with the company directed to pay $20 million in fines. Separately, OSHA assessed a penalty of $109,500 for the September 2, 2004 incident that killed two workers. Not surprisingly, given the puny nature of this kind of fine, BP's violations of OSHA requirements became chronic; the company received 862 OSHA citations between June 2007 and February 2010 for violations at the Texas City plant.

Under new leadership following the election of President Obama, OSHA fined BP $50.6 million following the Texas City explosion. Even this amount paled in comparison to the $1 billion in estimated damages that BP paid in settlement to tort plaintiffs in the aftermath of the accident. But to put these penalties for life-threatening and ecologically ruinous behavior in perspective, the Commodity Futures Trading Commission settled a case against the company for manipulating prices in the propane market, collecting $303 million in civil penalties. BP's total

2005 profits were $19.31 billion and $17.29 billion in 2007. So with respect to those who argue that this is a battle about preserving jobs, I'd suggest that BP is evidence that this isn't really a fight about jobs. If anything, it's a fight about profit. BP had ample funds to hire all the safety workers it wanted, and yet BP cut corners to minimize costs and make money.

Not every industrial accident can be prevented. But BP has been serial violator. And yet the inspection resources and enforcement mechanisms available to the regulatory agencies simply aren't up to the task. Nor was it clear that the agencies were all that interested in inspections and enforcement during the Bush Administration. So it seems to me that the real question for Congress is how to revive the agencies assigned to protect the American people and how to give them the resources they need to conduct vigorous inspections and enforcement actions. The question should not be how to demoralize their staffs, cut their budget, and suppress badly needed new rules.

Fanciful Costs

Although those who assert that a burdensome regulatory system is killing jobs never really explain exactly why they think that to be case, I must surmise that the theory behind the claim is that businesses must spend so much to comply with regulations that they run out of capital to invest in job creation. A recent study on regulatory costs, authored by Nicole and Mark Crain for the SBA Office of Advocacy claims that regulation costs the U.S. economy $1.75 trillion in 2008. The Crains' $1.75 trillion estimate is far larger than the cost estimate generated by the Office of Management and Budget that same year: $62 billion to $73 billion. They attribute this massive difference to the fact that their report considers many more rules than do the annual OMB reports, but they refuse to make available a list of the rules they did count and it is difficult to imagine that this orders-of-magnitude difference is attributable solely to their attentiveness to minor rules that OMB somehow missed.

I have attached a copy of a Center for Progressive Reform (CPR) report, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, as an appendix to my testimony. This analysis shows that Crain and Crain's calculations for the regulations not covered by OMB's report appear to be based largely on a decidedly unusual data source for economists – public opinion polling, the results of which the Crains massage into a massive, but unsupported estimate of the costs of "economic" regulations. Again, because they have refused to make their underlying data or calculations public, apparently even withholding them from the SBA office that contracted for the study, it is difficult to know precisely how they arrived at this result. Nevertheless, their calculations inspire great skepticism.

For one thing, as stated, their estimate of economic regulatory costs is based on the results of public opinion polling, specifically a poll concerning the business climate of countries that has been collected in a World Bank report. The authors of the World Bank report warn that its results should not be used for exactly the type of extrapolations made by Crain and Crain, because their underlying data are too crude.

Professor Sidney Shapiro, my co-author and the vice-president of CPR, has written a letter to SBA urging the agency to withdraw the report before it causes further embarrassment. He has not yet received a reply.

Public Opinion and the Midterm "Mandate"

The emerging crusade against regulations seems to assume that the public will not miss the protections provided by regulation. It also seems based on the premise that the public thinks that all regulations are equally distasteful. From these presumptions, deregulators appear to argue the results of mid-term elections are a public mandate to de-fund and further weaken the regulatory system. Certainly that would be the impact of the FY 2011 budget proposal from the majority this week. If agencies like EPA are weakened further, hoping for a cessation in catastrophic environmental disasters, much less chronic pollution, is naïve to the point of being quixotic.

The presumption that the public thinks environmental regulation is distasteful is directly refuted by public opinion polls. In a September 2010 Pew poll taken shortly before the midterm election, 81 percent of respondents said they favor stronger environmental regulation. A June 2010 Pew poll recorded 56 percent of respondents as favoring environmental protection over keeping energy prices low, a lower number but still a clear majority. Even in these dire economic times, with so many worrying about the cost of living, the deficit, and the availability of jobs, environmental pollution made the "top twelve" list of major issues in a December 15, 2010 Pew poll. The plurality of respondents—45 percent—concluded that the nation is staying about the same on the problem, 26 percent thought it is making progress, and 24 percent said it is losing ground.

I appreciate that the majority feels it has a mandate as a result of the election. But I would urge all Members to consider whether gutting environmental protection is really what voters had in mind, or whether this attack on regulation is simply an effort to re-fight past battles over the nation's environmental laws, this time by objecting not to the laws themselves but to their enforcement. It's bad enough that the agencies are underfunded to the point that they are barely able to do their jobs. But this fight is really about hobbling such legislative landmarks as the Clean Air Act, Clean Water Act, and outside the realm of the environment, the Occupational Safety and Health Act, banking reform, health care, and more.

The corporate and political voices in favor of deregulating today are, by and large, the same ones that opposed those laws from the outset. But Congress has already made the policy choices here, directing EPA, for example, to protect the water we drink and the air we breathe, and to make sure we are not bombarded by a variety of poisons in the food chain that ends in our lunch boxes and on our dinner tables. Those laws are already on the books, the product of lengthy consideration by Congress, following ample debate that included all voices. Many of those laws have been tested in court, too. For good reason, Congress delegated a measure of authority to the regulatory agencies to establish specific standards, the kind that require scientific expertise that Members could not reasonably be expected to possess. But Congress made clear in the law that the agencies must exercise that delegated authority within the specific parameters established by Congress.

I'd point out further that many of the regulations that are drawing fire have not yet been adopted. Industry is making the same arguments to Congress that it is making to the regulatory agencies themselves. That process is going forward, the agencies are pursuing the statutory obligations to craft regulations within the parameters Congress established, and industry and its allies are exercising their right to flood the agencies with information and objections that will shape those regulations. In other words, the arguments we're hearing from industry aren't unique. We heard many of them when the bills were passed and we heard them during agency consideration of the regulations. In some cases, we heard them in court. And now we are hearing them again. It's the same fight, all over again.

Regulations are a time-honored punching bag for business and for some on Capitol Hill. The corruption of the campaign finance system, accelerated dramatically by the Supreme Court's decision in *Citizens United*, 130 S. Ct. 876 (2010), has brought these destructive trends to the fore, with both parties struggling to amass the billions they need to compete in the 2012 election cycle. But it would be a mistake to suppose that the 2010 election results are indicative of a tolerance for environmental damage and even catastrophe.

The latest free-for-all against regulation frames a fundamental question for Congress: Will we do what we must to make sure that the environment we leave the next generation of Americans is clean enough for them to live their lives free of the health risks from environmental hazards? Or will we squeeze the last penny of monetary profit out of the planet's resources, at the cost of leaving behind a scarred landscape, polluted air and water, and enough toxics in the food we eat to pose serious risks to our children and their children? This question is the same that it has always been.

Thank you.

Attachment: *Setting the Record Straight*

Setting the Record Straight:

The Crain and Crain Report on Regulatory Costs

by CPR Member Scholar Sidney A. Shapiro (University Distinguished Chair in Law, Wake Forest University School of Law),
Ruth Ruttenberg (Professor of Economics, National Labor College),
and CPR Policy Analyst James Goodwin

February 2011

Setting the Record Straight: The Crain and Crain Report on Regulatory Costs

Introduction

Critics of health, safety, and environment regulation have sought to buttress the case against regulation by citing a 2010 report by economists Nicole Crain and Mark Crain called *The Impact of Regulatory Costs on Small Firms*[1] ("the Crain and Crain report"). The Crain and Crain report is the fourth in a series of reports that have been produced under contract for the Small Business Administration's (SBA) Office of Advocacy since 1995, each of which has attempted to calculate the total "burden" of federal regulations, and to demonstrate that small businesses in all economic sectors bear a disproportionate share of that burden.[2]

Among the Crain and Crain report's findings is one that has become a centerpiece of regulatory opponents' rhetoric: the "annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008."[3] This figure is several orders of magnitude larger than the estimate generated by the Office of Management and Budget (OMB)—the official estimate of the aggregate costs and benefits of federal regulations prepared annually for Congress. The 2009 OMB report found that in 2008 annual regulatory *costs* ranged from $62 billion to $73 billion.[4] The authors of the Crain and Crain report attribute this massive difference to the fact that their report considers many more rules than do the annual OMB reports, including rules with estimated costs less than $100 million, rules that were put on the books more than 10 years ago, and rules issued by independent regulatory agencies.[5]

As this report demonstrates, however, much more is at work than that. In areas where the OMB and Crain and Crain calculations overlap, Crain and Crain use the same cost data as OMB, but, unlike OMB, which presents regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations, a departure that is not justified as we explain in this report. Further, Crain and Crain's calculations for the regulations not covered by OMB's report appear to be based largely on a decidedly unusual data source for economists—public opinion polling, the results of which Crain and Crain massage into a massive, but unsupported estimate of the costs of "economic" regulations. Because Crain and Crain have refused to make their underlying data or calculations public—apparently even withholding them from the SBA office that contracted for the study—it is difficult to know precisely how they arrived at the result that economic regulation has a cost of $1.2 trillion dollars, comprising more than 70 percent of the total costs in their report. Nevertheless, even based on what Crain and Crain reveal, their calculation of the cost of economic regulations is deeply flawed, as we also explain.

In addition, the OMB report accounts for an equally relevant figure that the Crain and Crain's $1.75 trillion figure simply omits: the economic benefits of regulation. OMB's 2009 recent report found that in 2008 annual *benefits* of regulation ranged from $153 billion to $806 billion.[6] And, as a series of CPR reports have explained, the OMB reports likely overestimate regulatory costs and underestimate regulatory benefits, including omitting from its calculations altogether significant benefits that happen to defy monetization.[7] In contrast, the Crain and Crain report makes no effort to account for regulatory benefits. If, for example, a regulation imposes $100 in

costs on a business, but provides twice that in benefits, the Crain and Crain report would still tally that as $100 cost to society, even though it provides substantial net benefits.

It's easy to see why the anti-regulatory critics have seized on the Crain and Crain report and its findings.[8] The $1.75 trillion figure is a gaudy number that was sure to catch the ear of the media and the general public. Upon examination, however, it turns out that the $1.75 trillion estimate is the result of transparently unreliable methodology and is presented in a fashion calculated to mislead.

This report points out the severe flaws with the effort by Crain and Crain to estimate total regulatory costs. These flaws include:

- **Omitted benefits of regulation**. A discussion of regulation is inherently incomplete—and distorted—if it focuses on costs without also considering benefits. Simply put, OMB's calculations demonstrate that regulation has a positive net effect on the economy, and not by a little. The Crain and Crain report simply ignores the benefits of regulation, focusing solely on one half of the equation. But, claiming to present a compilation of regulatory costs, without also presenting a compilation of regulatory benefits, is fundamentally misleading. Indeed, using Crain and Crain's methodology, practically any economic transaction—from the purchase of a loaf of bread to the construction of a manufacturing plant—would be counted as a drain on the economy, because they only include the costs not the benefits.* The Crain and Crain report's failure to include an accounting of regulatory benefits is particularly puzzling, since virtually every source the authors rely on for estimates of costs also provide estimates of benefits as well.
- **Questionable assumptions and flimsy data**. The report's estimate of "economic regulatory" costs—financial regulations, for example—which account for 70 percent of the total regulatory costs, is not based on actual cost estimates. Instead, this estimate is based on the results of public opinion polling concerning the business climate of countries that has been collected in a World Bank report. The authors of the World Bank report warn that its results should not be used for exactly the type of extrapolations made by Crain and Crain, because their underlying data are too crude. Crain and Crain nevertheless enter the World Bank data into a formula, which they appear to have created out of whole cloth, that purports to describe a relationship between a country's regulatory stringency and its Gross Domestic Product (GDP). OMB has repeatedly warned against

* While comparing costs and benefits is beyond the scope of this paper, it is notable that the 2009 OMB report found that total regulatory benefits are far larger than total regulatory costs. *See infra* endnote 4 and *supra* accompanying text. This finding refers to total aggregate net benefits, which means that some individual regulations may not have benefits that exceed costs. But, this result usually arises from the difficulty of monetizing regulatory benefits, rather than the lack of actual benefits. *See* comments cited *infra* endnote 7; *see also* Rena Steinzor et al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* http://www.progressivereform.org/articles/PRIA_909.pdf; John Applegate et al., *Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein* (Ctr. for Progressive Reform, White Paper 901, 2009), *available at* http://www.progressivereform.org/articles/SunsteinOIRA901.pdf; Frank Ackerman et al., *Applying Cost Benefit Analysis to Past Decisions: Was Protecting the Environment* Ever *a Good Idea?* (Ctr. for Progressive Reform, White Paper 401, 2004), *available at* http://www.progressivereform.org/articles/Wrong_401.pdf.

trying to reduce the complex relationship between these two concepts to such simplistic terms, yet this is precisely what Crain and Crain do.

- **Opaque calculations**. Contrary to academic and government norms, Crain and Crain do not reveal their data or show the calculations they used to arrive at their cost estimates. Neither is the information available from the SBA Office of Advocacy. Moreover, Crain and Crain declined to furnish their data to CPR despite several requests. As a result, it is impossible to replicate their results, a flaw so significant it would prevent the publication of their paper in any respectable academic journal.
- **Slanted methodology**. The Crain and Crain report suffers from several methodological problems, all of which tilt the results towards an overstatement of regulatory costs. These problems are itemized and explained further below.
- **Overstated costs**. To estimate the cost of non-economic regulation, Crain and Crain almost always used the agency estimates of such costs that were submitted to OMB. Although OMB presents these costs as a range, Crain and Crain always used the upper bound estimate, effectively eliminating the agencies' careful efforts to draw attention to the uncertainties in these calculations. Moreover, cost estimates are typically based on industry data, and regulated entities have a strong incentive to overstate costs in this circumstance. As discussed below, empirical studies have shown that such estimates are usually too high.
- **Peer review rendered meaningless.** The peer review process used by the SBA Office of Advocacy does not support the reliability of the report. Only two people examined the document. The authors ignored a significant criticism raised by one of the two reviewers concerning their estimate of economic regulatory costs. As for the second person, the entire review consisted of the following comments: "I looked it over and it's terrific, nothing to add. Congrats[.]"[9]

For the reasons that follow, we conclude that the Crain and Crain report is sufficiently flawed that it does not come close to justifying regulatory reform efforts, such as the REINS Act,[†] which seek to limit protection of people and the environment. If Crain and Crain had used a more straightforward and generally accepted methodology, they likely would have reached a figure that was several orders of magnitude smaller. And, if Crain and Crain had properly considered regulatory benefits, they likely would have found that regulation is a net economic plus for society. Such findings, however, would not comport with the political agenda of the SBA's Office of Advocacy or of the opponents of regulation in general.

[†] Regulations from the Executive in Need of Scrutiny (REINS) Act, H.R. 10, 112th Cong. (2011). Under this bill, no new "economically significant" regulations would take effect unless Congress affirmatively approved the regulation within 90 days of receiving it, by means of a joint congressional resolution of approval, signed by the President. For more information on the REINS Act, see Sidney Shapiro, *The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment* (Ctr. for Progressive Reform, Backgrounder, 2011), *available at* http://www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder_2011.pdf.

The Crain and Crain Report's Methodology

The Crain and Crain report purports to provide a complete accounting of all regulatory costs. It divides the regulatory universe into four categories: economic regulations; environmental regulations; tax compliance regulations; and occupational health and safety and homeland security regulations. Notably, the report never provides a clear definition of the term "regulation," nor does it provide clear definitions of each of the four regulatory categories. Next, the authors employ different methodologies to calculate the total costs of regulation in each category. Finally, they add up the costs of regulation for each category to derive a total cost of federal regulations.

The report provides only a part of the data, equations, assumptions, extrapolations, and calculations that would be necessary for replicating the report's results. The authors of this white paper made several attempts to obtain the missing additional materials from the authors of the Crain and Crain report, as well as from the SBA Office of Advocacy, which funded the report, so that we could fully understand and verify the methodologies, data, and assumptions that were employed. The authors of the Crain and Crain report provided us with only very general responses and have given no indication that they would furnish us with the missing information.

Remarkably, a staff member at the SBA Office of Advocacy explained that his office did not have access to any of the additional materials, since it had only contracted to receive the final report from the authors.[10] Thus, the SBA Office of Advocacy entered into an agreement with Crain and Crain to spend taxpayer money on a report whose findings it could not then have verified in any significant way—not even checking the arithmetic.[‡]

Because this underlying information is unavailable, the Crain and Crain report is a political document, rather than an academic study. No academic author would submit such a study for publication without revealing the data and calculations on which the scholar relied. No academic publication would accept such a study unless such information was released. Academic reports also acknowledge and discuss potential weaknesses in their calculations, a modesty that is absent from the Crain and Crain report.

Methodological Problems

Economic Regulation Costs

To calculate the total cost of economic regulations, Crain and Crain employ a regression analysis that purports to establish a correlation between a country's score on the World Bank's "Regulatory Quality Index" (RQI) and the size of the country's economic activity, as measured by GDP per capita.[11] According to the World Bank report, the RQI seeks to measure public "perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development."[12] Crain and Crain have

[‡] If the SBA Office of Advocacy contracts to have similar reports performed in the future, we strongly urge it to obtain all the data, equations, assumptions, extrapolations, and calculations as part of the contract, and to make these materials readily available in a useable format on its website.

interpreted the RQI as measuring how friendly a country is to business interests.[13] The World Bank researchers did not intend for the RQI to be used as a proxy measure for regulatory burden or as a tool for critiquing a particular country's regulatory stringency.[14] Nevertheless, Crain and Crain use the RQI in precisely this fashion.

As the World Bank report explains, the RQI is based on public opinion polling, not quantitative data. It is derived from a composite of 35 opinion surveys that asked questions about the regulatory climate of approximately 200 countries.[15] Given its subjective origins, the World Bank researchers responsible for the RQI designed it with a few limited applications in mind—namely, to make meaningful cross-country comparisons as well as to monitor a single country's progress over time. At the same time, these researchers strongly caution against using the RQI for developing specific policy prescriptions in particular countries.[16]

Crain and Crain provide no justification defending their use of the RQI to estimate regulatory costs, nor do they ever acknowledge the myriad theoretical or empirical problems with calculating such costs based on public opinion polling. Significantly, one of the peer reviewers of the Crain and Crain report raised this objection, stating "I am concerned that the index may not measure what the authors say it measures, and even if it does, it may overstate the costs of regulation when used in conjunction with the other measures."[17] The authors do not appear to have revised the report in response to this comment.

As noted above, the Crain and Crain report uses the RQI, which the authors have converted into a proxy measure for a country's regulatory stringency, as the main variable in their formula for calculating the cost of a country's economic regulations—that is, the supposed reduction in that country's GDP caused by the regulations. The authors do not explain how they devised this formula, nor do they provide any of the underlying data, calculations, and assumptions that they used to devise it. Consequently, no one can verify whether or not the formula provides a reasonable model of reality, nor can anyone verify their calculations.

Using this formula, Crain and Crain calculate the loss in GDP the United States suffers because of economic regulation. It is unclear whether Crain and Crain calculate the loss in GDP as compared to the country with the highest RQI score or whether they calculate the loss in GDP attributed to all regulation. The latter baseline would reflect the GDP in a hypothetical United States that had no economic regulations. Whichever baseline they use, Crain and Crain thus conclude that the cost of economic regulations in the United States in 2008 was $1.236 trillion, "as reflected in lost GDP."[18]

Crain and Crain do not clearly define the category of "economic regulations," other than to note it is broadly inclusive.[§] The lack of a clear definition opens up the possibility that the category of "economic regulations" also includes the other categories of regulations identified by Crain and Crain. If, for example, this category includes some environmental regulation costs, those costs are also the subject of a separate calculation in the report. This would mean that some of

[§] The report indicates that the category of economic regulations is broad enough to include "a wide range of restrictions and incentives that affect the way businesses operate—what products and services they produce, how and where they produce them, and how products and services are priced and marketed to consumers." CRAIN & CRAIN, *infra* endnote 1, at 17.

these regulation costs would be counted twice (once as an economic regulation and once as an environmental regulation), leading to an exaggeration of total regulation costs. Some of the polling data used by the authors of the World Bank study in the calculation of the RQI asks questions of environmental and safety regulations, although the majority of the questions are about tax and price control regulations, trade barriers, access to capital, and regulatory barriers to starting a new business.**

One other significant problem in this category of costs is that the regression analysis used in the report assumes an overly simplistic relationship between regulatory stringency and GDP. As noted above, the Crain and Crain report's formula implies that increases in regulatory stringency *cause* a reduction in a country's economic activity, which are reflected in a decreased GDP. The actual relationship between regulatory stringency and a country's economic activity is not so clear-cut, however, because measurements of GDP do not include regulatory benefits. On this subject, the 2009 OMB report to Congress notes:

> The relationship between regulation and indicators of economic activity raises a number of complex questions, conceptual, empirical, and normative. A key issue involves identification of the appropriate measures. For example, is GDP the appropriate measure? As we have seen, many regulations have favorable net benefits, and by hypothesis, such regulations are desirable on standard economic grounds. Of course it would be useful to understand the effects on GDP of particular regulations and of classes of regulations. But while important, GDP is hardly a complete measure of relevant values, and some of the benefits of regulation, such as environmental protection, are not adequately captured by changes in GDP.[19]

Finally, the report's use of the RQI is misleading because it gives the false impression that the U.S. regulatory burden is especially high. In fact, the United States has one of the highest RQI scores, ranking eleventh out of more than 200 countries.[20] The United States ranks higher than many of its competitive trading partners, including China, Germany, Japan, Mexico, South Korea, and Taiwan, and its RQI score has remained fairly constant since 1996, when these scores were first developed.[21] But Crain and Crain's use of the RQI, and the SBA's use of the Crain and Crain report, imply that the U.S. is inferior to these other countries as an excellent place to do business.

Environmental Regulation Costs

To calculate the costs of environmental regulations, the Crain and Crain report adds up the estimated costs of environmental regulations found in each of OMB's annual reports to Congress on cost-benefit analysis since 2001.[22] These estimates in turn are based on aggregation of the

** The World Bank study relied on 35 different sources of global or regional surveys, produced by 33 different organizations. Only 16 of the sources had any measure of regulation at all. Only one specifically mentioned environmental regulations (the World Economic Forum Global Competitiveness Survey). Only 2 of the 35 sources mentioned labor market policy: the African Development Bank (not relevant to the US) and the Institute for Management Development World Competitiveness Yearbook. Neither of these two said which labor market issues they measured, and there was no mention of safety and health by them. *See* Kaufmann et al., *infra* endnote 11, at 29 (Table 1), 39-71 (App. A).

cost-benefit analyses that EPA produced when developing the regulations. Based on this data, Crain and Crain find that the total cost of environmental regulations in 2008 was $281 billion,[23] which is 16 percent of the total regulatory costs according to their estimate of total costs.

To generate cost estimates for its cost-benefit analyses, EPA primarily relies on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[24] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[25]

Industry cost estimates—and therefore the cost estimates that EPA develops-- do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[26]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[27]	Sector level capital expenditures for pollution controls	– EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[28]	Total, annual, or capital expenditures for occupational safety & health regulations	– OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[29]	Various measures of cost for pollution prevention	– Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[30]	Various measures of cost for environmental regulations	– Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Finally, unlike the OMB reports, which present regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations.[31] The authors justify this move by claiming that agencies allegedly have a strong incentive to underestimate regulatory costs, although they provide no empirical evidence to support this claim. In fact, as just explained, it is likely that regulatory costs are overstated. In any case, the choice by Crain and Crain to always take the higher bound estimate, rather than presenting their results as a range of costs, as OMB does, is a misleading use of the OMB data.

Agencies were not required by Executive Order to provide OMB with estimates of regulatory costs and benefits prior to 1988. For this reason, OMB had to rely on non-government estimates in order to estimate regulatory benefits and costs prior to 2000. For environmental regulations issued before 1988, the 2001 OMB report relied on a 1991 study of regulatory costs undertaken by economists Robert Hahn and John Hird.[32]

Hahn and Hird performed no new calculations of regulatory costs, but instead they generated an estimate by synthesizing a set of earlier studies of regulatory costs conducted by a small circle of conservative economists.[33] These estimates are subject to the same limitations as agency-produced cost analyses, including relying on industry-estimates of compliance costs and failing to account for innovation.[††] An additional problem is that the Hahn and Hird study is nearly 20 years old, and many of the earlier studies and data it relies upon are more than 30 years old. The data and assumptions reflected in the Hahn and Hird study cannot be reasonably extrapolated to modern social and economic reality.[‡‡]

Occupational Safety and Health and Homeland Security Regulation Costs

The Crain and Crain report concludes that the total cost of occupational safety and health and homeland security regulations in 2008 was $75 billion,[34] which is four percent of their total costs. Occupational safety and health regulations accounted for $65 billion of the total.

Occupational Safety and Health Regulation Costs

To calculate the occupational safety and health regulations, the Crain and Crain report relies on two sources. The first source, a 2005 study by Joseph Johnson, provides the total costs of all occupational safety and health regulations issued before 2001.[35] The second source, the 2009

[††] In addition, many of these earlier studies assume a regulatory baseline of zero for their comparisons of regulatory costs. In other words, these studies assume that in the absence of the regulations under examination, companies would have taken no environmentally protective actions. This assumption has no basis in a reality where other existing regulations (federal, state, and local), fear of tort liability, and simple market forces induce companies to take some minimal level of environmentally protective action all the time. This minimal level of actions represents the proper baseline against which regulatory costs should be measured. To the extent that these earlier studies assume a zero baseline, they grossly overestimate regulatory costs. McGarity & Ruttenberg, *infra* endnote 24, at 2047.

[‡‡] In the intervening years, the U.S. economy and society have drastically changed. For example, scientific knowledge regarding the harmful public health and environmental effects of pollution has greatly improved, the U.S. has shifted from an industrial sector-based economy to a service sector-based one, and even industry has become characterized by more automation and less human labor. *See* Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LABOR REV., March 2006.

OMB report to Congress, provides the total cost of all occupational safety and health regulation issued since 2001.

The cost estimate from the 2009 OMB report to Congress is based on a simple aggregation of the cost-benefit analyses that OSHA produced when developing these regulations.[36] As discussed above, the cost assessments generated as part of these cost-benefit analyses greatly overstate the costs of regulations, since the agencies that produce them rely on industry for estimates of compliance costs, adopt conservative assumptions to fill in data gaps, and fail to account for innovation.

The Johnson study likewise suffers from several flaws, leading it to overestimate these regulatory costs. The study begins by aggregating the agency-produced cost-benefit analyses for all of OSHA rules issued before 2001.[37] As just noted, these costs estimates are overstated. Nevertheless, the Johnson study then inflates OSHA's cost estimates by multiplying the total of all of the estimates by 5.5. According to Johnson, using the multiplier is necessary to account for the costs of all of OSHA's non-major regulations—since OSHA does not perform cost-benefit analyses for these regulations—and for *fines* levied for violations of any OSHA standards.[38] In other words, the Johnson study assumes that for every dollar industry spends on compliance with OSHA's major rules, it spends $5.50 on compliance with non-major regulations and on fines for violations of existing OSHA standards.

We see no justification for counting the fines that companies pay for violating regulatory standards as regulatory costs. Instead, these are the costs of *choosing* to break the law. That is, the fines would never have occurred if the firms had not chosen to disobey the law. Under this logic, mass lawbreaking raises regulatory costs, enabling regulatory opponents to argue that we need to reduce regulation because of these high regulatory costs.

The Johnson study took the multiplier of 5.5 from a 1996 study by Harvey James.[39] The James study uses an unpublished and otherwise unavailable 1974 estimate prepared by the National Association of Manufacturers (NAM) of the per-firm cost of compliance with OSHA regulations.[40] Because the report is unavailable, it cannot be checked for accuracy. As we related earlier, industry estimates of regulatory costs are suspect because of the political incentive to inflate such costs. Nevertheless, the Crain and Crain report incorporate the Johnson study without any discussion of this significant limitation in the data.

Homeland Security Regulation Costs

To calculate the cost of all homeland security regulations, the Crain and Crain report again relies on the 2009 OMB report to Congress,[41] which is based on the cost-benefit analyses that the Department of Homeland Security produced when developing its regulations.[42] The cost assessments provided in these cost-benefit analyses are overstated for all the reasons stated above: industry-supplied estimates of compliance estimates; conservative assumptions to fill in data gaps; and failure to account for innovation.

Tax Compliance Regulation Costs

To calculate the cost of tax compliance regulations, the Crain and Crain report starts with estimates of the time that businesses, non-profit organizations, and individuals spend each year completing tax-related forms and filings, and multiplies it by an estimate of the hourly cost of filling out the forms. Using this methodology, the Crain and Crain report concludes that the total cost of tax compliance regulations in 2008 was $160 billion,[43] which is about nine percent of their total costs.

The report says it derives its estimates of the time it takes to fill out tax forms from the Internal Revenue Service and the Tax Foundation, a conservative-leaning non-profit organization.[44] However, they do not explain which data they use or how those data contribute to their estimate. To the extent that data from the Tax Foundation are used, the report's estimate of the amount time spent on tax compliance should be viewed with caution since the Tax Foundation tends to be "anti-tax" in orientation.

The authors calculate tax compliance costs for businesses separately from individuals and non-profit organizations, using the reasonable assumption that businesses spend more money per hour complying with tax regulations. Crain and Crain assume that all businesses rely on "Human Resources professionals" to prepare their taxes, but they provide no evidence to justify this assumption. They nevertheless multiply estimates of the amount of time it takes to fill out the tax forms by $49.77 per hour ("the hourly compensation rate for Human Resources professionals") on tax compliance.[45] The report then appears to assume that all individuals and non-profit organizations have their taxes prepared by accountants or auditors, and it estimates that these entities spend $31.53 per hour ("the average hourly wage rate for accountant and auditors") on tax compliance.[46] With respect to individuals, this assumption seems particularly unfounded given that millions of American households prepare their own taxes.

Conclusion

The Crain and Crain study is rife with flawed methodologies and questionable data and assumptions. Of even greater importance, each of the problems with the Crain and Crain report's methodologies, data, and assumptions lead to an overstatement of regulatory costs. Because of these problems with the Crain and Crain report's reliability, we believe policymakers should disregard its misleading conclusions as they consider matters of regulatory policy.

Endnotes

[1] NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) (This report was developed under a contract with the Small Business Administration's Office of Advocacy), *available at* http://www.sba.gov/sites/default/files/rs371tot.pdf.

[2] For the three earlier reports, see W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2005) (This report was developed under a contract with the Small Business Administration's Office of Advocacy), *available at* http://archive.sba.gov/advo/research/rs264tot.pdf; W. MARK CRAIN & THOMAS D. HOPKINS, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2001), *available at* http://archive.sba.gov/advo/research/rs207tot.pdf; THOMAS D. HOPKINS, PROFILES OF REGULATORY COSTS (1995), *available at* http://archive.sba.gov/advo/research/rs1995hoptot.pdf.

[3] CRAIN & CRAIN, *supra* endnote 1, at 6 (2009 dollars).

[4] OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (converted from 2001 to 2009 dollars), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf [hereinafter 2009 OMB Report]. The Regulatory Right-to-Know Act requires OMB to produce a report every year that, among other things, calculates the annual cost of major regulations. Treasury and General Government Appropriations Act of 2001 §624, Pub. L. 106-554, 31 U.S.C. §1105 note.

[5] CRAIN & CRAIN, *supra* endnote 1, at 3-5.

[6] 2009 OMB Report, *supra* endnote 4, at 3 (converted from 2001 to 2009 dollars).

[7] *See, e.g.*, Sidney Shapiro et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2010), *available at* http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf; Rena Steinzor et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2009), *available at* http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf; Amy Sinden & James Goodwin, *CPR Comments on Draft 2008 Report to Congress on the Benefits and Costs of Federal Regulations* 5-8 (2008), *available at* http://www.progressivereform.org/articles/2008_Comments_OMB_Report.pdf. For all of the comments on OMB's annual reports to Congress on the benefits and cost of federal regulation produced by CPR Member Scholars and staff, see Ctr. for Progressive Reform, *OMB Reports on the Costs and Benefits of Regulation*, http://www.progressivereform.org/OMBCongress.cfm (last visited Feb. 5, 2011).

[8] For examples of instances in which anti-regulatory critics have cited the Crain and Crain report and its conclusions, see, e.g., James L. Gattuso, Diane Katz, & Stephen A. Keen, *Red Tape Rising: Obama's Torrent of New Regulation* (Heritage Foundation, Backgrounder No. 2048, 2010) ("According to a report recently released by the Small Business Administration, total regulatory costs amount to about $1.75 trillion annually . . . ."), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf; Sen. Mark R. Warner, Op-Ed, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010 ("According to the U.S. Small Business Administration, the estimated annual cost of federal regulations in 2008 exceeded $1.75 trillion."), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html?hpid=opinionsbox1; Press Release, U.S. Chamber of Commerce, U.S. Chamber Calls on Federal and State Lawmakers to Stem the Growing Tide of Excessive Regulation (Oct. 7, 2010) ("Donohue cited statistics from the Small Business Administration's Office of Advocacy estimating the total cost of federal regulations at $1.75 trillion."), http://www.uschamber.com/press/releases/2010/october/us-chamber-calls-federal-and-state-lawmakers-stem-growing-tide-excessive (last visited Feb. 1, 2011).

[9] OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, INFORMATION QUALITY PEER REVIEW REPORT FOR THE IMPACT OF FEDERAL REGULATORY COSTS ON SMALL FIRMS 4 (2010) (Bob Litan's peer review), *available at* http://www.sba.gov/sites/default/files/files/TheImpactofFederalRegulatoryCostsonSmallFirmsPRFY2010.pdf.

[10] Telephone Interview with Radwan Saade, Regulatory Analyst, Small Business Administration, Office of Advocacy, Office of Economic Research (Jan. 11, 2011).

[11] CRAIN & CRAIN, *supra* endnote 1, at 18-25. The RQI was developed as part of the World Bank's Worldwide Governance Indicators project, which seeks to establish a variety of indexes for measuring countries' governance and institutional quality. *See* Daniel Kaufmann et al., *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996–2008* at 2 (The World Bank, Development Research Group, Macroeconomics and

Growth Team, Policy Research Working Paper No. 4978, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424591## (follow "One-Click Download" hyperlink at the top of the page).

[12] Kaufmann et al., *supra* endnote 11, at 6.

[13] *See* CRAIN & CRAIN, *supra* endnote 1, at 21 (explaining that increases in the RQI correspond to "reductions in regulatory burden.").

[14] *See id.*

[15] Kaufmann et al., *supra* endnote 11, at 4.

[16] *Id.* at 5 (describing the RQI as "too blunt a tool to be useful in formulating specific governance reforms in particular country contexts. Such reforms, and evaluation of their progress, need to be informed by much more detailed and country-specific diagnostic data . . . .").

[17] OFFICE OF ADVOCACY, *supra* endnote 9, at 2 (Richard Williams' peer review), *available at* http://www.sba.gov/sites/default/files/files/TheImpactofFederalRegulatoryCostsonSmallFirmsPRFY2010.pdf. Richard Williams is a conservative economist who currently works as the Director of Policy Research at the Mercatus Center, an anti-regulatory think tank. *See* Mercatus Ctr., *Richard Williams Biography*, http://mercatus.org/richard-williams (last visited February 4, 2011).

[18] CRAIN & CRAIN, *supra* endnote 1, at 24 (2009 dollars).

[19] 2009 OMB Report, *supra* endnote 4, at 29.

[20] *See* Kaufmann et al., *supra* endnote 11, at 89-91 (Table C4). The RQI is designed so that possible scores range from -2.5 (*i.e.*, the greatest regulatory burden, however defined) to 2.5 (*i.e.*, the lowest regulatory burden, however defined). In 2008, the RQI score for the United States was 1.579. CRAIN & CRAIN, *supra* endnote 1, at 24.

[21] *See* Kaufmann et al., *supra* endnote 11, at 89-91 (Table C4).

[22] CRAIN & CRAIN, *supra* endnote 1, at 25- 27.

[23] *Id.* at 31 (Table 6) (2009 dollars).

[24] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

[25] *Id.* at 2046.

[26] *Id.* at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

[27] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[28] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[29] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[30] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

[31] CRAIN & CRAIN, *supra* endnote 1, at 27.

[32] *Id.* at 25.

[33] Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 248-54 (1991).

[34] CRAIN & CRAIN, *supra* endnote 1, at 31 (2009 dollars).
[35] *Id.*
[36] 2009 OMB Report, *supra* endnote 4, at 11 (Table 1-2).
[37] Joseph M. Johnson, *A Review and Synthesis of the Cost of Workplace Regulations*, *in* CROSS-BORDER HUMAN RESOURCES, LABOR, AND EMPLOYMENT ISSUES 433, 453-54, 466 (Table 10) (Andrew P. Morriss & Samuel Estreicher eds., 2005).
[38] *Id.* at 455.
[39] HARVEY S. JAMES, JR., ESTIMATING OSHA COMPLIANCE COSTS 10-13 (Ctr. for the Study of Am. Bus., Policy Study No. 135, 1996).
[40] *Id.* James compared the NAM estimate to cost-benefit estimates produced by OSHA. Since the NAM estimate was approximately 5.5 times greater than the aggregate value of OSHA's cost-benefit analyses, he assumes he was justified using a 5.5 multiplier. *Id.* James did not cite an original source for the numbers that he derived from the NAM estimate. He merely cited a book by Robert S. Smith in which the NAM estimate was featured in a table. *Id.* at 4. There is no indication in James' report that he read or made any independent attempt to evaluate the accuracy of the NAM report.
[41] CRAIN & CRAIN, *supra* endnote 1, at 31.
[42] 2009 OMB Report, *supra* endnote 4, at 17-18.
[43] CRAIN & CRAIN, *supra* endnote 1, at 29 (2009 dollars).
[44] *Id.* at 28.
[45] *Id.* at 29.
[46] *Id.* at 29.

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The Center for Progressive Reform
455 Massachusetts Ave., NW, #150-513
Washington, DC 20001
202.747.0698
info@progressivereform.org

Direct media inquiries to Matthew Freeman or Ben Somberg, 202.747.0698,
mfreeman@progressivereform.org or bsomberg@progressivereform.org.

Visit CPR on the web at www.progressivereform.org.
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Mr. SHIMKUS. Thank you, Ms. Steinzor. Now we will recess the hearing to go cast votes. We have three votes. My colleagues, I would put on the record that 15 minutes after the last vote, we will reconvene. I am not sure how you all figure that out, but that is why you have the staff to help you. But we will come back 15 minutes after the last vote.

[Recess.]

Mr. SHIMKUS. I would like to call the hearing back. And I want to thank my colleagues for coming back expeditiously. That was a pretty quick turnaround, and now we will go into the 5-minute questions. Most members are still making their way back or trying to grab a sandwich. So I am sure that a few more will show up by the time, but I will recognize myself for 5 minutes.

First I would like for Dr. Lutter—you cited a breathtaking statement by EPA in June 10. In fact, I have it right here along with a December statement of EPA analysis. In your statement in which you are quoting the EPA when it put out a proposed rule for combustion byproducts under the Resource Conservation and Recovery Act, the EPA said, and I quote "the regulatory impact analysis for this proposed rule does not include either qualitative or quantitative estimates of potential effects on economic productivity, economic growth, employment, job creation, or international competitiveness." Do you believe that they—comment on this statement. And do you believe they should put that as part of the analysis?

Mr. LUTTER. First of all, I think they should be commended for full disclosure, but more importantly, I think they should have done more analysis on that. And I think what is interesting is exactly with respect to the employment effects, that employment is clearly recognized under the executive order.

As Chris DeMuth has pointed out, employment effects are not necessarily costs, but it is important, especially in this environment, for decision makers to be aware of that and also for the public to be aware of employment effects. And I think a reasonable economic analysis, especially of a regulation of that magnitude, should have taken into account employment effects. I am not a specialist in that rule, but that rule is a rule of several billion dollars.

Mr. SHIMKUS. Thank you. Ms. Harned, in—I don't even know—my first term or my second term, I worked with NFIB closely to get liability relief for small businesses and Superfund obligations as being one of the primary responsible parties, then went after the smaller guys who weren't really involved other than they used municipal landfill, in this case like everyone else. But, of course, two industries used it with hazardous material, and then they got pulled in.

It is under your belief that regulations should have an analysis of economic impact on jobs, wouldn't you agree?

Ms. HARNED. Yes, and the Superfund example, I think, is a good one of that and just also the key that NFIB has seen with our members and regulation generally which is when you talk about unintended consequences, typically you are talking about what happens with the regulation to the members I represent, the small business owners I represent. And I don't think when—I would assume when Superfund was enacted, nobody thought that we were going to have members letting us know that they spent $43,000 to

get them out of litigation that they shouldn't even have been in to begin with.

And so doing that work on the front end can help prevent those unintended consequences and can help make sure that small business owners have the certainty they need going forward so that they can hire.

Mr. SHIMKUS. And we may follow up on a whole separate Superfund hearing because of the cost of litigation versus the cost of recovery. Some of the States do a much better job because they are not tied into the morass of litigation.

Dr. DeMuth, do less expensive environment federal regulations necessarily mean less environmental protection?

Mr. DEMUTH. No, it is easy to posit a case where a stricter rule will result in less pollution, but we have a lot of cases where EPA has found ways to reduce the costs of its regulation that have actually increased the effectiveness.

One example would be the lead phase-down regulations, which, in addition to—which accelerated the withdrawal of lead additives from the gasoline supply. At the time it put those rules in place, it put in place a trading system so that gasoline refiners had more refining capacity, could substitute lead at a faster rate than those with lesser, and make trades among themselves. That has been a pretty well-studied example of how we reduced the cost of compliance and greatly accelerated the removal of lead from the gasoline supply by harnessing market incentives to the EPA rules.

Mr. SHIMKUS. And I think my clock got all messed up, so I don't know how much time, and I want to be respectful of my colleagues. I just want to make sure we put in the record the guidelines for preparing economic analysis by the EPA December 2010, just this statement. I don't want to put the whole—in 9.2.3.3 Impacts on Employment, I quote "regulatory-induced employment impacts are not in general relevant for a benefit-cost analysis. For most situation, employment impacts should not be included in the formal benefit-cost analysis." And I think that is part of the reason why we are having this hearing because many of us will say it should.

And then I would like to now—my time has expired. I would like to recognize my colleague, Mr. Green from Texas.

Mr. GREEN. Thank you, Mr. Chairman. Mr. Lutter, you also said that you had worked at OMB.

Mr. LUTTER. Yes, sir.

Mr. GREEN. It seems like I recall having dealt with over the last many years with agencies and their regulations, that oftentimes their regulations are submitted to OMB for whether it be cost-benefit analysis or comment before it actually takes effect. Is that true?

Mr. LUTTER. That has been the case for many years, yes, sir.

Mr. GREEN. OK, do you know if OMB does any cost-benefit analysis that may be separate from the individual agency?

Mr. LUTTER. Well, historically it doesn't. It offers comment on the agency's economic analyses, their benefit-cost analyses and other related analyses, all required by the Executive Order. Those comments are typically taken seriously by the agency that then revises the economic analysis to reflect OMB comments. But there is not

a separate OMB analysis except to improve the analysis of the agency.

Mr. GREEN. But there is an analysis. There is an oversight of the agency, whether it be EPA or Department of Labor or any other agency, that OMB would actually look at their economic analysis?

Mr. LUTTER. There is oversight. The magnitude of the changes depends on the circumstances.

Mr. GREEN. OK, I appreciate that. Thank you. We have heard from our Republican colleagues that regulations designed to protect the environment and public health may cost too much, and they all have been ignored by the other side of the equation, and costs are not taking action to protect the environment and public health.

Last year, the Office of Management Budget estimated the major federal regulations over the last 10 years costs between $43 and $55 billion. Ms. Steinzor, does that cost tell the whole story?

Ms. STEINZOR. No, thank you for asking that question. It doesn't because it ignores the benefits of regulation, and that is a very important part of this equation. Regulation does help create jobs because the money is being channeled back into the economy. It is not being destroyed. So that is one of the reasons why we are emphasizing competitive energy policies that will put us ahead in global competition because forcing us to stop using polluting materials will be very helpful.

Mr. GREEN. OK, I appreciate that. Mr. Lutter, do you agree that the balanced discussion of the cost of regulations should include a discussion of the benefits too?

Mr. LUTTER. Yes.

Mr. GREEN. OK, OMB estimated that the economic benefits of major regulations over the last 10 years found tremendous benefits up to $616 billion. The benefits oftentimes outweigh to cost 3 to 1 and sometimes as much as 12 to 1, but these hard numbers don't tell, I think, the human side of the story.

And I think Mr. DeMuth talked about the reasonableness of taking lead out of gasoline, and there was a reasonable regulation to be able to trade and to deal with it. I don't think any of us would want to go back to what—because there are a lot of countries in the world who still have lead in their gasoline. But that was probably one that ultimately paid off much better.

And frankly it sounds like from your testimony, it was more workable than some of the ones we may see again through lots of different administrations.

Ms. Steinzor, it may be tempting for some to rely on a clinical cost estimate to form and justify policy. Do you think it makes sense to rely on analytical tools alone, or do we need to remain cognizant of the other principles of our society, like fairness and justice and equity?

Ms. STEINZOR. Yes, sir, and I actually think that Congress did a terrific job on that when it wrote the Clean Air Act and the Resource Conversation and Recovery Act and the Safe Drinking Water Act and the Toxic Substances Control Act. All of those statutes talk about protecting human health and the environment with an adequate margin of safety. Those are the kind of phrases that you used, and I would just—until you change your instructions to the agencies, that is what they are going to be following.

Mr. GREEN. OK, thank you. One last question in my last 20 seconds. Typically agency rules, industries have the right to go to the courthouse and file, whether it be the NFIB or individual affected industries. Don't you think that is also a check, and I guess let me ask Ms. Harned if the NFIB actually ever filed in court representing a certain part of the industry on some regulation you thought was maybe not proper?

Ms. HARNED. Why, we have done that on several occasions with EPA, Army Corps of Engineers, and I think a couple of other agencies. All of these issues that we were raising were, checking the administration for not following Small Business Regulatory Enforcement and Fairness Act. The good thing is we have that as a tool. The bad news is in the case where we—the court agreed with us, the appeals court ultimately agreed with us, our members never saw any relief. They just told the agency, don't do it again, basically. So the rule never got——

Mr. GREEN. Did the agency overrule that—did the court overrule the agency?

Ms. HARNED. They did not provide—they did not tell the agency to go back and fix the problem. They just said don't do it again. So I guess my point is they acknowledged that the agency didn't follow its procedures and that that was in violation of the law, but they did not go back and fix the issue that we were complaining about fundamentally, which was a streamline process that had been taken away from small business owners for permitting.

Mr. SHIMKUS. Gentleman's time has expired. I would just weigh in in that there are litigation costs that have to then be borne by the small business to even go through that process.

Mr. BARTON. Like to yield 5 minutes to my colleague from Kentucky, Mr. Whitfield.

Mr. WHITFIELD. Thank you, Mr. Chairman, and thank you all very much for your testimony today. One of the things about this that bothers me the most is, and some of you touched on in your testimony, and that is that Congress does seem to be ceding more and more authority to regulatory bodies, particularly by writing pieces of legislation that are very vague. And it lends itself to interpretations by the way that people want to interpret it.

An example of that, I think Mr. DeMuth pointed this out in his testimony, was on the Tarp legislation. We thought they were going to be buying toxic assets with some of these public funds. Instead, they were making equity investments in financial firms, and so I am assuming that most of you would agree with me that Congress may be ceding too much authority to regulatory bodies. Would you agree with that, Mr. Lutter?

Mr. LUTTER. I think it is very helpful for regulatory bodies to have fairly precise instructions about what is congressional intent. It facilitates a more technical decision rather than an unfettered policy one, which is best left with elected representatives.

Mr. WHITFIELD. What about your, Ms. Harned?

Ms. HARNED. Yes, I think this is a continuing concern, and I do agree, the health care law is a good example of this as well that we are seeing right now that is impacting our members. And it is really the agencies that are going to——

Mr. WHITFIELD. Might I also say that we didn't have an opportunity to offer one amendment on the floor on that bill. Mr. DeMuth, do you have a——

Mr. DEMUTH. Yes, I agree, sir. If you look across the range of EPA's organic statutes, I would say that those that have been the most contentious and have lead to the greatest problems have been those that given them very, very wide discretion.

And the ones that have been most successful, I think the classic case is the automobile emissions standards. They were basically written on the hill, and they have been very effective. There hasn't been that much litigation.

Mr. WHITFIELD. Right.

Mr. DEMUTH. Everybody respects them. Congress spoke.

Mr. WHITFIELD. Right.

Mr. DEMUTH. And it reflected—I mean they were controversial at the time. The automobile manufacturers didn't like them, but Congress made a considered decision that this was something that was important. And I think that applying that approach much more broadly across RICRA, TASKA, the Superfund Program, and the Clean Water and Air Acts would be very beneficial.

Mr. WHITFIELD. What about your, Ms. Steinzor? Do you agree with my statement?

Ms. STEINZOR. I agree that the laws should be specific. I actually would observe that the environmental laws are pretty specific. I worked for the committee many years ago, and we rewrote Superfund. And I actually have counted the pages. It went from 50 pages to 400 pages. So very, very specific instructions.

Mr. WHITFIELD. Yes. Well, I think most people certainly in my district agree and feel very strongly that they are losing jobs because of regulations. We had a plant close last week, and they specifically—the owner of the plant said I am closing this because of environmental regulations, and 200 jobs were lost right there.

Now, one of the things that I am totally puzzled about is we look at these formulas about benefits versus cost, benefits versus cost. And, Ms. Steinzor, in your testimony, you talk about the benefits, for example, of the Clean Air Act. By 2020, the benefits will be $2 trillion annually. Now, Mr. DeMuth, you and Mr. Ginsberg wrote a law journal article one time at the University of Michigan in which you looked at formulas used to determine benefits, cost-benefit analysis, and you were, I believe, critical of some of these formulas being used. Would you explain briefly why? I mean it is so frustrating when somebody says the benefit is too—I mean you say that a life lost would be $84,000 or whatever. Could you just comment briefly on the formulas used to calculate these benefits?

Mr. DEMUTH. I think that the approaches to calculating benefits have become more specific over time and better, but that they involve enormously large room for subjective judgment.

Professor Steinzor and also Administrative Jackson last week cited a figure of 650,000 lives saved per year from EPA regulations. I regard that as preposterous, intellectually embarrassing. They think it is reasonable. What they do is they take the amount of pollution in America in 1970, and they take GDP in 1970 and they take GDP today, and they multiple it by the pollution in 1970. Now, we probably would be saving that many lives, but you know

what? We wouldn't be able to see each other if pollution had increased that much. And then they take credit for all of the difference.

So you can see a lot of very poor procedures, and this is the administrative EPA talking before an important congressional committee. So you can see that the opportunity for exaggeration is still immense.

Mr. SHIMKUS. The gentleman's time has expired. The ranking member asked if we could allow Ms. Steinzor to, because some of her testimony was questioned, a brief response. So I am going to ask unanimous consent that we allow Ms. Steinzor to respond for a minute. Without objection. Ms. Steinzor.

Ms. STEINZOR. Thank you. The estimates of benefits that are made under things like the Clean Air Act and other statutes are very low because we assume, for example, that if a child is brought to an emergency room with an asthma attack, that that attack is worth $363. I don't even think they let you through the door or give you a plastic ID bracelet for $363. And the cost of a nonfatal heart attack in a person under the age of 24 is $83,000. So unless you actually die of your heart attack, that is all the amount of money we think it is worth to prevent having you exposed to air pollution that can make your heart disease worse or give you—worsen your asthma.

So these benefits—I would disagree with Mr. DeMuth. These benefits are likely to be much, much higher than what EPA says they are.

Mr. SHIMKUS. And thank you, ma'am. Now, I would like to recognize Congressman Joe Pitts from Pittsville for 5 minutes. Pennsylvania.

Mr. PITTS. Thank you, Mr. Chairman. Mr. DeMuth, in your written testimony, you state "on the cost side, these include higher prices, the loss of many good things outside the realms of environmental quality and employment such as the quality and reliability of some products and services."

Could you please give us some examples of quality and reliability losses? And does this affect the ability of businesses to access capital to either comply with more burdensome requirements or to simultaneously comply and hire—expand their businesses?

Mr. DEMUTH. The costs could certainly take the form of those you suggest. I had in mind more kind of direct and obvious things. Sometimes installing pollution control gear simply raises cost. Sometimes it lowers the utility of a product. The hardware that we use to control pollution on cars degrades the performance of the car. We have all gotten used to it, and pollution has gone down enormously. But the performance of cars in terms of miles per gallon is less than it would have been otherwise.

A good example for people in the Washington area, especially those that have experienced power outages in the past couple of weeks, is the reliability of our power system. The Clean Air Act through—I mean people on the staff will—who are down in the weeds will understand this. The Clean Air Act discourages plant modernization in the electric power business because of a curious anomaly in the Act where if you try to—you may have a lot of good reasons for renovating your plant. If you renovate the plant, it will

reduce pollution and make the power supply much more reliable. But you will trip yourself into so much more stringent regulations.

And so power companies tend to defer and delay, and EPA has been trying to fix this for 20 years. It is something that I would recommend to legislators to fix. It hasn't been able to do it, and I think that the effect on keeping our power grid up to date through keeping the generating facilities up to date has been very substantial.

Mr. PITTS. Thank you. Ms. Harned, you say that small businesses spend 36 percent more per employee to comply with environmental regulations than larger businesses, while small businesses provide two-thirds of the new jobs. Does this mean that the Small Business Regulatory Enforcement and Fairness Act simply does not work?

Ms. HARNED. Well, it works when it is followed again the letter and the spirit of it. What we have noticed is when the Act was first introduced, there was more of blatant noncompliance, I think, than you would find today 20 years later, though that still occurs. I think what you see though is ways to do the end run around it, to maybe not certify a rule that otherwise would be certified to have a more in-depth small business analysis.

And our view of the world is, look, once these regs are on the books, they are on the books. And getting them off has proven to be very difficult if not impossible. Why not do your homework on the front end and make sure that you use the tools that are given to you through the law to solicit small business impact and really understand how a law—how a regulation is going to work before implementing it? I know it takes time on the front end, but it is much better to do it that way than have to clean up a mess later like you saw in Superfund and other things like that.

Mr. PITTS. Thank you. Mr. Lutter, finally, do you believe that the creation of new enforcement and compliance jobs related to the issuance of a new rule should be given substantial weight in the net jobs calculation?

Mr. LUTTER. I have concerns about it, net jobs calculations, even though I understand its appeal to many parties. I have tried to articulate a preference for a conventional calculation of benefits being shown to justify cost as a basis for issuing a regulation.

I think, having said that, there is a variety of effects on employment that are also legitimate to consider in that benefit-cost calculation. And my survey indicates that some analyses for some regs are not doing that. I think with respect to employment—or, I am sorry, enforcement jobs themselves, if there is an enforcement job in the regulatory agency and that function is now required to ensure compliance with the rule, then that job is a cost of the rule and ought be considered as such.

Similarly, if there is an enforcement compliance officer in the regulated industry that now is not otherwise hired and that person's sole function is to ensure that they are complying with red tape, that is also a cost.

Mr. PITTS. Thank you.

Mr. SHIMKUS. Gentleman's time has expired. The chair now recognizes the gentlelady from California, Ms. Capps.

Ms. CAPPS. Thank you, Mr. Chairman. I would like to turn to Mr. DeMuth. Thank you for the testimony, each of you. Mr. DeMuth, your testimony suggests that environmental regulations are no longer as cost effective as they once were because the marginal benefits have decreased. Essentially you are suggesting we have kind of already largely solved the problem of pollution. I wish that were true. The Centers for Disease Control has found that chemical exposures in this country are everywhere, and we see the public health impacts of those exposures.

According to the CDC, 90 percent of people tested have BPA in their bodies. Nearly every person tested had toxic fire retardants in their blood, and autism rates are rising at an alarming pace. California, for example, where we have a lot of pollution, autism rates have grown sevenfold in recent years.

Last year, the president's cancer panel released a report focused on the link between environmental exposures and cancer. As they noted in 2009, one-and-a-half million Americans were diagnosed with cancer and 562,000 died from the disease. The panel concluded that reform of the Toxic Substances Control Act is—and they laid quotes around this—"critically needed."

Mr. DeMuth, are these experts and scientists wrong to say that we need to be doing more to address environmental exposures to harmful chemicals?

Mr. DEMUTH. I don't think they are wrong, and I don't think you are wrong. And I am sorry that—I think you may have misinterpreted what I said. I said that I thought that EPA regulations were becoming less cost effective over time. I didn't say there was no pollution left. I didn't say there was nothing left to do.

To take your CDC case, one of the pollutants, toxic pollutants people have been most concerned about has been mercury. The CDC measures of mercury, for example, women 15 to 40, their conventional categories, the measured amounts have been below their reference rates since about 2000 and——

Ms. CAPPS. I don't want to cut you off, but I want to move on because I have other questions. But we will agree——

Mr. DEMUTH. If you look at mercury regulations that EPA is dealing with, the amount of additional mercury being subtracted is extraordinarily small at high costs, and that compares——

Ms. CAPPS. Well, that is not the same with every kind of chemical though, but I——

Mr. DEMUTH. No, that is an example of what I had——

Ms. CAPPS. That is what you were driving at?

Mr. DEMUTH. Yes.

Ms. CAPPS. OK, but you do agree that we need to do more, we need to be doing more to address environmental exposures——

Mr. DEMUTH. Of course.

Mrs. CAPPS [continuing]. To harmful chemicals. Do you agree that we should reform TSKA, for example?

Mr. DEMUTH. I think that would be highly worthwhile.

Ms. CAPPS. OK, so I can see that——

Mr. DEMUTH. We might, you know, I am not—what I would want to do with the Act, you know, I am not sure, and I don't know what the various proposals are.

Ms. CAPPS. Let me turn then to Ms. Steinzor, and I appreciate very much——

Mr. DEMUTH. OK.

Mrs. CAPPS [continuing]. Your answering my question.

Mr. DEMUTH. Thank you.

Ms. CAPPS. Ms. Steinzor, what do you think? Do you think we need to be doing more to address environmental exposures to harmful chemicals?

Ms. STEINZOR. Yes, we need to be doing a lot more, and to use your example of the Toxic Substances Control Act, we have—many people don't realize this, but we don't test chemicals before they are put on the market in this country and——

Ms. CAPPS. You wait and see what happens.

Ms. STEINZOR. We wait and see what happens, and people are basically human guinea pigs when that goes on. And a very big need to revise TSKA in that way.

Ms. CAPPS. Well, some of my colleagues, we hear a lot from them about the failures of the current regulatory system. They suggest that the failure is a result of staffers at the agencies running amok. I don't think that is the case, but instead of pointing fingers at staffers in agencies, there might be some other reasons. What are some of the examples that you would give to why we are not continuing in the path the way we should?

Ms. STEINZOR. The agencies are drastically underfunded. EPA hasn't had a raise in constant dollars in its funding since 1984, and you have passed a series of laws thousands of pages long since that time that give them all sorts of new responsibilities. And they just simply can't keep up with the very important mandates that Congress has given them.

Ms. CAPPS. I appreciate that. You know, Mr. Chairman, I wish we lived in a world where EPA had worked itself out of a job. Someday perhaps we will be able to do that, but cancer patients and parents of autistic children nationwide know that we are not there yet. Scientists nationwide know that to achieve the goal of getting rid of pollution, we are going to need to strengthen the Environmental Protection Agency's authority, not take away essential EPA tools. And with that, I will yield back.

Mr. SHIMKUS. I thank the gentlelady, and I would like to yield to the gentleman, Congressman Bass, for 5 minutes.

Mr. BASS. Thank you very much, Mr. Chairman, and I am most apologetic for coming in late. If there are any questions that have already been addressed, you just say so, and I can take a look at it in the record. I have two questions. Dr. Lutter, you make a good case in your testimony that analysis of regulatory action should indicate that the action will have clear net benefits and no, if you will, unnecessary, underlined, burdens. And you argue that this discipline will promote public understanding and accountability for legislators.

Will the result of that kind of policy be fewer regulations or better regulations in your opinion, fewer new regulations?

Mr. LUTTER. Thank you. I think it is—the result will be an improvement in regulation, which would be measured both by the quantity and the quality. I think of this really as analysis has two functions to perform.

One is it has a function to let the regulators at the regulatory agency and the White House know about the intended effects so that they know when they are regulating what are the best estimates available to them about the consequences of their regulatory decision, surely for public health and safety, also for cost. But especially in this constrained environment, on unemployment. I think that is something that is fair for them to be informed of.

But also with respect to public accountability. I think then the question is is there information being given to Congress and to the public about what the government knows about the consequences of its regulatory decisions and provided that the analysis is carefully done to meet credible standards. And I think the public accountability function can be helped by more credible analysis of regs.

Mr. BASS. All right, Dr. DeMuth, do you think that the Administrative Procedures Act and regulatory reviews are being used in assessing the true needs and appropriate burdens for federal regulations and making appropriate adjustments when required?

Mr. DEMUTH. Congressman, I am afraid I don't have a very helpful answer to that. The Administrative Procedure Act basically requires the agencies to make decisions that comport with the statutes and to follow certain procedures for notice and comment. And then it has a fallback saying that decisions can't be arbitrary or capricious. I think that is basically a pretty good structure.

There is a lot of talk in Washington these days about the quite surprising growth in the use of a technique called interim final rules. A lot of agency rules in the past year, I think because the agencies are swamped in part because Congress gave them a lot of new business to do in some big statutes last year, and they are resulting to interim final where they just announce what they are going to do. There is no notice and comment at all.

That was intended as sort of an emergency procedure where here is our interim final, but now we are going to have a rule-making proceeding. But in a lot of cases, it appears that the interim final rules are really going to be the final final rules. So that, I think, suggests some problems with the APA that might be addressed.

Mr. BASS. Do you think that there was any significant discretion on the part of the agencies in the amount of rule making, understanding that the Congress may have burdened them with new requirements, but could they have taken a different route that might have resulted in a lighter regulatory burden?

Mr. DEMUTH. Yes, sir. That is a pervasive effect, a pervasive phenomenon. There are lots of statutes in the environmental area and many others as well that give the agencies very, very wide discretion in making hard tradeoffs between various goods and the single purpose agency, whether it is the EPA or the FDA or whatever, is always going to favor the goods that you all in Congress instructed it to promote. That is its job, but when you give it a lot of discretion, you can expect the agency to push and sometimes go too far.

Mr. BASS. Thank you, Mr. Chairman.

Mr. SHIMKUS. I thank the gentleman. The chair now recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTA. Thank you, Mr. Chairman. Appreciate the time and thanks to our panelists for being with us today. A lot of questions and just kind of get a little background of where I am coming from. I represent the largest manufacturing district in the State of Ohio, 2½ years ago was the ninth largest in Congress. And I am not going to tell you where we are today and what has happened.

But, you know, no one out there in my district or across Ohio or across this country doesn't want to say that we don't want clean air or clean water. But, you know, if I could start with Mr. DeMuth, going back to page three of your testimony, which I found interesting. Again you are talking about your percentages that are out there and where things have gone. And you were talking about the '70s and the '80s. You said in both cases, the single-purpose agency having achieved say a 90 percent reduction in risk or pollution will then wish to tackle another 8 percent and then on.

And so, I would just like to start with that because I have communities in my district that draw water from—we have a lot of rivers. But EPA standards are getting to such a point that the parent companies of these plants that are located in these communities are saying if your cost goes up anymore, we are going to pull you. And so I found your testimony interesting because that is going on in our area right now.

And I just wandered if you could comment on what you have seen also nationally.

Mr. DEMUTH. What did you say I could comment on?

Mr. LATTA. If you—nationally. If you could comment on that, if you have seen other statistics nationally on that.

Mr. DEMUTH. I wish I could be more helpful. I mean there are a lot of—there is a lot of evidence such as the kind that you cite. When I was working on these matters in the government, I would see a lot of them. I think that there are many EPA rules that are very sensible and well crafted, but the general tendency is to push much too hard.

And it is a—one of the best things that has been written on the subject is by Justice Breyer of the Supreme Court when he was an academic. He wrote a book called "Squaring the Vicious Circle" and he pointed out that single purpose expert agencies, without a budget on compliance costs, will try to go all the way to 100 percent. And as the costs get higher and higher, you get more cases such as those in your district. And they will essentially push until they get somebody pushing back, which is what is happening today.

Mr. LATTA. Thank you. Pardon me. Ms. Harned, Ms. Steinzor said a little bit ago that regulations create jobs. Do you agree with that?

Ms. HARNED. That has not been the experience of our members. They consistently cite regulations as one of the reasons, over the last 26 months, in fact, one of the top three reasons they are not hiring in this economy.

Mr. LATTA. Let me ask you this. Have you heard of any of your other NFIB members out there have situations like this? Again when I am home, I go through maybe two to three to four plants a day, and they are either very small or very large. But I was in one place. It was kind of disconcerting because the gentleman said that, after I heard him talking about some situation here with the

EPA, I said well what was it that the EPA said when you talked to them? He said well, here is the problem. He said he told him that if he had to implement all these regulations, that they are going to put him out of business. And the comment back to him from the regulator was we don't care.

Ms. HARNED. Right, and I feel like that is very much the sense that we get from our members, from the regulators, and also the concern that it is—they are always—the concern that it is a gotcha mentality on enforcement and that you really can't win. If they come in your place of business, there is so much on the books, they are bound to find something. And that really is not what helps public health and safety anyway. You want be having more of a partnership approach.

This worked really well, truthfully, and the last probably 9 years with OSHA where they were really working with small business owners to help them understand their obligations. Compliance assistance was very much a focus at that agency from 2000 to 2008, and as a result, you saw injuries go down. I mean we have proof to show that you can get positive benefits for the public by having more of a cooperative approach with the regulators instead of a gotcha mentality.

Mr. LATTA. Thank you. And, Mr. Lutter, on page 7 of your testimony, I found something also interesting because I tell you with my district, I see it all the time. You cited a study from a Michael Greenstone. He is now with MIT talking about the question of comparing counties that were and were not in attainment under the Clean Air Act. And I know of a situation in my district where contiguous counties to a larger county were all placed on a nonattainment because of the one county being just—artificial line is how they drew it, and everybody fell into it, even though the other counties were not in the situation of being nonattainment.

But I know that you say on page eight then, of your testimony, that these estimates probably overstate the national loss of activity due to nonattainment designations. But I can see that jobs are being moved because of this nonattainment. And just wondered if you could comment again on that.

Mr. LUTTER. Well, this is actually a very interesting study that you cite precisely because it is one of the most careful, comprehensive, authoritative. Its "Journal of Political Economy" reviews of what in many ways is a cornerstone of the Clean Air Act. And though that has been extensively studied, one question is just, retrospectively, if you look at the nonattainment versus the attainment counties, what does it do? And the answer is you get these large adverse effects on employment in the nonattainment counties.

The author, quite appropriately, says, well, there is this risk of a certain amount of shifting of jobs to the attainment counties, which could be interpreted as the result of two things. One is the regulations are less onerous there, and the other one, of course, is the air quality is better so maybe people are moving for that reason as well.

What I think is interesting is the extent to which that analysis may speak to current dilemmas because, as I pointed out, one of the regulations that I looked at is also the Ozone National Ambient

Air Quality Standard, and that has been repeatedly—I know it is not within the jurisdiction of this committee, but it has been repeatedly revised. And it is interesting how, as an illustration, as Chris DeMuth pointed, it points to more and more increasingly stringent options being considered and adopted by the regulatory agency even at the detriment of cost and compliance costs.

Mr. LATTA. Thank you, Mr. Chairman. Yield back.

Mr. SHIMKUS. The gentleman's time has expired. Chair recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman, and I appreciate each of you being here and shedding some light on this. And I can only tell you that I can't find a business or an industry in my district that thinks that they are under-regulated. And so we have to deal with those issues on a regular basis, and trying to find that proper balance is something that I hope we can do in this Congress.

And the question I would have for you, Mr. DeMuth, is are you concerned about proposing the use of performance standards, that you are actually encouraging the Federal Government to dictate the means of production or investment in manufacturing in this country?

Mr. DEMUTH. A performance standard, in my understanding, is a standard that says this is the amount of pollution we are going to permit. And I generally think that that is superior to a technology standard that says this is the way you are going to manufacture tires or this is, you know. So in general, I think that performance standards involve less dictation to businesses about how they will meet pollution obligations and have more flexibility.

There are cases where I think that the advantages of performance standards outweigh this, but in many, many more cases than we permit today, I would think that moving to performance standards would be a step in the right direction.

Mr. HARPER. When you are looking at the environment standards or statutes that are in place, what comes to the top of your list of what most needs to be reformed? If you had to identify a couple that you think are definitely in need.

Mr. DEMUTH. I would say in the jurisdiction of this committee, the RIKRA and Superfund statutes, I think that they have produced some good—RIKRA has definitely produced some good things. Together, I think they have been woefully inefficient. I think probably the worst environmental statute is outside of your jurisdiction, and that is the National Ambient Air Quality Standards portion of the Clean Air Act with all of the State implementation plans.

There is an enormous amount of waste and inefficiency simply in the administration of this program. And if you compare it to automobile pollution standards, what Congress has done directly in the acid rain and ozone standards, where we had Congress itself making a decision, reflecting the consensus of our representatives as to what the standard was going to be and how fast we were going to pursue it, I think those have been much more effective.

And if you go back to 1970, you can see why people were interested in this State implementation plan approach, but it has become a bureaucratic quagmire, and it is not doing anything good for the economy or the environment. It could be doing much more.

Mr. HARPER. And I would love to have your take on how you view the large federal deficits and amount of federal spending, what impact you are seeing that have in your view on businesses in this country.

Mr. DEMUTH. I think that it is a powerful suppressant to business investment because it creates the idea that our national government itself will be at risk, that our borrowing will be downgraded. These are things that a lot of businesspeople take seriously, and it leaves them, like consumers, wondering about our future and making them much less likely to make large capital investments.

Mr. HARPER. Thank you. Yield back.

Mr. SHIMKUS. Gentleman yields back his time. The chair recognizes the gentleman from Louisiana, Mr. Cassidy, for 5 minutes.

Mr. CASSIDY. Ms. Steinzor, am I pronouncing that correctly? I came in late.

Ms. STEINZOR. Yes.

Mr. CASSIDY. You know a heck of a lot more than I do about this, and I am actually going to explore the theoretical, which is not under our jurisdiction. I am going to speak about Clean Air Act, but I am just interested in picking your brain because I kind of agree with these folks. So I learn, if you will, from you whom I may agree or disagree.

Clearly the elephant in the room of our economy is whether or not CO_2 and greenhouse gases are going to be regulated. An incredible concern in my district from Baton Rouge, Louisiana. Lots of people with good jobs and good benefits are employed in these industries.

As I read about the cap-and-trade bill, one thing that they said was almost inevitable, there would be carbon leakage. People would just move their carbon-intensive enterprises to another country, losing the jobs, just shipping the jobs overseas but still emitting the greenhouse gas.

Just accepting for the sake of argument that this is a concern, you know, and then I think I recently saw a big steel plant out of Spain who relocated, just shut down. When I asked why, they said well, heck, they just sold their credits. It was easier for them to move their carbon intensive or energy intensive enterprise elsewhere than to put up with the regulations. And I am thinking as I look at Spain's fiscal mess, wow, maybe this contributed to the fiscal mess.

So in the theoretical, where a regulation or a regulatory environment comes in and says thou shalt, and the easiest way to comply is to say adios and to move down to some place where they speak Spanish or Chinese or you name it, regulation doesn't kill jobs in that regard? You follow what I am saying? I mean it just seems like there is this exodus of jobs related to this sort of regulation.

So again it is not under our jurisdiction, but I figured that could be the basis of, if you will, a theoretical conversation.

Ms. STEINZOR. I would point to perhaps the most devastating event in your State, which would be the Deepwater Horizon spill.

Mr. CASSIDY. Now, if I may, I think you point out correctly that the problems there is not the absence of regulation but a dysfunctional regulatory environment. And I would also point out that on-

going, we have a job moratorium now because they can't, although with resources, they can't pull their regulatory environment together. So a lot of people who depend upon these jobs for their mortgages can't get work.

I am sorry. That just touches a button in me because I know so many families that are connected by this kind of heavy hand of government destroying their ability to work and support their families. I am sorry. Continue.

Ms. STEINZOR. Well, I have a lot of compassion for those people too, and I would suggest to you that the entity that cost them the jobs was British Petroleum in cooperation with Transocean and Halliburton.

Mr. CASSIDY. Now, that is to imply though that the other actors out there, Chevron, Exxon, Mobile, you name it, are doing the same sort of bad behavior as BP. There is no evidence for that. Indeed the National Academy of Engineers said that the problems of the Macando Well were identifiable and fixable and that the moratorium would not appreciably increase safety. So we have thousands of people out of work because one bad actor is—that is being ascribed to everybody else.

Ms. STEINZOR. Well, I think the moratorium was lifted, but I think what my point was, and the oil spill commission certainly concluded this, that there are systemic problems throughout the whole industry, but if we were to just look at British Petroleum in isolation, it had profits of $19 and $17 billion.

Mr. CASSIDY. I am not putting—now, believe me, we can agree. I knew we would have common ground. We can put BP on the dock, and we are going to both be in agreement. My concern isn't about——

Ms. STEINZOR. But that is——

Mr. CASSIDY. Yes, BP as a bad actor, about the fact that good actors are now being penalized because the regulatory environment can't—and people are losing jobs. I mean job—they got rigs moving to the coast of Africa with the jobs that go with it. Because the regulatory will not get off bottom center to allow good actors to again begin to work.

Now, to me that just seems a total kind of tyranny of the regulator.

Ms. STEINZOR. Well, again we have 55 inspectors in the Gulf of Mexico to inspect 3,500 oil rigs and production platforms. So I am not going to lay a bet that there won't be another spill, but if we look at countries that don't have any regulation, they do pay an incredible price. I mean there is an article in the British medical journal "The Lancet"——

Mr. CASSIDY. I am not at all—excuse me. Just because I have limited time. I am not saying don't regulate. I am just saying the tyranny of the regulator right now who always shifts it so that you can never quite get your permit. And the people who depend upon those jobs don't have their jobs with the salary and the benefits.

Ms. STEINZOR. I guess what I am trying to say is that I don't think those 55 inspectors are feeling particularly tyrannical and that the big economic cost to Louisiana was unregulated industry that really was careless, negligent, was making outrageous profits

and squandered the economic and natural health of the whole Louisiana coast.

Mr. CASSIDY. If I may say, I would say it was not—it was a single actor, BP. If I may finish. It was a single actor called BP, and again as according to the president's own handpicked council of engineers, this was not a—the problems were fixable and definite. And lastly, it is not the 55 frankly. It is Brownwich and Salazar. So at some point, they become the translator of someone who decides to otherwise squash an industry. Thank you.

Mr. SHIMKUS. The gentleman's time has expired. We want to thank the first panel for their testimony. You may get questions in writing from members as a follow-up. We would ask if you do, to respond, and we do appreciate your testimony. Since I had to start this thing so quick so we could get done, the way this hearing was set up was to talk to the economists big picture. Second panel deals with case studies from individuals. So that is how this was set up, and we appreciate you coming.

And now we will ask for the second panel to be seated. We would like to thank the second panel for joining us. Because I have time, I will introduce you all at one time, and then we will start from my right to left for the 5-minute testimonies.

Joining us on the second panel will be Leonard F. Hopkins, fuel procurement and reliance manager from Southern Illinois Power Cooperative, serves portions of my congressional district, which I said in my opening statement. And we are happy to have you here.

Mr. Joseph Baird is a partner in Baird Hanson Limited Liability Partnership. Ms. Marcie Kinter, vice-president, Government and Business Information, Specialty Graphic Imaging Association. We have—not in order—Wendy K. Neu, executive vice-president, Hugo Neu Corporation, and chairperson of We Recycle. And last but not least the Honorable Vince Ryan, Harris County attorney.

Welcome, and we will start with Mr. Hopkins with your 5-minute testimony. Again your entire testimony will be submitted for the record. Executive summary within the 5 minutes as close as possible. And welcome.

STATEMENT OF LEONARD F. HOPKINS, FUEL PROCUREMENT AND RELIANCE MANAGER, SOUTHERN ILLINOIS POWER COOPERATIVE; JOSEPH BAIRD, PARTNER, BAIRD HANSON LLP; MARCIA Y. KINTER, VICE PRESIDENT, GOVERNMENT & BUSINESS INFORMATION, SPECIALTY GRAPHIC IMAGING ASSOCIATION; WENDY NEU, EXECUTIVE VICE PRESIDENT, HUGO NEU CORPORATION; AND VINCE RYAN, COUNTY ATTORNEY, HARRIS COUNTY, TEXAS

STATEMENT OF LEONARD F. HOPKINS

Mr. HOPKINS. Thank you very much. Good afternoon. My name is Leonard Hopkins, as stated, and I serve as the fuel and compliance manager for Southern Illinois Power Cooperative. I am honored to have the privilege to appear before you today.

Southern Illinois Power is generation and transmission cooperative serving approximately 250,000 people and businesses located in the southern-most counties of Illinois. We are a not-for-profit corporation and are owned directly by our members. SIPC operates

one power generation station south of Marion, Illinois which utilizes two coal-fired boilers to generate power for its members.

When each of these boilers was built, they were equipped with state-of-the-art pollution control equipment that would allow them to burn Illinois bituminous coal and meet all environmental regulations. We continue to comply with such regulations today.

The coal combustion residue regulation being proposed by EPA poses a serious threat, excuse me, to the economic survival of the cooperative for which I work. My comments will focus on the effects EPA's decision could have on Southern Illinois Power. I believe these comments also reflect the sentiments of many of our nation's electric cooperatives. Southern Illinois Power Cooperative has been utilizing its coal combustion byproducts in beneficial ways for over 20 years. Roof shingle sand, abrasive products, mine reclamation, cement, and fertilizer blends are all example of ways our coal combustion residues are recycled into beneficial products for society.

Southern Illinois Power is concerned that placing the label of hazardous on coal combustion residue will place the same stigma on all coal combustion byproducts and effectively end the possibility of recycling such materials. In the litigious society of today, manufacturers and end users will flee from any recycled product that is remotely related to hazardous waste. Such an action would remove these recycled products from the marketplace, and the recovery of replacement materials would require increased emissions of carbon dioxide and other pollutants.

Further, small virtually unavoidable spills of ash at power plants could be considered illegal disposal of hazardous material and could cause the plant to be in a constant state of noncompliance. Shipments to hazardous waste landfills in the country could increase tenfold as such hazardous waste landfills might be completely filled in only 2 years. The barriers to compliance associated with such an action could conceivably drive coal-fired power generators like Southern Illinois Power out of business.

Southern Illinois Power Cooperative is a small generation and transmission system and defined as a small business by the U.S. Small Business Administration. By regulation, cooperatives are not allowed to maintain large capital reserves.

When the cost of running our business suddenly increases like it would under the subtitle C option, we must go directly to our lenders. There is no cash cushion to mitigate these increases, and the cost of new loans would be shared by each co-op member owner in the form of higher electricity rates. SIPC conservatively estimates the subtitle C option would cost its members a minimum of an additional $11 million per year, which is about 25 percent of our current annual fuel budget, and we serve an area of the State that has up to 15 percent unemployment.

In cases where businesses like SIPC are affected, EPA is obliged to pursue the least costly approach in order to mitigate impacts on facilities that can least afford them. Moreover, Congress made clear in enacting the Bevel Amendment, under which this decision is being made, that EPA should avoid the subtitle C option if at all possible.

Under the subtitle D option, EPA can promulgate federal regulations specifically designed for CCR disposal units. These regula-

tions would be directly enforceable by the States and the public under RIKRA citizen supervision, and violators would be subject to significant civil penalties. Excuse me. EPA would also retain its imminent and substantial endangerment authority to take action against any CCR units that pose risk to human health or the environment.

The D prime option would enable EPA to establish an environmentally protected program without crippling CCR beneficial use and imposing unnecessary costs on power plants, threatening jobs and increasing electricity costs.

In conclusion, Southern Illinois Power agrees with many others who are already on record as opposing the subtitle C approach. This list includes a bipartisan group of 165 House members and 45 U.S. senators in the 111th Congress, virtually all the States, other federal agencies, municipal and local governments, CCR marketers and beneficial users, unions, and many other third parties who have maintained that regulating CCRs under RIKRA's hazardous waste program is simply regulatory overkill and would cripple the CCR beneficial use industry.

We respectfully suggest there is no reason to pursue this approach when the subtitle D prime option offers the same degree of protection without the attendant risks and burdens of subtitle C.

Thank you again for the opportunity to express the views of a small cooperative regarding a proposed regulation that will have lasting effects on the lives and livelihoods of our members. Thank you.

[The prepared statement of Mr. Hopkins follows:]

One-Page Summary of the Testimony of Leonard Hopkins

Before the House Energy & Commerce Committee

Subcommittee on Environment and the Economy

"Environmental Regulations, the Economy, and Jobs" - – February 15, 2011

1) Southern Illinois Power Cooperative (SIPC) is a not-for-profit, small business that serves 250,000 people in the 22 southernmost counties of Illinois; an area of high unemployment.

2) SIPC utilizes two environmentally-controlled boilers that are fired with Illinois coal to provide electricity to its member/customers. These boilers produce coal combustion residue that is generically referred to as "coal ash".

3) SIPC has been recycling and reusing much of its coal ash for over twenty years. It continues to seek markets for these byproducts today.

4) One option (Subtitle C) of the Coal Combustion Residue (CCR) regulation being proposed by EPA would threaten the ability of Southern IL Power Cooperative to recycle its coal ash and cost the Coop. millions of dollars per year to handle this material. Such a financial strain could conceivably put the power plant out of business.

5) Under Subtitle D Prime of the proposed EPA regulation, EPA and states would have sufficient regulatory oversight to prevent hazard to the environment and public. SIPC (and many others across the country) urge EPA to eliminate the hazardous waste approach to any Coal Combustion Residue regulation.

6) An Appendix, which contains supporting documentation to this testimony, is included.

Testimony Before the House Energy & Commerce Committee

Subcommittee on Environment and the Economy

"Environmental Regulations, the Economy, and Jobs" - – February 15, 2011

Good afternoon. My name is Leonard Hopkins, and I serve as the Fuel & Compliance Manager for Southern Illinois Power Cooperative. I am honored to have the privilege to appear before you today. Southern Illinois Power is a Generation and Transmission Cooperative serving approximately two hundred fifty thousand (250,000) people and businesses located in the southernmost twenty-two counties of Illinois. We are a not-for-profit corporation and are owned directly by our members. SIPC operates one power generation station south of Marion, Illinois which utilizes two coal-fired boilers to generate power for its members. When each of these boilers was built, they were equipped with the state-of-the-art pollution control equipment that would allow them to burn Illinois bituminous coal and meet all environmental regulations. We continue to comply with such regulations today.

The proposed coal combustion residue regulation being proposed by EPA poses a serious threat to the economic survival of the cooperative for which I work. While my comments will focus on the effects EPA's decision could have on Southern Illinois Power, I believe these comments also reflect the sentiments of many of our nation's electric cooperatives.

Southern Illinois Power Cooperative has been utilizing its coal combustion byproducts in beneficial ways for over twenty years. Roof shingle sand, abrasive products, mine reclamation, cement, and fertilizer blends are all examples of ways our coal combustion residues are recycled into beneficial products for society. Southern Illinois Power is concerned that placing the label of "hazardous" on coal combustion residue will place the same stigma on **ALL** coal combustion byproducts, and effectively end the possibility of recycling such materials. In the litigious society of today, manufacturers and end users will flee from any recycled

product that is remotely related to a hazardous waste. Such an action would remove these recycled products from the market place, and the recovery of replacement materials would require increased emissions of carbon dioxide and other pollutants. Further, small, virtually unavoidable spills of ash at power plants could be considered illegal disposal of a hazardous material and could cause the plant to be in a constant state of non-compliance. Shipments to hazardous waste landfills in the country could increase tenfold, and such hazardous waste landfills might be completely filled in only two years. The barriers to compliance associated with such an action could conceivably drive coal-fired power generators like Southern Illinois Power out of business.

Southern Illinois Power Cooperative is a small Generation & Transmission System, and defined as a "Small Business" by the U.S. Small Business Administration. By regulation, cooperatives are not allowed to maintain large capital reserves. When the cost of running our business suddenly increases, like it would under a Subtitle C option, we must go directly to our lenders. There is no cash cushion to mitigate these increases, and the cost of the new loans would be shared by each co-op member-owner in the form of higher electricity rates. SIPC conservatively estimates the Subtitle C option would cost its members a minimum of an additional eleven million dollars per year (about 25% of our current annual fuel budget), and we serve an area of the state that has up to 15% unemployment! In cases where small businesses like SIPC are affected, EPA is ***obliged to pursue the least costly approach*** in order to mitigate impacts on facilities that can least afford them. Moreover, Congress made clear in enacting the Bevill Amendment, under which this decision is being made, that EPA should avoid the Subtitle C option if at all possible.

Under the Subtitle D option, EPA can promulgate federal regulations specifically designed for CCR disposal units. These regulations would be directly enforceable by the states (and the public, under RCRA's citizen suit provision), and violators would be subject to significant civil penalties. EPA would also retain its imminent and substantial endangerment authority to take action against any CCR units that posed a risk to human health or the

environment. The D Prime option would enable EPA to establish an environmentally protective program without crippling CCR beneficial use and imposing unnecessary costs on power plants, threatening jobs and increasing electricity costs.

In conclusion, Southern Illinois Power Cooperative agrees with many others who are already on record as opposing the Subtitle C approach; this list includes a bi-partisan group of 165 House members and 45 U.S. Senators in the 111th Congress , virtually all the states, other federal agencies, municipal and local governments, CCR marketers and beneficial users, unions, and many other third-parties who have maintained that regulating CCRs under RCRA's hazardous waste program is simply regulatory overkill and would cripple the CCR beneficial use industry. We respectfully suggest there is no reason to pursue this approach when the Subtitle D prime option offers the same degree of protection without the attendant risks and burdens of Subtitle C.

Thank you, again, for this opportunity to express the views of a small Cooperative regarding a proposed regulation that will have lasting effects on the lives and livelihoods of its members.

APPENDIX

Supporting Documentation for Testimony of Leonard Hopkins before the Subcommittee on Environment and the Economy; "Environmental Regulations, the Economy, and Jobs" (2/15/2011)

COMMENTS TO THE CCR CO-PROPOSAL 11-19-2010

ATTN: Docket No. EPA-HQ-RCRA-2009-0640

Southern Illinois Power Cooperative ("SIPC") submits these comments in response to the United States Environmental Protection Agency's ("EPA" or "Agency") proposed rule entitled "Hazardous Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals ["CCRs"] From Electric Utilities." 75 Fed. Reg. 35128 (June 21, 2010) ("CCR Proposal" or "Proposal"). SIPC is a non-profit small business serving approximately 250,000 people and businesses located in the southern tip of Illinois. SIPC operates the Marion Power Station, which utilizes two coal-fired boilers to generate power.

SIPC agrees with many others who are already on record as opposing the Subtitle C approach -- including a bi-partisan group of 165 members of Congress, 45 U.S. Senators, virtually all the states, other federal agencies, municipal and local governments, CCR marketers and beneficial users, unions, and many other third-parties who have maintained that regulating CCRs under Resource Conservation and Recovery Act's ("RCRA") hazardous waste program is simply regulatory overkill and, in fact, would be counter-productive, as it would cripple the CCR beneficial use industry. There is no logical reason to pursue a Subtitle C approach when the Subtitle D prime option offers the same degree of protection without the attendant risks and burdens of Subtitle C.

Through this proposal, EPA seeks to establish, for the first time, federal rules designed specifically for the management of CCRs generated by electric utilities that use coal for the

purpose of producing electricity. The two primary regulatory options on which EPA seeks comment are: (1) regulation of CCRs destined for disposal as listed "special wastes" under the hazardous waste regulations of Subtitle C of RCRA, or (2) regulation of CCRs destined for disposal as non-hazardous wastes under Subtitle D of RCRA. Under both the Subtitle C and Subtitle D options, CCRs that are beneficially used remain excluded from regulation (referred to as coal combustion products ("CCPs")).

As acknowledged by EPA, the Bevill Amendment establishes the statutory process by which Congress directed EPA to make a determination regarding whether CCRs warrant regulation under RCRA. Following years of study, EPA completed the statutorily-mandated Bevill determination process for CCRs on May 22, 2000, concluding, based on two earlier Reports to Congress, that CCRs do not warrant regulation under RCRA Subtitle C hazardous waste regulations. *See* 65 Fed. Reg. 32214 (May 22, 2000). The proposal's Subtitle C option would constitute a non-permissible reversal of the final 2000 Regulatory Determination. Accordingly, EPA should pursue regulation under Subtitle D.

While SIPC has significant concerns with the Subtitle D option, as discussed below, there is no question that RCRA's Subtitle D framework provides the appropriate legal structure under which EPA **may** develop federal regulations for CCRs. Under the proposed Subtitle D option, EPA would not reverse its final 2000 Regulatory Determination for CCRs. Under this approach, CCRs would remain classified as non-hazardous wastes, and EPA would develop self-implementing national regulations for CCR disposal facilities enforceable by the states and by citizens under RCRA's citizen suit provision (See 75 Fed. Reg. at 35133-34). The Agency also would retain its imminent and substantial endangerment authority to take action against any CCR disposal facilities that posed a risk to human health and the environment (*Id.* at 35211).

Furthermore, the Subtitle D Prime option would enable EPA to establish an environmentally protective program without crippling CCR beneficial use and imposing unnecessary costs, threatening jobs and increasing electricity costs.

Because the EPA proposal is a "co-proposal", Southern Illinois Power Cooperative's comments are broken down into two parts: Subtitle C and Subtitle D.

SUBTITLE C

SIPC opposes regulating coal ash under the hazardous waste requirements set forth in Subtitle C of RCRA. Under the Subtitle C proposal, EPA would list CCRs from electric utilities and independent power producers intended for disposal in landfills and surface impoundments as a "special waste," subjecting them for the first time to the Subtitle C hazardous waste regulations at 40 C.F.R. parts 260 through 268, as well as the permitting requirements in 40 C.F.R. parts 271 and 272.

A major flaw in the Subtitle C option is that it is premised on the notion that EPA is at liberty to reverse its final Regulatory Determination that CCRs do not warrant regulation under Subtitle C of RCRA. Because the statute does not authorize EPA to reverse if final Regulatory Determination, EPA may not adopt the Subtitle C hazardous waste option for CCRs. Even assuming for purposes of argument that the statute did authorize such reversal, EPA's proposal to regulate CCRs under Subtitle C does not comport with the Bevill Amendment's statutorily-prescribed decision-making process and would be arbitrary and capricious. For example, the Subtitle C option would cripple CCR beneficial use and impose unwarranted and excessive costs on the utility industry.

While it is impossible for anyone to prove the effects of a regulation that has not yet been promulgated, SIPC believes that adverse impacts on CCR beneficial use has occurred as a result of the mere threat of Subtitle C regulation. SIPC has been utilizing its coal combustion products

in beneficial ways for over twenty years. Roof shingle sand, abrasive products, mine reclamation, cement, and fertilizer blends are examples of ways SIPC's coal combustion products are recycled into beneficial products for society. SIPC is concerned that placing the label of "hazardous" on coal combustion residue will place a stigma on ALL coal combustion products, and effectively end the possibility of recycling such materials. In the litigious society of today, manufacturers and end users will flee from any recycled product that is remotely related to a hazardous waste. Regulation under Subtitle C would remove these recycled products from the market place, and the recovery of replacement materials would require increased emissions of carbon dioxide and other pollutants, while unnecessarily depleting our natural resources.

In addition, Subtitle C will impose unwarranted costs on electric generation, which will ultimately be passed on to the consumer. SIPC is a small Generation & Transmission System, and defined as a "Small Business" by the U.S. Small Business Administration. By regulation, cooperatives are not allowed to maintain large capital reserves. When the cost of running our business suddenly increases, like it would under a Subtitle C option, we must go directly to our lenders. There is no cushion to mitigate these cost increases, and the cost of the new loans would be shared by each co-op member-owner in the form of higher electricity rates. SIPC estimates that a Subtitle C option would cost its members an additional eleven million dollars per year (about 25% of our annual fuel budget), and we serve an area of the state that has up to 15% unemployment! In cases where small businesses like SIPC are affected, EPA is ***obliged to pursue the least costly approach*** in order to mitigate impacts on facilities that can least afford them. SIPC would like to emphasize again that Congress made clear in enacting the Bevill

Amendment, under which this decision is being made, that EPA should avoid the Subtitle C option if at all possible.

EPA admits that the Subtitle C compliance costs for utilities would be at least three times higher than for the "identical" controls under the Subtitle D option ($1,474 million under the Subtitle C option versus $585 million under the Subtitle D option). Thus, such an approach is unsupportable. As acknowledged by EPA, the Subtitle D option will provide "identical" controls at a fraction of the cost.

In addition to the legal hurdles posed by CCR regulation under Subtitle C, the Subtitle C option would impose serious and often intractable compliance problems for SIPC given the physical nature of CCRs and the volume of CCRs generated. For example, due to the sheer volume and the physical composition of CCRs, *de minimis* volumes of CCRs are inevitably released during normal power generation and subsequent handling operations (*e.g.*, fugitive and *de minimis* emissions from ash conveyor equipment or loading equipment and during the transport/handling of CCBs for beneficial use). Despite SIPC's state of the art CCR management practices, *de minimis* releases are virtually impossible to prevent. Nonetheless, if CCRs are regulated under Subtitle C, these *de minimis* releases would likely constitute improper hazardous waste disposal subjecting SIPC to potential liability. This is because RCRA Subtitle C contains no *de minimis* exemption for listed wastes. *See* 40 C.F.R. § 261.3(c)(2). Given the fact that there is very little, if any, risk associated with such *de minimis* releases (as demonstrated by the lack of "damages cases") such an approach creates an unjustifiable burden on SIPC and is wasteful of agency and judicial resources.

The determination to regulate the material under Subtitle C does not appear to be tied to the chemical makeup of the material (as demonstrated by the information in the public domain,

CCRs generally do not exhibit hazardous characteristics under current RCRA regulations), but to how it is managed. EPA has assessed various "damages cases" and determined that certain disposal practices pose a potential threat to human health and the environment – not that the material itself is hazardous. In response to these "damages cases," EPA proposes to subject CCRs destine for disposal to the entire "cradle to grave" regulatory structure without fully understanding whether all of the Subtitle C requirements can or should be implemented at electric utilities and without complying with Section 3004(x) of RCRA. While EPA has determined that implementation of some of the existing Subtitle C requirements would present practical difficulties and as such EPA has proposed to revise some, EPA has failed to assess whether all of the Subtitle C requirements would present practical difficulties or whether they are even necessary to accomplish its objective.

In particular, EPA says that it will not entertain comment regarding aspects of Subtitle C that it has not proposed to modify and that it will not respond to unsolicited comments regarding those sections. 75 Fed Reg. 35173 (June 21, 2010). SIPC believes that it is inappropriate for EPA to apply the following unmodified provisions of Subtitle C to sources subject to Subtitle C only because of CCRs being listed as a "special waste." SIPC believes that EPA failed to consider the operations at these sources and the complete management cycle of CCRs and thus failed to realize that additional Subtitle C requirements need modification to address situations where implementation of these requirements would present practical difficulties.

As discussed below, the operations at these sources are very different then those at a typical RCRA source. Thus, these sources, and in particular SIPC, did not have a realistic, fair, or reasonable opportunity to comment on these provisions when they were first proposed. For EPA to now disregard comments on those provisions as they relate to the sources subject to this

rulemaking violates the requirements of notice and comment as provided by the Administrative and Procedures Act (5 U.S.C. § 553) and is arbitrary and capricious.

While SIPC strongly opposes regulation of coal ash under Subtitle C, SIPC issues the following comments to illustrate the insurmountable compliance and disposal obstacles Subtitle C regulation poses.

Unmodified Conditions of Subtitle C

Delisting (40 C.F.R. §§ 260.20 and 260.22; and 40 U.S.C. 3001(f))

RCRA provides for a process to remove or "delist" a waste from the lists in Part 261. This delisting process often takes several years and costs hundreds of thousands of dollars. Since each CCR stream presents different risks and CCRs are a high volume low toxicity waste, they warrant a streamlined delisting process. Thus, EPA should craft a streamlined approach to delist CCRs, including developing a delisting petition standard template, limiting analytical parameters required to be assessed to only those relied on by EPA as the basis for originally listing CCRs (based on extensive testing and existing information about CCRs), and setting a limit on the amount of time EPA has to review and approve/deny delisting petitions. Furthermore, a streamlined delisting approach is necessary to alleviate the disposal capacity and power supply shortages expected to occur if a Subtitle C proposal is adopted.

The Empty Container Rule (40 C.F.R. § 261.7)

While "special waste" does not appear to be subject to regulation under part 261, the proposed Subtitle C requirements would regulate containers containing CCRs. Of concern is that EPA has not provided a mechanism for determining when these containers are "empty." With the addition of Section 261.7 to RCRA regulations, EPA intended to clarify that non-empty containers are subject to control because non-empty containers hold residues that are considered hazardous wastes for regulatory purposes. 45 F.R. 78525 (Nov. 25, 1980). To address this

concern, EPA developed a rule to determine when certain containers are "empty." However, under the current proposal, there does not appear to be a mechanism for determining when containers that contain "special waste" are "empty." Therefore, SIPC suggests that EPA modify Section 261.7 to include "special waste" remaining in containers. Given the low toxicity associated with CCRs as compared to "hazardous wastes," there is no reason to believe that such modification would not be protective of human health and the environment.

Manifesting (Subpart B, Sections 264.71, 264.72, 264.73 (b)(2) and (b)(8), 265.71, 265.72 and 265.73 (b)(2) and (b)(8))

The proposal will newly regulate the management, including transportation, of massive volumes of well-characterized low hazard waste that is generated by a limited number of facilities that ship such waste to an even more limited number of disposal sites. The number of individual generators, treatment facilities and disposers is very small in comparison to the industrial universe already regulated under RCRA. Yet, given the volume of CCRs generated each year, the amount of paperwork and administrative costs that will be produced and incurred is expected to have the potential to overrun limited state and federal resources. The primary purpose of these requirements is to ensure that shipments can be tracked, are properly transported, and hazards are properly communicated. 70 FR 10775, 10791 (Mar. 4, 2005). The manifest serves to assist regulated entities and regulatory authorities in tracking hazardous waste so that regulated quantities of hazardous waste can be tracked from the original generating site to the site of ultimate disposition. 66 F.R. 28239, 28262 (May 21, 2001). To avoid a potential collapse of the existing system, EPA should only require the generating facility to submit an annual report providing the amount of CCRs generated and disposed on-site and off-site along with the names of the off-site facilities that accepted the CCRs. Such an approach would satisfy

the intent behind the requirements to manifest CCRs, while limiting the burden on the regulated community and the permitting authority.

Short Term Storage (40 C.F.R. § 262.34)

While Section 262.34 alleviates a hazardous waste generator from having to obtain a permit or comply with interim status requirements if hazardous waste is stored less than 90 days in a certain manner, the containers, containment buildings, tanks, and staging areas (i.e., piles) that are utilized to store CCRs cannot often meet the requirements of 262.34, even though they are protective of the environment as demonstrated by the lack of evidence identifying these activities as a threat to human health or the environment. Since there is very little, if any, risk associated with the temporary storage and staging of CCRs in structures and areas that are specifically designed and used for short-term (less than 90-day) storage and staging (as demonstrated by the lack of "damages cases") requiring these structures and areas to comply with Section 262.34 creates an unjustifiable burden on SIPC. For example, due to the sheer volume and the physical composition of CCRs, CCRs are inevitably released throughout the facility during normal power generation (*e.g.*, fugitive and *de minimis* emissions from ash conveyor equipment or loading equipment and during the transport/handling of CCBs for beneficial use). These *de minimis* amounts of CCRs are often comingled with other dusts and materials such that routine janitorial operations regularly encounter CCRs and place them into various waste receptacles. Special exemptions and/or limited regulatory requirements should be developed for containers, tanks, silos, containment buildings and staging areas that are specifically designed and used for short-term (less than 90-day) storage or temporary staging of

CCRs prior to off-site shipment or removal to an on-site disposal area. Such short-term management options are essential to power plant operations and routine maintenance activities.

Sampling and Indicator Parameters (40 C.F.R. §§ 264.98 and 265.92)

Because there is extensive information available regarding the chemical makeup of CCRs, there is no reason to require sampling for parameters beyond those set forth in the Subtitle D proposal. The analyte list used for detection and assessment monitoring in the Subtitle D proposal should also be used in the Subtitle C proposal. There is no reason to require additional analytes under a Subtitle C proposal, especially when both proposals require "identical" controls. The indicator parameters in Section 265.92(b) are not appropriate for CCRs. Furthermore, as EPA is well aware, the primary constituents of concern for CCRs are boron, molybdenum, arsenic, cadmium, selenium, strontium, magnesium, and manganese. To suggest that the presence of total organic carbon and total organic halogens are indicative of CCR contamination is to completely ignore the extensive body of information available regarding the chemical makeup of CCRs. As EPA is aware, these indicator parameters have been the cause of many "false positives". Almost every interim status facility initially underwent assessment monitoring, because these parameters are not truly indicative of groundwater contamination. The indicator parameters for CCRs should be a subset of the assessment analyte list set forth in the Subtitle D proposal. For example, much has been written about the use of boron as indicator of CCR contamination.

Containers and Tanks (40 C.F.R. §§ 264 Subparts I and J and 265 Subparts I and J)

Because there is no evidence that CCRs contained in containers or tanks pose a risk to human health or the environment, the requirements in 264 Subparts I and J and 265 Subparts I and J should not apply. EPA has referenced the "damages cases" as support for its position that CCRs should be regulated under Subtitle C. However, none of the "damages cases" identify risks associated with the storage of CCRs in containers or tanks. Many tanks are large permanent structures (e.g., overhead storage silos, containment rooms below electrostatic precipitators, attachments to hoppers) that are integral to ongoing operations and non-moveable. Many containers consist of 55-gallon drums or barrels, hoppers, and roll-off boxes, which are integral to ongoing operations and maintenance activities. Most, if not all, containers and tanks are located inside buildings or other structures, where they are protected from weather and underlain by impervious surfaces. The tanks and containers are subject to oversight and frequent inspection by plant personnel. These tanks and containers are not designed to hold a large amount of material nor are they used for long-term storage. Thus, they should not be subject to regulation. At a minimum the requirement should not apply to containers and tanks holding dry CCRs or containers and tanks inside buildings or located above impervious surfaces. As evidenced by the "damages cases", to the extent CCRs present a risk to heath or the environment, wet CCRs stored in impoundments or landfills present such risk, not CCRs stored in containers or tanks. Furthermore, EPA did not consider the costs associated with complying with these requirements in the RIA.

Waste Piles (40 C.F.R. §§ 264 Subpart L and 265 Subpart L)

Since there is very little, if any, risk associated with the temporary storage and staging of CCRs in piles (as demonstrated by the lack of "damages cases"), requiring facilities to comply with Subpart L of Parts 264 and 265 creates an unjustifiable burden on SIPC. Waste piles are

routine used during CCR management. Special exemptions and/or limited regulatory requirements should be developed for waste piles that are specifically designed and used for short-term (less than 90-day) storage or temporary staging of CCRs prior to off-site shipment or removal to an on-site disposal area. Such short-term management options are essential to power plant operations and routine maintenance activities. All of the risks identified by EPA arise from CCR management in impoundments and landfills, with the primary driver being the generation of leachate that threatens nearby water bodies. There is no evidence to suggest that temporary waste piles pose a risk to human health or the environment. The standards should reflect the known risks and companies should be allowed to temporarily store CCRs in piles.

Point of Generation

As designed and operated, coal-fired power plants include numerous air pollution control devices, ash collection/receiving hoppers, containment rooms, sumps, tanks/silos, portable roll-off boxes, loading areas, and stormwater conveyances, all of which are connected to or are adjacent to the location of the coal-fired boiler that produce the coal ash. Such units are typically within the footprint of the main physical plant, in areas protected by roofs and building structures, underlain by impervious concrete surfaces and often not easily or readily accessible. To promote safe and efficient operations and consistent with industry's commitment to worker protection, these structures are routinely maintained and spills are cleaned promptly. While these structures contain materials that may be considered CCRs, the structures are dissimilar from the typical container and tank regulated under RCRA and the land-based storage and disposal units identified in the "damages cases." SIPC is concerned that the Subtitle C proposal could be interpreted to subject these units and operations to the various Subtitle C requirements. Such regulation would offer little human health or environmental protection, yet place significant

administrative and operating burdens upon the regulated facilities. To ensure that these units and operations are not subject to the Subtitle C requirements, coal ash should not be regulated as a CCR until it reaches the point of disposal. For example, the material should not be subject to regulation until it reaches the point at which the material exits the end of a pipe or closed conveyor for placement into or onto a land-based disposal unit.

Modified Sections of Subtitle C

Exclusions – CCPs (40 C.F.R. § 261.4)

EPA has stated that the Subtitle C proposal is intended to cover fly ash, boiler slag, bottom ash and FGD materials destine for disposal. Excluded from regulation are CCRs that are beneficially used. Since CCPs are excluded from regulation and remain subject to the Bevill Amendment, EPA should clarify that the various CCP generation, storage, treatment, and management structures, areas and equipment are also excluded from regulation. For example, CCPs are often temporarily stored in containers, tanks, piles, and impoundments prior to being beneficially used because market conditions often require facilities to accumulate large amounts of CCPs prior to being beneficially used. Since CCPs are not listed as a special waste, these management practices should not be subject to regulation. Nonetheless, SIPC is concerned that the proposal could be inappropriately interpreted by some and as such SIPC requests that EPA clarify that CCP management practices, including handling and storage, are not subject to the Subtitle C proposal.

Exclusions – Non-CCR Surface Impoundments (40 C.F.R. § 261.4)

SIPC is concerned that the proposal could be inappropriately interpreted by some as regulating impoundments that are not designed to hold an accumulation of CCRs as CCR surface impoundments. Many coal-fired power plants rely on a series of surface impoundments to settle solids, clarify and cool wastewater prior to recycle or discharge, manage intake water, and

manage stormwater. These impoundments are not designed to hold an accumulation of CCRs, they are designed as waste water treatment facilities or water accumulation facilities (e.g., intake-water basins). However, it is not uncommon for *de minimis* amounts of CCRs to enter these impoundments either through surface deposition, surface runoff or from discharge of effluent from upstream settling impoundments. If these impoundments were subject to the proposal, then many of them would be required to close. These impoundments are integral to and necessary for continued operation of most generating facilities, and the operation of them plays a critical role in maintaining compliance with various Clean Water Act requirements. Requiring closure of these impoundments has the unintended consequence of requiring closure of several electric generating facilities because many facilities cannot operate without these impoundments.

Thus, in recognition of the low risk of release to groundwater posed by these impoundments and given their critical role in continuing operations and compliance with various Clean Water Act requirements, SIPC believes EPA should develop an exemption for those impoundments that are not specifically designed to hold an accumulation of CCRs, even though they may contain *de minimis* amounts of CCRs (e.g., less than 10% of their volume). In the alternative, EPA should develop a *de minimis* exemption for wastewaters and effluent contained in and discharging from impoundments, especially those which are not specifically designed to hold an accumulation of CCRs and do not routinely receive CCRs. Following such an approach would allow EPA to achieve regulation of the surface impoundments that initially receive and settle the solids, but would exempt secondary and tertiary settling and polishing impoundments and their wastewater contents. It would also exempt other impoundments that are used to manage stormwater, cooling water and other processes. These recommended approaches recognize the relatively low risk of significant releases to groundwater posed by impoundments

that are not designed to hold an accumulation of CCRs and do not initially receive and settle CCRs. These approaches also reduce regulatory redundancy, because many of these impoundments are regulated under existing National Pollutant Discharge Elimination System permits.

Exclusions – Part 258 Landfills (40 C.F.R. §§ 261.4 and 265.1)

EPA has indicated that it modeled the Subtitle D proposal after the Part 258 rules and determined that such an approach was sufficiently protective of human health and the environment. Therefore, EPA should develop an exclusion for CCRs being disposed in landfills permitted under Part 258. This will prevent the imposition of additional requirements on these facilities and should ensure that when existing CCR surface impoundments are closed under the proposal, ample disposal capacity exists. Absent this exemption, these landfills would likely not accept CCRs and a shortfall in disposal capacity is expected as CCR surface impoundments are closed.

Four CCR Waste Streams (40 C.F.R. § 261.50)

Each of the four major CCR waste streams should have their own special waste number. Under the proposed rulemaking, EPA advocates simply listing all CCRs under a single S001 special waste classification regardless of the differences among the individual waste streams in terms of chemical and physical properties, the impacts due to actual or alleged damages cases, and other factors. Each waste stream has different physical and chemical properties and interacts differently in the environment. Thus, each waste stream should have its own special waste number and each should be regulated differently. For example, EPA's "damages cases" focus on impoundments that contain fly ash. There is very little, if any, evidence to suggest that current

bottom ash, boiler slag, or FGD material generation, storage, treatment, or transportation possess a risk to human health or the environment. Specific regulation, if any, should be developed for each waste stream.

Retroactive Application of RCRA (40 C.F.R. §§ 264.1300 and 265.1300)

For the first time in EPA's thirty-year implementation of RCRA, EPA proposes to extend RCRA Subtitle C jurisdiction to previously closed and/or inactive facilities (75 Fed. Reg. at 35177). Such an approach is not only unlawful, but inconsistent with EPA's administration of the RCRA program: Subtitle C regulations are prospective in nature and are not directed at inactive facilities.[1] EPA's decision to overturn thirty years of regulatory precedent turns on the theory that the definition of "regulatory disposal" encompasses "passive leaking" and includes "the continued release of constituents to surrounding soil and groundwater through the continued infiltration of precipitation through inappropriately closed CCR impoundments . . . . (*Id.* at 35177). However, EPA fails to recognize that such an interpretation has been rejected by the courts. Several United States Courts of Appeals soundly rejected the interpretation EPA is proposing. *See* e.g., *Carson Harbor Village v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001); *ABB Industrial Systems v. Prime Technology*, 120 F.3d 351, 358 (2nd Cir. 1997); *United States v. CDMG*, 96 F.3d 706, 711 (3rd Cir. 1996); and *Joslyn Manufacturing Co. v. Koppers Co.*, 40 F.3d 750, 762 (5th Cir. 1994).[2] EPA's decision to reach back to inactive surface impoundments is therefore arbitrary, capricious, and unlawful. EPA should delete the last sentence in Section 264.1300(b) from the proposal.

[1] *See, e.g.*, 43 Fed. Reg. 58984 (Dec. 18, 1978); 45 Fed. Reg. 33074 (May 1980).

Definition of CCRs (40 C.F.R. §§ 264.1301 and 265.1301)

EPA proposes to regulate only coal ash "destine for disposal." As discussed above, CCPs are often temporarily stored in piles and other units prior to being beneficially used. Because CCP temporary storage units are often similar to those used for CCRs, EPA needs to clarify "destined for disposal" to indicate that the accumulation of coal combustion materials in piles or other units does not automatically result in the material being characterized as CCR. In addition, the definition should only apply to solids and should exclude wastewaters that contain *de minimis* amounts of CCRs. For example, due to the sheer volume and the physical composition of CCRs, *de minimis* amounts of CCRs are inevitably released during normal power generation and subsequent handling operations (*e.g.*, fugitive and *de minimis* emissions from ash conveyor equipment or loading equipment and during the transport/handling of CCBs for beneficial use). These CCRs are often encountered and accumulate when the building and various structures are washed down. This maintenance/cleaning activity results in wastewater that contains *de minimis* amounts of CCRs. Regulating these wastewaters and the various structures that contain them under Subtitle C is unnecessary and unduly burdensome. There is no evidence to suggest that these wastewaters pose a risk to human health or the environment.

Definition of CCR Landfill (40 C.F.R. §§ 264.1301 and 265.1301)

EPA proposes to regulate piles as CCR landfills. Within many generating facilities, including SIPC's facility, waste piles are routinely used to support ongoing operations and maintenance activities. They are typically used for short-term storage or staging of materials prior to consolidation and off-site shipment and the contents are removed on a continual basis. Thus, their operation does not present a significant risk to the environment as evidenced by the lack of "damages cases." To subject piles used for temporary storage to the landfill requirements

will result in significant capital expenditures that were not considered in the RIA. EPA should develop a set of reasonable design and operating standards consistent with the uses and risks posed by piles. Design standards could include the requirement for a low permeability underlayment or base such as asphalt, concrete or an HDPE liner. Operating standards could include such provisions as labeling, and the requirement to remove at least 90% of the contents every 90 days, with a full cleanout annually.

Furthermore, as drafted, there is ambiguity around what constitutes a gravel pit, quarry and a large scale fill operation. CCPs are regularly used as fill material without any adverse impacts to human health or the environment. For example, CCPs are regularly used on generating sites to build roads and dust/noise berms. Such uses should not be prohibited. At a minimum EPA should provide some guidance as to what constitutes a large scale fill operation. Many structural fill projects utilize hundreds of thousands of tons of CCPs and are engineered and built to be protective of human health and the environment. Beneficial uses should not be precluded just because of their size.

In addition, the proposed definition of "existing CCR landfill" should be modified to include lateral expansions of operating units where such expansion is within the site footprint of an area already approved and permitted by the state. There is no environmental or health-based reason for not including approved and permitted locations within the definition of an existing CCR landfill. The undeveloped portion of the approved permitted site has undergone environmental and related technical review by the permitting authorities and has been approved for the location of a CCR landfill. To exclude a location that has otherwise already been permitted for a CCR landfill from the definition of an "existing" landfill merely because there is not a binding contractual commitment to begin construction would unfairly subject these areas to

the design and operating standards for "new CCR landfills," when *identical* locations are considered "existing CCR landfills" subject to different operating standards based merely on the existence of a contract to commence construction. Such a distinction is arbitrary and capricious and provides no practical benefit.

SIPC is also concerned that the definition of a CCR landfill could be inappropriately interpreted by some as capturing piles that temporarily hold CCPs. SIPC would like EPA to clarify that piles used to temporarily store CCPs are not CCR landfills. To hold otherwise would be contrary to the plain language of the proposal. A CCR landfill is a landfill "where CCRs are placed in or on land." The operative term is "CCRs." Since, in this case the pile would be holding CCPs not CCRs, the pile is not a CCR landfill.

Definition of CCR Surface Impoundment (40 C.F.R. §§ 264.1301 and 265.1301)

SIPC is concerned that the definition of a CCR surface impoundment could be inappropriately interpreted by some as capturing impoundments or ditches that are not designed to hold an accumulation of CCRs, but that contain incidental amounts of CCRs. Many coal-fired power plants, including SIPC's, rely on a series of surface impoundments and ditches to settle solids, clarify and cool wastewater prior to recycle or discharge, manage intake water, and manage stormwater. In most cases, these impoundments and ditches are not designed to hold an accumulation of CCRs, they are designed as waste water treatment facilities or water accumulation facilities (e.g., intake-water basins). However, it is not uncommon for *de minimis* amounts of CCRs to enter these impoundments and ditches either through surface deposition, surface runoff or from discharge of effluent from upstream settling impoundments. If these impoundments and ditches were subject to the proposal, then many of them would be required to close. Requiring closure of these impoundments and ditches has the unintended consequence of

requiring closure of several electric generating facilities because many facilities cannot operate without these impoundments and ditches. In recognition of the low risk of release to groundwater posed by these impoundments, their critical role in continuing operations and compliance with various Clean Water Act requirements, SIPC believes EPA should develop an exemption for those impoundments that are not specifically designed to hold an accumulation of CCRs, even though they may contain *de minimis* amounts (e.g., less than 10% of their volume) of CCRs. In the alternative, EPA should develop a *de minimis* exemption for wastewaters and effluent contained in and discharging from impoundments, especially those which are not specifically designed to hold an accumulation of CCRs and do not routinely receive CCRs. Following either approach would allow EPA to achieve regulation of the surface impoundments that initially receive and settle the solids, but would exempt secondary and tertiary settling and polishing impoundments and their wastewater contents. Both approaches would also exempt other impoundments that are used to manage stormwater, cooling water and other processes. These recommended approaches recognize the relatively low risk of significant releases to groundwater posed by impoundments that are not designed to hold an accumulation of CCRs and do not initially receive and settle CCRs. These approaches also reduce regulatory redundancy, because many of these impoundments are regulated under existing National Pollutant Discharge Elimination System permits.

SIPC is also concerned that the definition of a CCR surface impoundment could be inappropriately interpreted by some to include impoundments that temporarily hold CCPs, such as bottom ash impoundments. The bottom ash generated by SIPC is exclusively marketed and is not "destined for disposal." Therefore, it is a CCP, not a CCR. However, because the process entails the use of an impoundment, SIPC would like EPA to clarify that impoundments used to

temporarily store CCPs are not CCR surface impoundments. To hold otherwise would be contrary to the plain language of the proposal. A CCR surface impoundment is an impoundment "designed to hold an accumulation of ***CCRs*** containing free liquids." The operative term is "CCRs." Since, in this case the impoundment would be holding CCPs not CCRs, the impoundment is not a CCR surface impoundment.

Reporting (40 C.F.R. §§ 264.1302 and 265.1302)

The reporting requirements are onerous and the exclusion is too limited to provide facilities an opportunity to avoid the reporting requirements. Under the proposal, CCR surface impoundments are required to cease receiving waste within 5 years of the effective date of the rule and to close within 2 years of ceasing to receive waste. Thus, this information will not provide any environmental benefit. It will only burden the facility and the permitting agency. Furthermore, in the case of many active CCR surface impoundments, the information contained within the report will likely be outdated before the document is even received and reviewed by EPA. A simple certification completed by a registered professional engineer that states that the impoundment is being operated consistent with its design standards and that sufficient capacity exists to allow operation until at least the next reporting period should be sufficient. In the alternative, if such reporting is necessary, it is not essential to have an independent registered professional engineer certify that no changes have occurred to avoid the reporting obligation. Unlike the Subtitle D proposal, state oversight will occur under the Subtitle C proposal; negating any perceived need for third party verifications. Any registered professional engineer should be able to certify that the elements of the exclusion have been met.

Surface Impoundments (40 C.F.R. §§ 264.1303 and 265.1303)

For the most part, the information required to be reported is duplicative of that required under the self-implementing interim status standards and Parts A and B of the RCRA permitting process. Therefore, this requirement is arbitrary and capricious and should be deleted. In the alternative, EPA should consider the following comments relating to the various subsections of Sections 264.1303 and 265.1303.

Sections 264.1303(b) and 265.1303(b) are unclear. Some existing CCR surface impoundments may not have construction plans and its unclear what should be included in a maintenance plan. As EPA is aware, many existing CCR surface impoundments were designed and built over 30 years ago. As a result, these facilities do not have construction plans. Furthermore, EPA has already received much of this information as a part of its ongoing inspection efforts and since all CCR surface impoundments are required to close under the proposal, the plans do not provide meaningful information.

The purpose of Sections 264.1303(d) and 265.1303(d) is unclear. The configuration of most generating stations is such that these markers would not be visible by the public. Should this information be needed by the permitting authority, the facility's permit application would have owner/operator information and identify the location of the various impoundments subject to the proposal. Thus, these markers would provide no benefit. In addition, it is unclear how EPA will assign identification numbers within 60 days of the effective date of the rule when it will not have all of the necessary information at that time. Part A of the required permit application (which will list regulated impoundments) is not due until 180 days after the effective date. Therefore, the Regional Administrator will not likely have sufficient information to issue identification numbers prior to obtaining Part A permit applications. Because the markers will

provide no environmental or regulatory benefit, the requirement is arbitrary and capricious and should be deleted.

Much of the information required by Sections 264.1303(e) and 265.1303(e) is duplicative with what is required by Part A of the required permit application. Therefore, these requirements are arbitrary and capricious and should be deleted. In the alternative, only readily available information should be required to be produced or these requirements should be revised to only apply to impoundments with high hazard dams. For the most part, information requested relates to the integrity of dams and high hazard dams are the ones that pose the greatest risk.

Furthermore, the requirement to provide a drawing with a scale of 1 inch = 100 feet is not practical. Many surface impoundments are hundreds of acres. The development of such detailed maps would be extremely cumbersome and costly. In addition, an independent registered professional engineer is not necessary to certify the design. Unlike the Subtitle D proposal, state oversight will occur under the Subtitle C proposal. Thus, there is no need for third party certification; any registered professional engineer should be able to certify the design.

The requirements in Sections 264.1303(f) and 265.1303(f) are unnecessary and have the potential to increase risk to the public. Sections 264.1303(f) and 265.1303(f) require all changes and modifications to plans for CCR surface impoundments to be approved by the Regional Administrator. This not only creates a burden for the Regional Administrator, because plans will likely be modified to account for ever changing site conditions (e.g., berm maintenance), it will likely result in the delay of implementation of environmentally protective changes (e.g., berm maintenance and overflow replacement). Thus, this requirement should be deleted.

Sections 264.1303(g) and 265.1303(g) inappropriately prevents CCR surface impoundments from accepting run-on. Many impoundments, including those operated by SIPC,

are part of the facility's stormwater management program and run-on is specifically called for under the facility's stormwater pollution prevention plan. The use of these impoundments to manage stormwater is integral to ongoing operations. Prohibiting CCR surface impoundments from receiving run-on will require construction of new impoundments without providing measurable environmental benefits. The requirement should be eliminated or modified to allow run-on to occur until the CCR surface impoundment ceases receiving CCRs in accordance with the proposal. There is no reason to prohibit run-on prior to closure.

Inspection Requirements (40 C.F.R. §§ 264.1304 and 265.1304)

This section should be deleted. The general inspection requirements set forth in Section 264.15 and the contingency plan requirements set forth in Section 264.51 require facilities to perform regular inspections and to develop a plan to minimize hazards to human health and the environment. The existing Subtitle C requirements therefore are sufficiently protective. This section is superfluous and should be deleted.

If this section is not deleted then the requirement to notify the EPA Regional Administrator and the state when the certification is placed in the operating record (40 C.F.R. § 264.1304(a)(5)) should be deleted. It creates an administrative burden upon both the Regional Administrator and the state without providing any environmental benefit. Having the information available for inspection should be adequate.

Liner Design For New CCR Landfills (40 C.F.R. §§ 264.1306 and 265.1306)

This section should allow for equivalent liner designs approved during the permit process. Performance based standards provide facilities with flexibility while ensuring that appropriate safeguards are in place. This allows facilities to account for site conditions, by allowing them to meet a performance criteria as opposed to a specific technical criteria. Because

the alternative design would meet the performance criteria and have to be approved during the permit process, there is no reasonable probability of adverse effect on human health or the environment caused by the use of an alternative liner. Furthermore, 42 U.S.C. § 6924(o)(2) allows for alternative designs and operating practices, so long as the alternative will prevent the migration of any hazardous constituents into the ground water or surface water at least as effectively as the proposed liner and leachate collection system. Thus, EPA has the authority to allow for alternative designs.

Air Requirements (40 C.F.R. §§ 264.1308 and 265.1308)

EPA's attempt to regulate air emissions under RCRA is arbitrary and capricious. Most electric generating facilities have operating permits issued under 40 CFR Part 70 ("Title V Clean Air Act Permits") that address fugitive dust from CCR management units, including CCR surface impoundments and CCR landfills. Furthermore, most State Implementation Plans approved or promulgated by the EPA Administrator pursuant to section 110 of the Clean Air Act regulate fugitive dust emission limits.

EPA has wrongfully included an emission limit without providing any information on how that limit is to be complied with. For example, EPA has provided no information on the particle size, the form of the standard, whether an averaging period is available, the point of compliance, or how one considers upwind sources. The proposed standard appears to have been lifted from the 24 hr PM2.5 NAAQS. However, the proposal fails to properly incorporate all of the compliance standards set forth in the NAAQS and, therefore, conflicts with the requirements promulgated under the Clean Air Act. Therefore, the requirement is arbitrary and capricious. Furthermore, any attempt to regulate fugitive dust emissions from CCR units should contain an alternative standard if (a) one has been established pursuant to applicable requirements

developed under a State Implementation Plan approved or promulgated by the Administrator pursuant to section 110 of the Clean Air Act, as amended, (which is provided for in the Subtitle D proposal) or (b) one is contained in an applicable Title V Clean Air Act Permit. These alternatives include the entire spectrum of existing requirements that regulate fugitive dust emissions, avoid confusion on how the standard is to be implemented and avoid conflicts with how fugitive dust emissions are regulated under the Clean Air Act and approved State Implementation Plans.

Surface Impoundment Closure (40 C.F.R. § 268.14)

A significant flaw in the Subtitle C proposal is the unrealistic timetable for the closure of CCR surface impoundments. Within five years of the effective date of the proposal, existing surface impoundments would have to cease receiving CCRs. Within 2 years of ceasing to receiving CCRs, CCR surface impoundments would have to be closed. While existing units may be allowed 5 years to continue operating, the period of time by which closure must be completed once they cease operating – i.e., stop receiving CCRs – is simply too short.

Given the number and size of the surface impoundments SIPC operates, a significant number of the impoundments will not be able to complete closure within two years. First, because a large number of impoundments will have to be closed during roughly the same time frame, SIPC does not anticipate being able to obtain the personnel and equipment necessary to close multiple sites, especially since other companies will need to obtain the same resources at the same time. Furthermore, even if sufficient manpower/equipment is available, SIPC anticipates that it will be unable to close its CCR surface impoundments in the timeframes EPA proposes. For instance, surface impoundments would be required to close by removing liquid

wastes or solidifying remaining wastes.2 For very small surface impoundments, it is conceivable that SIPC could comply with this requirement within the proposed time frame; for most of SIPC's CCR surface impoundments, however, dewatering the impoundment alone is expected to take several years to complete, making it physically impossible to comply with EPA's closure time frame.

Given the disparity in the sizes of these units, the length of time necessary to dewater impoundments, and the need for many of these units to be closed when the rules come into effect, SIPC strongly recommends that EPA not establish a specific time frame for closure. Instead, EPA should require utilities to close CCR surface impoundments consistent with a closure plan approved by the state. The establishment of a closure plan, with set schedules, is the most effective method to account for the many variables associated with the closure of these units and is the approach commonly used by utilities. A closure plan also will provide EPA and the public with certainty that closure will occur in a step-wise and timely manner, without requiring facilities to comply with wholly unrealistic closure time schedules.

SUBTITLE D

SIPC supports the development of Subtitle D non-hazardous waste regulations for CCRs under the proposed Subtitle D "Prime" option with the modifications discussed below. The Subtitle D Prime option, with the modifications discussed below, will allow EPA to establish a robust and environmentally protective program for coal ash disposal units without crippling coal ash beneficial use and imposing unnecessary regulatory costs on power plants, threatening jobs, power reliability, and increasing electricity costs.

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[2] *Id.* at 35252, proposed at 40 C.F.R. § 257.100(c)(1).

Exclusions – Existing State Programs (40 C.F.R. § 257.1)

The underlying premise behind the Subtitle D proposal is that the states are inadequately governing the operation and closure of CCR surface impoundments and landfills. However, several states have robust programs in which CCR surface impoundments and landfills are subject to state permitting, consent decrees, groundwater management programs, or site remediation programs. When such state oversight exists that requires the state to approve the design, operation, closure, post-closure care, and groundwater monitoring, no federal regulation is necessary. Therefore, an exemption should exist for CCR surface impoundments and landfills that are subject to state permitting, consent decrees, groundwater management programs, or site remediation programs that require the state to approve the design, operation, closure, post-closure care, and groundwater monitoring of the CCR surface impoundment or landfill.

Exclusions – Non-CCR Surface Impoundments (40 C.F.R. § 257.1)

SIPC is concerned that EPA and state personnel will characterize impoundments that are not designed to hold an accumulation of CCRs, but that contain incidental amounts of CCRs, as CCR surface impoundments. Many coal-fired power plants rely on a series of surface impoundments to settle solids, clarify and cool wastewater prior to recycle or discharge, manage intake water, and manage stormwater. In most cases, these impoundments are not designed to hold an accumulation of CCRs, they are designed as waste water treatment facilities or water accumulation facilities (e.g., intake-water basins). However, it is not uncommon for *de minimis* amounts of CCRs to enter these impoundments either through surface deposition, surface runoff or from discharge of effluent from upstream settling impoundments. If these impoundments were subject to the proposal, then many of them would be required to close. These impoundments are integral to and necessary for continued operation of most generating facilities,

and the operation of them plays a critical role in maintaining compliance with various Clean Water Act requirements. Requiring closure of these impoundments has the unintended consequence of requiring closure of several electric generating facilities because many facilities cannot operate without these impoundments.

Thus, in recognition of the low risk of release to groundwater posed by these impoundments and given their critical role in continuing operations and compliance with various Clean Water Act requirements, SIPC believes EPA should develop an exemption for those impoundments that are not specifically designed to hold an accumulation of CCRs, even though they may contain *de minimis* amounts of CCRs. In the alternative, EPA should develop a *de minimis* exemption for wastewaters and effluent contained in and discharging from impoundments, especially those which are not specifically designed to hold an accumulation of CCRs and do not routinely receive CCRs. Following such an approach would allow EPA to achieve regulation of the surface impoundments that initially receive and settle the solids, but would exempt secondary and tertiary settling and polishing impoundments and their wastewater contents. It would also exempt other impoundments that are used to manage stormwater, cooling water and other processes. These recommended approaches recognize the relatively low risk of significant releases to groundwater posed by impoundments that are not designed to hold an accumulation of CCRs and do not initially receive and settle CCRs. These approaches also reduce regulatory redundancy, because many of these impoundments are regulated under existing National Pollutant Discharge Elimination System permits.

Exclusions – Part 258 Landfills (40 C.F.R. §§ 257.1)

EPA has indicated that it modeled the Subtitle D proposal after the Part 258 rules and determined that such an approach was sufficiently protective of human health and the

environment. Therefore, EPA should develop an exclusion for CCRs being disposed in landfills permitted under Part 258. This will prevent the imposition of additional requirements on these facilities and should ensure that when existing CCR surface impoundments are closed under the proposal, ample disposal capacity exists. Absent this exemption, these landfills would likely not accept CCRs and a shortfall in disposal capacity is expected as CCR surface impoundments are closed.

Applicability (40 C.F.R. § 257.40)

Subtitle D should only govern CCRs generated by electric utilities and independent power producers. Throughout the preamble, EPA indicates that only coal ash generated by electric utilities and independent power producers is subject to regulation. However, unlike the Subtitle C proposal, the applicability section in Subtitle D does not limited the applicability to CCRs generated by electric utilities and independent power producers. To avoid any confusion, SIPC recommends that the applicability section be modified to indicate that the proposals only applies to CCRs generated by electric utilities and independent power producers.

Definition of CCRs (40 C.F.R. § 257.40)

Throughout the preamble, EPA indicates that Subtitle D is intended only to regulate CCR disposal practices. However, because the definition of CCRs in Subtitle D broadly defines CCRs as fly ash, bottom ash, boiler slag, and flue gas desulfurization materials, without distinguishing whether the material is destine for disposal (like the Subtitle C proposal), SIPC is concerned that the rule may be interpreted inappropriately to capture some CCP storage activities. As EPA is aware, its regulatory authority under Subtitle D is limited to regulating solid waste disposal practices and solid wastes are defined as "discarded materials." (42 U.S.C. § 6903(27)). Since CCPs by definition are not discarded materials, they cannot be subject to regulation under

Subtitle D. To avoid any confusion, SIPC recommends that EPA modify the definition of CCRs in Section 257.40 to track the definition proposed under Subtitle C. Only coal ash destine for disposal should be subject to regulation under Subtitle D.

Furthermore, the definition should only apply to solids and should exclude wastewaters that contain *de minimis* amounts of CCRs.

Definition of CCR Landfill (40 C.F.R. § 257.40)

EPA proposes to regulate piles as CCR landfills. Within many generating facilities, including SIPC's facility waste piles are routinely used to support ongoing operations and maintenance activities. They are typically used for short-term storage or staging of materials prior to consolidation and off-site shipment and the contents are removed on a continual basis. Thus, their operation does not present a significant risk to the environment as evidenced by the lack of "damages cases." To subject piles used for temporary storage to the landfill requirements will result in significant capital expenditures that were not considered in the RIA. EPA should develop a set of reasonable design and operating standards consistent with the uses and risks posed by piles. Design standards could include the requirement for a low permeability underlayment or base such as asphalt, concrete or an HDPE liner. Operating standards could include such provisions as labeling, and the requirement to remove at least 90% of the contents every 90 days, with a full cleanout annually.

Furthermore, as drafted, there is ambiguity around what constitutes a gravel pit, quarry and a large scale fill operation. CCPs are regularly used as fill material without any adverse impacts to human health or the environment. For example, CCPs are regularly used on generating sites to build roads and dust/noise berms. Such uses should not be prohibited. At a minimum EPA should provide some guidance as to what constitutes a large scale fill operation.

Many structural fill projects utilize hundreds of thousands of tons of CCPs and are engineered and built to be protective of human health and the environment. Beneficial uses should not be precluded just because of their size.

In addition, the proposed definition of "existing CCR landfill" should be modified to include lateral expansions of operating units where such expansion is within the site footprint of an area already approved and permitted by the state. There is no environmental or health-based reason for not including approved and permitted locations within the definition of an existing CCR landfill. The undeveloped portion of the approved permitted site has undergone environmental and related technical review by the permitting authorities and has been approved for the location of a CCR landfill. To exclude a location that has otherwise already been permitted for a CCR landfill from the definition of an "existing" landfill merely because there is not a binding contractual commitment to begin construction would unfairly subject these areas to the design and operating standards for "new CCR landfills," when *identical* locations are considered "existing CCR landfills" subject to different operating standards based merely on the existence of a contract to commence construction. Such a distinction is arbitrary and capricious and provides no practical benefit.

SIPC is also concerned that the definition of a CCR landfill could be inappropriately interpreted by some as capturing piles that temporarily hold CCPs. SIPC would like EPA to clarify that piles used to temporarily store CCPs are not CCR landfills. To hold otherwise would be contrary to the intent of the proposal and would inappropriately expand the reach of Subtitle D to materials that are not "discarded".

Definition of CCR Surface Impoundment (40 C.F.R. §§ 257.40)

SIPC is concerned that the definition of a CCR surface impoundment could be inappropriately interpreted by some as capturing impoundments or ditches that are not designed to hold an accumulation of CCRs, but that contain incidental amounts of CCRs. Many coal-fired power plants, including SIPC's, rely on a series of surface impoundments and ditches to settle solids, clarify and cool wastewater prior to recycle or discharge, manage intake water, and manage stormwater. In most cases, these impoundments and ditches are not designed to hold an accumulation of CCRs, they are designed as waste water treatment facilities or water accumulation facilities (e.g., intake-water basins). However, it is not uncommon for *de minimis* amounts of CCRs to enter these impoundments and ditches either through surface deposition, surface runoff or from discharge of effluent from upstream settling impoundments. If these impoundments and ditches were subject to the proposal, then many of them would be required to close. Requiring closure of these impoundments and ditches will have the unintended consequence of requiring closure of several electric generating facilities because many facilities cannot operate without these impoundments and ditches.

In addition, characterizing these impoundments and ditches as CCR surface impoundments would be contrary to the plain language of the proposal. A CCR surface impoundment is an impoundment "***designed to hold an accumulation of CCRs containing free liquids***." The operative terms are "designed to hold". As discussed, these impoundments and ditches are not designed to hold an accumulation of CCRs.

In recognition of the low risk of release to groundwater posed by these impoundments, their critical role in continuing operations and compliance with various Clean Water Act requirements, SIPC believes EPA should develop an exemption for those impoundments that are not specifically designed to hold an accumulation of CCRs, even though they may contain *de*

minimis amounts (e.g., less than 10% of their volume) of CCRs. In the alternative, EPA should develop a *de minimis* exemption for wastewaters and effluent contained in and discharging from impoundments, especially those which are not specifically designed to hold an accumulation of CCRs and do not routinely receive CCRs. Following either approach would allow EPA to achieve regulation of the surface impoundments that initially receive and settle the solids, but would exempt secondary and tertiary settling and polishing impoundments and their wastewater contents. Both approaches would also exempt other impoundments that are used to manage stormwater, cooling water and other processes. These recommended approaches recognize the relatively low risk of significant releases to groundwater posed by impoundments that are not designed to hold an accumulation of CCRs and do not initially receive and settle CCRs. These approaches also reduce regulatory redundancy, because many of these impoundments are regulated under existing National Pollutant Discharge Elimination System permits.

SIPC is also concerned that the definition of a CCR surface impoundment could be inappropriately interpreted by some as capturing impoundments that temporarily hold CCPs, such as bottom ash impoundments. The bottom ash generated by SIPC is exclusively marketed and is not "destine for disposal" or a "discarded material." Therefore, it is a CCP, not a CCR. However, because the process entails the use of an impoundment, SIPC would like EPA to clarify that impoundments used to temporarily store CCPs are not CCR surface impoundments. To hold otherwise would be contrary to the intent of the proposal and would inappropriately expand the reach of Subtitle D to materials that are not "discarded".

Location Criteria (40 C.F.R. § 257.40(a))

Pursuant to 257.40(a), CCR surface impoundments and landfills are subject to 40 C.F.R. § 257.3-1. However, because CCR units are more analogous to municipal solid waste landfills,

the requirements of Section 258.11 should be applicable instead of those set forth in Section 257.3-1.

Placement Above Water Table (40 C.F.R. § 257.60)

For many years, landfills have been permitted, successfully operated and constructed in areas below the natural water table. This section should allow for the construction of a CCR landfill or surface impoundment below the water table if it meets certain performance standards. In addition, a determination of a site's natural water table is arbitrary. It is subject to broad interpretation by permitting process stakeholders including project advocates, regulatory agencies, and project opponents. For example, the definition of natural water table does not factor in the hydraulic conductivity of the soil. Furthermore, it is likely impossible to determine the natural water table in areas where pumping or other activities have been underway for many years.

Closure (40 C.F.R. §§ 257.65, 257.71 and 257.100)

The timetable for the closure of CCR surface impoundments and landfills that are unable to meet the proposed design and operating standards is too short. Section 257.60 would require existing landfills and surface impoundments to meet certain location restrictions or performance criteria (*e.g.*, not be located in unstable areas or have engineering measures incorporated into the design to ensure that the integrity of the structural components will not be disrupted if located in unstable areas). Further, Section 257.71 requires within five years of the effective date of the Subtitle D rules, existing surface impoundments to be dredged and have installed a composite liner and leachate collection system, or close. Because these obligations may be impossible to

meet and would otherwise impose significant operational costs on SIPC, SIPC agrees with EPA that "many surface impoundments may close as a result of these requirements." 75 Fed Reg. at 35199. Likewise, a number of landfills may also close if they are unable to comply with the "unstable areas" location restriction. The proposed time table for closing such landfills and surface impoundments, however, is unrealistic and SIPC will be physically incapable of meeting these schedules.

In particular, EPA proposes to require disposal units that cannot meet the location restrictions or associated operating standards to close within 5 years of the effective date of the finalized regulations, which may be extended by an additional two years if the owner or operator can make a particular demonstration that there exists a lack of alternative disposal capacity and the unit poses no immediate threats to human health or the environment.[3] While existing units may be allowed 5 years to continue operating, the period of time by which closure must be completed once they cease operating – *i.e.*, stop receiving CCRs – is simply too short for the vast majority of CCR disposal units, especially surface impoundments. The proposal provides that an owner/operator must being closure activities within 30 days after the date on which the CCR landfill or impoundment receives the known final receipt of CCRs[4] and *must complete closure within 180 days* following the start of closure activities. 40 C.F.R. § 257.100(k). This means, for example, that a CCR surface impoundment that is still operating on the effective date of the

[3] Oddly, CCR surface impoundments that are not able to install a composite liner system would not be able to make this demonstration and would have to close within 5 years of the effective date of the rules. 40 C.F.R. § 257.71(g). EPA provides no explanation as to why it will grant an extension under 40 C.F.R. § 257.65 and not under 40 C.F.R. § 257.71.

[4] There is an exception to this requirement allowing closure to begin no later than 1 year from the last receipt of CCRs if the unit has remaining capacity and there is a reasonable likelihood that the unit will receive additional CCRs. Proposed at § 257.100(j).

rules, but subsequently ceases receiving CCRs after the effective date of the rules, has only 210 days to complete closure after the final receipt of CCRs.

Given the number and size of the disposal units SIPC operates, a significant number of units will not be able to complete closure within this 210 day time frame. First, because a large number of sites will have to be closed during roughly the same time frame, SIPC does not expect to be able to obtain the personnel and equipment necessary to close multiple sites at once, especially since other companies will need to obtain the same resources at the same time. Furthermore, even if sufficient manpower/equipment is available, SIPC will simply be unable to close its disposal units in the timeframes EPA proposes.

For instance, surface impoundments would be required to close by removing liquid wastes or solidifying remaining wastes. 40 C.F.R. § 257.100(c)(1). For many of the CCR surface impoundments SIPC operates dewatering the impoundment alone is expected to take several years to complete, making it physically impossible to comply with EPA's closure time frame.

Given the expected length of time necessary to dewater impoundments, and the need for many of these units to be closed when the rules come into effect, SIPC recommends that EPA not establish a specific time frame for closure. Instead, EPA should require utilities to close CCR surface impoundments and landfills consistent with a closure plan approved by a state, or developed and certified by a registered professional engineer or hydrologist. The establishment of a closure plan, with set schedules, is the most effective method to account for the many variables associated with the closure of these units and is the approach commonly used by utilities. A closure plan also will provide EPA and the public with certainty that closure will

occur in a step-wise and timely manner, without requiring facilities to comply with wholly unrealistic closure time schedules.

Alternative Liners (40 C.F.R. §§ 257.70 257.71, and 257.72)

A performance standard should be established. Performance standards provide facilities with flexibility while ensuring that appropriate safeguards are in place. EPA noted in the preamble that it modeled the Subpart D proposal after the Part 258 regulations. Those regulations (Section 258.40(a)) allow for alternative liners under certain circumstances. SIPC believes that providing alternatives like those set forth in 258.40(a) allow facilities the flexibility to account for site conditions. For example, SIPC recommends changing 257.70(a)(2), 257.71(a)(2) and 257.72(a)(2) to read as follows: "... and the lower component must consist of or be equivalent or superior to a two-foot layer of compacted soil with a hydraulic conductivity of no more than $1x10^{-7}$ cm/sec." To address EPA's concern with the lack of state oversight, SIPC suggests that the performance standard be accompanied by notification and documentation requirements. Providing an alternative standard to address circumstances where the requirement is highly dependent on site-specific conditions is appropriate when mechanisms are in place to ensure that the alternative is protective of health and the environment. Certification by an independent registered professional provides an appropriate level of certainty that the performance standard is being met. In addition, notification would be provided to the state and the public such that enforcement could be pursued if necessary. SIPC believes that providing an alternative like the one it is proposing allows facilities the flexibility to account for site conditions. The performance criteria proposed will result in a liner that performs in a substantially equivalent manner as the liner EPA proposes and, therefore, there is no reasonable probability of adverse effects on health or the environment caused by the alternative liner.

Leachate Collection System (40 C.F.R. §§ 257.71(a)(1), § 257.72(a)(1)

EPA proposes no later than five years after the effective date of the Subtitle D regulations, existing CCR surface impoundments be constructed with a composite liner with "a leachate collection system between the upper and lower components of the composite liner." Section 257.70(a)(1). EPA proposes a similar condition for new CCR surface impoundments and lateral extensions to existing impoundments and landfills, directing that the leachate collection system shall be installed "between the upper and lower components of the composite liner." Section 257.72(a)(1). This clearly is an error, given that the composite liner systems that are required must have the upper flexible membrane liner "installed in direct and uniform contact with the compacted soil component." Sections 257.71(a)(2), 257.72(a)(2). In other words, given that both components of the liner system must be in direct contact with one another, there is no way that a leachate collection system can be installed between these two components.

The regulatory text for new CCR landfills makes clear that the leachate collection system is to be installed over the liner. See Section § 257.70(a)(2). There is no reason why the requirements for new landfills should be different and there is no reason why EPA should require owner/operators to implement a system that is impossible to install given other requirements in the proposal. Therefore, any requirement to install and operate a leachate collection system for CCR surface impoundments should be consistent with the requirements imposed for new CCR landfills.

Drawing Requirements (40 C.F.R. § 257.71(d)(7))

The requirement to provide a drawing with a scale of 1 inch = 100 feet is not practical. Many surface impoundments are hundreds of acres. The development of such detailed maps would be extremely cumbersome and costly. This requirement should be deleted.

Air Requirements (40 C.F.R. § 257.80)

EPA's attempt to regulate air emissions under RCRA is arbitrary and capricious. Most electric generating facilities have operating permits issued under 40 C.F.R. Part 70 ("Title V Clean Air Act Permits") that address fugitive dust from CCR management units, including CCR surface impoundments and CCR landfills. Furthermore, most State Implementation Plans approved or promulgated by the EPA Administrator pursuant to section 110 of the Clean Air Act regulate fugitive dust emission limits.

EPA has wrongfully included an emission limit without providing any information on how that limit is to be complied with. For example, EPA has provided no information on the particle size, the form of the standard, whether an averaging period is available, the point of compliance, or how one considers upwind sources. The proposed standard appears to have been lifted from the 24 hr PM2.5 NAAQS. However, the proposal fails to properly incorporate all of the compliance standards set forth in the NAAQS and, therefore, conflicts with the requirements promulgated under the Clean Air Act. Therefore, the requirement is arbitrary and capricious.

Furthermore, any attempt to regulate fugitive dust emissions from CCR units should contain an alternative standard if (a) one has been established pursuant to applicable requirements developed under a State Implementation Plan approved or promulgated by the Administrator pursuant to section 110 of the Clean Air Act, as amended, (which is provided for in the Subtitle D proposal) or (b) one is contained in an applicable Title V Clean Air Act Permit. Such alternatives include the entire spectrum of existing requirements that regulate fugitive dust emissions, avoid confusion on how the standard is to be implemented and avoid conflicts with how fugitive dust emissions are regulated under the Clean Air Act and approved State Implementation Plans.

Run-On (40 C.F.R. § 257.81)

While this requirement may be appropriate for CCR landfills, it is not appropriate for CCR surface impoundments that are part of a facility's stormwater management program and run-on is specifically called for under the facility's stormwater pollution prevention plan. The use of these impoundments to manage stormwater is integral to ongoing operations. Prohibiting CCR surface impoundments from receiving run-on will require construction of new impoundments without providing measureable environmental benefits. This requirement should be deleted.

Groundwater Monitoring/Detection/Assessment/Corrective Action (40 C.F.R. §§ 257.90 through 98)

Consistent with the municipal landfill regulations (40 C.F.R. §§ 257.21, 258.50, 258.54, and 257.24(a)), Subtitle D should allow for alternatives to the various compliance requirements contained in Sections 257.90 through 257.98. These include, but are not limited to, allowing for (a) the suspension of groundwater monitoring, (b) alternative schedules for groundwater monitoring, (c) alternative schedules for corrective action, and (d) the deletion of monitoring parameters. Subtitle D is self implementing and EPA has determined that the third party certification from a registered PE, notification to the state, and placement of information in the operating record provide adequate oversight. Providing for alternatives allows facilities to take site specific conditions into account and properly considers the actual risks associated with each unit.

Assessment Of Corrective Measures (40 C.F.R. § 257.96)

The requirement to complete an assessment of potential corrective measures within 90 days of initiating such an analysis is unreasonably short. Experience has shown that remedy alternatives are frequently not simple. Furthermore, it is not unusual to have to collect additional

field data before a remedy can be selected. Identification of remedy alternatives, collection and analysis of data used to evaluate remedy alternatives, and discussions with vendors/contractors regarding availability of labor and materials are all critical steps in the remedy selection process. 270 days should be allowed.

Section of Remedy (40 C.F.R. § 257.97)

Costs should be a factor when evaluating various remedies. Section 257.96(b) requires the owner/operator to assess costs but when evaluating the various remedies in accordance with Section 257.96 costs are not considered. Consistent with Section 257.96, costs should be a factor in evaluating corrective measures.

Post Closure Care (40 C.F.R. § 257.101)

An owner or operator should be allowed to stop managing leachate if it demonstrates and a registered professional engineer certifies that leachate no longer poses a threat to human health and the environment.

Constituents For Detection and Assessment Monitoring (Appendix III and IV)

Conductivity, pH and TDS should not be included in the detection monitoring and assessment monitoring analyte list. These parameters will cause numerous false positives and there are no cleanup criteria. They are useful field parameters, but should not be included in statistical analyses. CCRs are well characterized and the other parameters are appropriate.

Use of Registered Professional Engineers

In those states that EPA decides have adequate Subtitle D CCR programs, it will be unnecessary to have registered professional engineers ("PEs") or hydrologists certify compliance with the CCR regulatory provisions. In those states, however, that do not have qualified

programs to administer and enforce the federal Subtitle D rules, SIPC generally supports the concept set forth in the proposal of using registered professionals to certify compliance with various components of the rule. However, SIPC believes that EPA should not limit the list of registered professionals that have the expertise and authority to certify compliance with certain components of the rule. EPA should review each requirement to determine whether the most appropriate professional was identified and specifically add professional geologists to the list set forth in Section 257.91(e)(2).

SIPC does not agree that PEs, hydrologists and geologists must be independent (*i.e.*, not an employee) of the owner/operator of the landfill or surface impoundment. SIPC believes it is inappropriate to require that such professionals be independent from the owner/operator of the disposal unit, because this condition imposes a significant barrier to meaningfully and cost-effectively complying with the regulations, while providing little to no assurance that "independent" professionals have distinct interests from the owner/operator of the disposal unit.

These professionals, whether employee or independent contractors, are all subject to state registration and licensing and have a strong incentive to maintain their licenses in good standing. Such state-licensing and registration programs will help to ensure that all professionals exercise proper judgment about the operation of CCR landfills and surface impoundments. Accordingly, EPA should eliminate the proposed requirements that these professionals be "independent" from the company for which they are certifying compliance.

Respectfully Submitted,

Leonard F. Hopkins

Leonard F. Hopkins, P.E.

Fuel & Compliance Manager

Mr. SHIMKUS. Thank you, Mr. Hopkins, and I recognize Mr. Baird for 5 minutes. Let us get your microphone set.

STATEMENT OF JOSEPH BAIRD

Mr. BAIRD. That will help. I am Joe Baird, a partner in Baird Hanson Williams, a mineral resource firm in Boise, Idaho. I am also president of the Northwest Mining Association. Today I am representing the Idaho Cobalt Project of the Formation Capital Corporation, U.S.

But the problem we now seek to address is not unique to formation. It is a problem for any mining company operating or hoping to operate on federal lands. And by showing up here today, we were hoping to alert the Congress and the executive branch to a developing duplication of—a true duplication of environmental regulatory burdens that are already managed by longstanding programs of the BLM and the Forest Service governing exactly the same subject matter and covering the same technical issues as an EPA regulatory initiative.

Now, just quickly on the Cobalt Project, it is a project that is at the end of permitting, and it is—it will consist of an underground mine and a floatation mill that uses simple physical separation of ore from country rock, eliminating the need to use aggressive chemicals for the milling.

The project footprint is only about 135 acres, and it is located within a traditional cobalt mining district. And to the extent possible, the project will backfill workings with cemented paste tailings and development rock and use dry stack tailings for surface storage to eliminate the need for a tailings bond. Project will produce about 185 direct jobs, $8.2 million in annual payroll, $8.8 million in taxes annually for a minimum of 10 years and will importantly be the only source of super alloy cobalt in the U.S. Super alloy grade cobalt is a critical component of all jet engines and many green applications including hybrid cars, solar cells, and wind turbines.

Currently all U.S. needs are met by importation primarily from a single foreign company. Formation is very proud of the fact that the Forest Service approval of the final environment impact statement has not been challenged. We have written our verbal understandings with the Shoshone Bannock Nations, the Nez Perce Nation, the Idaho Conservation League, Boulder White Clouds Council, Earth Works, and Western Mining Action Project. We were and are grateful for those constructive discussions.

Yet even with all of these favorable attributes, the project took 7 years to permit, and that is simply too long. Today, we are not even going to try to deal with those permitting issues, but we are trying to head off something coming at us or coming at the industry as a whole.

For decades, mines on federal lands have been subject to strict, site-specific reclamation financial assurance requirements of the Forest Service or the BLM. The Cobalt Project is on land managed by the Forest Service, but EPA is developing its own financial assurance requirements for all hard rock mines, including those already subject to financial assurances of the BLM and the Forest Service.

If EPA proceeds as they are currently planning, it would end up causing financial assurances to be bonded, to be cash bonded actually, beyond what the Forest Service or the BLM determines is actually needed to protect the environment. The debt capital requirement would unnecessarily force termination of many existing mines, jobs, public and private revenue streams, and hamper creation of new mines supplying strategic and base metals and materials necessary to sustain U.S. manufacturing jobs.

Implicit in EPA's position is that Forest Service BLM programs are managed so incompetently that as a class mines on Forest Service or BLM lands constitute a degree and duration of risk that EPA must—that causes EPA to must duplicate the long established Forest Service and BLM programs.

Yet in 1999, the National Research Council of the National Academy of Science as responding to Congress found that existing Forest Service BLM framework to be "generally effective in protecting the environment" and more importantly even for this purpose that "improvements in the implementation of existing regulations prevent the greatest opportunity for improving environmental protection," meaning that let us work with the existing structure as opposed to creating whole new programs out there.

So just to wrap up, the Idaho cobalt project and many other mines existing in future are critical to the survival and the revival of the U.S. manufacturing sector, which depends on mining products as feed stock. Mining and manufacturing produce some of the best paid jobs and best tax revenue streams in the entire economy.

Permitting of hard rock mines in the U.S. is already a long and costly process particularly when compared to our business competitors in the world. So please don't force us to do the same thing twice with two different departments and end up having to pay reclamation bonds twice over. Thank you very much for your time.

[The prepared statement of Mr. Baird follows:]

Testimony of

Formation Capital Corporation, U.S.

&

The Northwest Mining Association

presented by

Joseph H. Baird, Baird Hanson Williams LLP

before the

United States House of Representatives

Subcommittee on Environment and the Economy

February 15, 2011

"EPA Development of Hardrock Mine Reclamation Financial Assurances would duplicate US Forest Service and US Bureau of Land Management Programs & Rules"

EXECUTIVE SUMMARY

Formation Capital Corporation ("Formation") is developing the Idaho Cobalt Project ("Cobalt Project") which will produce about 185 direct, good-paying jobs, $8.2 Million in payroll, $8.8 Million in taxes annually over a minimum ten-year period, and provide the only US source of super-alloy grade cobalt. Super-alloy grade cobalt is a critical component of all jet engines and many applications in the Green economy. Currently, all US needs are met by importation, primarily from a single foreign company.

For decades, mines on Federal lands have been, and continue to be, subject to the strict, site-specific, reclamation financial assurance requirements of the US Forest Service ("Forest Service") or US Bureau of Land Management ("BLM"). The Cobalt Project is on Forest Service land. The US EPA is developing financial assurance requirements for all "hardrock mines," including those already subject to existing Forest Service or BLM financial assurance requirements. 74 Fed. Reg. 37213, July 28, 2009. If the EPA requirements proceed, it would presumably double or triple reclamation financial assurance requirements beyond what the Forest Service or BLM determines is needed to protect the environment. This "dead capital" requirement would unnecessarily force termination of many existing mines, jobs, public/private revenue streams, and hamper creation of new mines supplying strategic and base metals, and materials necessary to sustain U.S. manufacturing jobs.

Implicit in EPA's position is that the Forest Service/BLM programs are managed so incompetently that, as a class, mines on Forest Service or BLM lands constitute such a "degree and duration of risk" that EPA must create a duplicative financial assurance program parallel to, and independent of, long-established Forest Service and BLM "bonding" programs. Yet, in 1999, the National Research Council (NRC) of the National Academy of Sciences, responding to Congress, found that the existing Forest Service/BLM framework to be "generally effective" in protecting the environment, and that "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." EPA is developing a program that is not

required to protect the environment or taxpayers. We hope EPA will decide not to create this "unnecessary burden" that threatens existing mining jobs and future mineral investment in the U.S.

1.0 Formation Capital Corporation, U.S. and Northwest Mining Association: Who we are.

My name is Joe Baird. I am a partner in Baird Hanson Williams LLP ("BHW"), which is a mining and mineral resource law firm based in Boise, Idaho. I am President of the Northwest Mining Association ("NWMA"). Today, I am representing the Idaho Cobalt Project of Formation Capital Corporation, U.S. ("Formation"). However, the problem we now seek to address is certainly not unique to Formation. Formation is only presented as a case study to try to alert the Congress and Executive Branch to a developing duplication of environmental regulatory burdens that are already managed by long-standing, strictly enforced programs covering EXACTLY the same subject matter and EXACTLY same technical issues such that the regulatory and cost burdens would at least double, without benefit to the public.

Formation is the owner and proponent of the Idaho Cobalt Project in Lemhi County, Idaho. The Idaho Cobalt Project will provide the United States with its sole source of high purity super-alloy cobalt, an alloy metal essential to military and civilian jet engine construction and widely used in the high tech computer and electronics industries. Cobalt is also an essential element used in a variety of environmental applications such as the rechargeable lithium-ion batteries used in electric and hybrid electric vehicles, wind turbine generators, solar panels, fuel cell technologies, oil de-sulfurization processes and in coal and gas to liquids technologies that produce clean burning synthetic fuels. Currently, the US consumes about 60% of worldwide consumption of super-alloy cobalt. Formation will be able to supply about 25% of U.S. requirements for super-alloy cobalt. Currently, all U.S. needs are met by importation, primarily from a single company.

The Idaho Cobalt Project will provide approximately 185 direct, good-paying jobs, $8.2 Million in payroll, $8.8 Million in taxes annually over a minimum ten year period, and provide the only US source of super-alloy grade cobalt. The Project's direct employments benefits will be primarily in

Lemhi and Shoshone Counties, Idaho, which have unemployment rates of 12.6% and 14.8%, respectively. Thus, it is not surprising that a poll conducted in 2008, indicated that 68% of Lemhi County residents were aware of the Idaho Cobalt Project and of those aware of it, the Project was favored by a margin of 77% to 7%. Formation's sister company, Essential Metals Corporation, has already refurbished part of the former Sunshine Hydrometallurgical Plant in Shoshone County so the Plant could resume production of high purity gold and silver from precious metals dore produced by other mining companies, initially restoring a dozen jobs to Shoshone County. The primary part of this Hydrometallurgical Plant will be refurbished to take cobalt concentrates from the Idaho Cobalt Project and produce high purity super-alloy cobalt and copper and provide approximately another 40 jobs. Well-paid, full-time employment is very hard to come by in rural Idaho. Formation is very proud to provide those jobs. Formation also looks forward to being the only U.S. source of super-alloy cobalt.

Importantly, today Formation is discussed as a representative the mining industry as whole, but most particularly the Northwest Mining Association ("NWMA"), whose members produce many vital mineral commodities and provide tens of thousands of direct employment jobs. NWMA is a 116 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 42 states and are actively involved in exploration and mining operations on Federal and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA's broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. *More than 90% of our members are small businesses or work for small businesses.* Most of our members are individual citizens.

2.0 The Idaho Cobalt Project

The Idaho Cobalt Project (sometimes "Project") will consist of an underground mine and flotation mill that uses simple physical separation of ore from country rock, eliminating the need to use aggressive

chemicals for milling. The Project "footprint" is about 135 acres and located within a traditional cobalt mining district. The Project will backfill with cement tailings (paste) and development rock to the extent possible and use dry-stack tailings for surface storage to eliminate the need for a tailings pond. Although ground water modeling predictions indicate that neither surface nor ground water standards will be impaired during operations, a ground water remedial pump back system will be installed during mine construction, just in case the modeling is incorrect. Comprehensive and extensive reclamation plans and water quality modeling have been developed and performed to ensure environmental quality is restored and maintained in perpetuity. There will be significant financial assurances posted with the Forest Service to ensure all reclamation work is performed regardless of whether Formation or the Project is successful financially.

This favorable view of the Project is not Formation's alone. Many State of Idaho and Federal agencies spent years evaluating, studying and questioning the Idaho Cobalt Project, including conducting an extensive multi-year Environmental Impact Statement, and then granted the Project the relevant approvals and permits. The Idaho Conservation League, Boulder White Clouds Council, Earthworks, and Western Mining Action Project (collectively, "Environmental Groups") had originally commented unfavorably upon the Project's Environmental Impact Statement; however, NONE of the Environmental Groups challenged the Forest Service approval or the Final Environmental Impact Statement. Similarly, the Shoshone-Bannock Tribes and the Nez Perce Tribe were actively engaged with the Project permitting process, but none of the Tribes chose to challenge the Project. In other words, those persons and entities, governmental and private, most typically associated with environmental stewardship in central Idaho were sufficiently satisfied with Formation's responses to their concerns that NONE of them chose to challenge the Forest Service approval of the Final Environmental Impact Statement. Of course, achieving this positive state of affairs was neither easy, nor inexpensive.

Formation forwarded the Project Plan of Operation to the Forest Service in January 2001. The final Forest Service Record of Decision was issued January 2009, but negotiations on the Forest Service financial assurances continue. Thus, it has taken approximately ten (10) years from start to finish, but even after one factors out non-regulatory delays (such as the collapse of the capital funding markets after 9/11), the Project permitting process took approximately seven (7) years. This is far too long for a project with only 135 acres of impact from an underground mine in a traditional mining district, particularly when such a critical national prize as high purity cobalt production was at stake. However, most of the permitting issues that Formation faced were not unique to the Idaho Cobalt Project, but symptomatic of the difficulties and delays faced by every mining project.

It has been said that "politics is the art of the possible." Unfortunately, regardless of what we say and do today, this Hearing cannot meaningfully even begin to tackle the layers of unnecessary regulatory delays that hamper the production of U.S. minerals and hamper the creation of the jobs and tax revenue associated with mining. However, we hope that by focusing on one developing issue, EPA's proposal to impose unnecessary financial assurances on the hardrock mining, we can prevent the creation of a program that is duplicative of existing, long-established environmental programs managed effectively by Federal land management agencies. We believe that with the Committee's help, correcting this specific and narrow problem is indeed possible.

3.0 EPA's CERCLA 108(b) Program Issues

3.1 CERCLA 108(b) Program

On July 28, 2009, 74 Fed. Reg. 37213, the US Environmental Protection Agency (EPA) noticed that it was planning to develop a financial assurance program for hardrock mines pursuant to Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," a/k/a "Superfund"). EPA has started its CERCLA 108(b) initiative more than twenty five (25) years after Congress expected it to have been completed. The world has changed. Environmental laws and regulations have mushroomed during this period to the point that most of the activities that placed most

of the mining sites on the EPA CERCLA National Priorities List ("NPL") are not merely prohibited but they are often criminal activities today.

Under current law, a mineral exploration or mining operation on Federal lands is subject to a comprehensive framework of Federal and State environmental laws and regulations including: the Clean Water Act; the Safe Drinking Water Act; the Clean Air Act; the National Environmental Policy Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Endangered Species Act; and the BLM and Forest Service surface management regulations for mining. These laws and regulations are "cradle to grave," covering virtually every aspect of mining from exploration through mine reclamation and closure. All of the significant regulations under which mining is regulated by the above cited laws were promulgated after the passage of CERCLA.

Importantly, current law, current mining techniques and current reclamation practices have not given rise to many new, if any, orphan mining CERCLA sites that arise from activities permitted in the last twenty-five years. Thus, current mining is so tightly regulated by Federal and State environmental laws that the chances of newly permitted mines being placed on the CERCLA NPL as orphans is substantially reduced, even without providing financial assurances. However, the adequacy or burdens of these laws is a topic for a different forum at a different time. Today, we only seek to put a spotlight on the development of EPA's CERCLA 108(b) program where it is wholly and completely redundant; that is, on Federal lands managed by the Forest Service or the BLM.

3.2 EPA CERCLA 108(b) Regulatory Duplication on Federal Lands

When Congress passed CERCLA 108(b) in 1980, neither the BLM or the States had *any* significant hardrock mining regulations, let alone financial assurances programs, and the Forest Service regulatory program was in its infancy. However, over the last 30 years, the BLM and the Forest Service have developed sophisticated and empirically derived hardrock mining regulatory programs, including financial assurance requirements. The long-term development and implementation of these programs has provided experience to the BLM and Forest Service that EPA does not have.

We believe the financial assurance programs administered by the BLM and the USFS have been successful, particularly in the last 20 years. In 1999, the National Research Council (NRC) of the National Academy of Sciences, in response to a request from Congress, found that the existing environmental regulatory framework for mining on Federal land is "generally effective" in protecting the environment. *Hardrock Mining on Federal Lands*, National Research Council, National Academy Press, 1999, p. 89. These existing regulatory programs already substantially limit the degree and duration of environmental risk associated with the current hardrock mining industry. The NRC Report demonstrates that current environmental laws, regulations and practices work together with current financial assurance requirements to ensure today's hardrock mines do not become tomorrow's Superfund sites.

Most importantly, we agree with the NRC that "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." *Id.* at 90. Rather than propose a new, duplicative, burdensome and cost-prohibitive program, EPA should work with the Federal land management and State regulatory agencies to improve implementation of existing regulations and financial assurance requirements. Instead, EPA is developing a program that will be redundant with Forest Service and BLM programs.

CERCLA 108(b)'s statutory charge for development of financial assurance requirements is directed at facilities managing hazardous substances, but directs the agency to do so only for "classes of facilities ... consistent with the degree and duration of risk." Mining and beneficiation facilities that have been approved by the Forest Service or the BLM, subject to an Environmental Impact Statement ("EIS"), and subject to Federal financial requirements are a distinct class of facility. A major part of this approval process is a determination that the project will comply with all Federal and State laws, during operation and in perpetuity. Indeed, typically EPA is actively involved on mine facility EISs, so the agency has a say in the type of analysis that is conducted and the type of mitigation that is required.

When one compares EPA's CERCLA 108(b) charge to the facts surrounding the class of facilities regulated by the Forest Service and the BLM, one realizes that implicit in EPA's position is that the Forest Service and BLM programs are managed so incompetently that, as a class, mines on Forest Service or BLM lands constitute such a "degree and duration of risk" that EPA must create a duplicative financial assurance program parallel to, and independent of, long-established Forest Service and BLM financial programs. We disagree. There is ample objective evidence this is not true. For example, in 1999, the National Research Council (NRC) of the National Academy of Sciences, responding to Congress, found that the existing Forest Service/BLM framework to be "generally effective" in protecting the environment, and that "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." Nevertheless, EPA is developing a program to cover these programs. This would be duplicative, wasteful, and unnecessary economic burden that would threaten existing and future jobs in mining.

4.0 President Obama's Initiative to Eliminate Unnecessary Regulatory Burdens

President Obama "is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses." Executive Order 13563, January 18, 2011. Formation is a small business, and will remain a small business, even after construction of the Idaho Cobalt Project and the rebuild of the Hydrometallurgical Plant. In fact, 90% of the membership of the NWMA is composed of small businesses or individuals working for small businesses. Importantly, in President Obama's State of the Union address the President committed to eliminating "unnecessary burdens" on business. We believe that a duplicative regulation born more of inter-agency rivalry, than from a demonstrated need, would seem to be exactly the type of "unnecessary burden" that the President seeks to prevent from destroying jobs and reducing tax revenue.

5.0 Current EPA Authority to Regulate and Effect Financial Assurances

For many hardrock mines, including, at a minimum, *all* hardrock mines on BLM or Forest Service lands, the agencies (and, necessarily, the mines) must implement the evaluation requirements and applicable mitigation measures of the National Environmental Policy Act, most typically, as described in an Environmental Impact Statement ("EIS"). The environmental impacts and the uncertainties associated with project mitigaion identified in an EIS provide the factual basis for setting the nature and type of financial assurances for a hardrock mine. EPA already has the authority to participate in the preparation of an EIS as a cooperating agency. EPA evaluates and comments upon every EIS, as mandated by 42 USC 7609. Moreover, EPA has the authority to take any EIS that EPA deems inadequate to the Council on Environmental Quality in the Office of the President for final decision-making and disposition.

Accordingly, EPA already has ample existing authorities to participate in and affect the nature and amount of financial assurances. The only major difference between these existing authorities and EPA's CERCLA 108(b) initiative is that EPA's CERCLA 108(b) initiative would allow EPA to effectively eliminate the decision-making of the Federal land management agencies to whom Congress delegated surface management and financial assurance authority. These two agencies have the decades of experience that EPA cannot claim to possess. When asked about duplication of existing BLM and Forest Service financial assurances, EPA Headquarters' response was that it will be up to the Federal land management agencies to reduce the amount of the financial assurance they receive in order to avoid duplication. Congress delegated surface management authority for regulating and permitting hardrock mines on Federal lands to the land management agencies working cooperatively with the States. EPA should not be allowed to arrogantly usurp the time-tested programs developed by the BLM and the Forest Service over the past thirty (30+) years.

6.0 Conclusion

Formation's Idaho Cobalt Project will produce about 185 direct, good-paying jobs, $8.2 Million in payroll, $8.8 Million in taxes annually over a minimum ten-year period, and provide the only US source of super-alloy grade cobalt. This Project and many others, existing and future, are critical to the survival and revival the U.S. manufacturing sector, which depends on mine products as feedstock. Mining and manufacturing produce some of the best paid jobs and best tax revenue streams in the entire economy, and permitting of hardrock mines in the U.S. is already a long and costly process, particularly when compared to our competitors in the rest of the world.

Unfortunately, regardless of what we say and do today, this single Hearing cannot meaningfully even begin to tackle the layers of unnecessary regulatory delays that hamper domestic production minerals. However, today we hope that by focusing attention on just one aspect of EPA's misguided CERCLA 108(b) initiative that the Committee can assist in preventing the creation of a program that is duplicative of existing, long-established environmental programs managed effectively by Federal land management agencies. EPA should follow the 1999 advice, sought by Congress from the National Research Council of the National Academy of Sciences that indicated "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." Otherwise, duplicative financial assurances mandated by EPA's misguided CERCLA 108(b) initiative will create an unnecessary "dead capital" requirement that would force termination of many existing mines, jobs, public/private revenue streams, and hamper creation of new mines supplying strategic and base metals, and materials necessary to sustain U.S. manufacturing jobs.

Mr. SHIMKUS. Thank you, Mr. Baird. Now I would like to recognize Ms. Kinter for 5 minutes.

STATEMENT OF MARCIA Y. KINTER

Ms. KINTER. Thank you. Good afternoon. My name is Marci Kinter, and I am the vice president of Government and Business Information for the Specialty Graphic Imaging Association, or SGIA.

Thank you for the opportunity to address you this afternoon regarding a timely industry concern. Specifically I am here today to address a misguided interpretation of the byproducts exemption included in the Toxic Substance Control Act's inventory update law. This proposed interpretation offered by the EPA Office of Chemical Safety and Pollution Prevention will impose a significant reporting burden on the struggling U.S. manufacturing sector, without providing additional health, safety, or environment benefit beyond that already provided under existing EPA and OSHA regulations.

It is vital that you remind EPA of congressional intent to exempt most byproducts from the reporting requirements under the TSKA inventory update rule or IUR. Your interest in this matter is timely as the rule that I am here to discuss is currently undergoing interagency review.

SGIA represents the interests of those facilities that produce a wide array of products using either the screen printing or digital imaging print platform. Products such as all types of signage, the membrane switch on your microwave oven, the defrost pattern on your car's rear window to—and we are most known for our message on our T-shirts that we provide to everyone when you are wearing them. That is the industry sector that I represent.

Currently there are over 25,000 screen and digital printing facilities operating in the U.S. And the screen and digital print community is comprised of small businesses. The average facility size ranges from 50 to 40 employees. As you know, the cost of regulatory compliance poses a significantly higher burden on the small business community.

The TSKA inventory update rule requires the reporting of extensive data concerning the manufacturing, processing, and use of chemical substances. I am not here today to discuss the benefits or burdens of the entire TSKA inventory update rule. Instead, I would like to focus on a specific aspect, EPA's misinterpretation of the byproduct exemption under the proposed amendments to the IUR.

In the proposed rule, EPA's misguided interpretation says that waste byproducts generated during the manufacturing of items, like these T-shirts, are new chemicals if the manufacturer does the right thing by sending these waste byproducts by recycling rather than disposing of them. To say we were shocked to discover that the proposed TSKA IUR would have an actual regulatory impact was surprising as we are printers and not chemical manufacturers.

While we use chemicals, including inks and solvents, we certainly do not consider ourselves to be chemical manufacturers. At the end of the day, the final product that moves out the door is the printed product, such as this T-shirt, not a chemical product. Under EPA's interpretation, sending our waste byproducts, such as spent solvents and inks for recycling, would be considered by EPA

to be the manufacturing of a new chemical for commercial purposes, subjecting us to registration reporting of our waste byproducts under TSKA.

Our companies are already regulated by both OSHA for worker exposures as well as U.S. EPA for proper handling and disposal. EPA's misguided interpretation will not only affect those facilities represented by SGIA. Manufacturers of all sorts will now be burdened by reporting their waste byproducts as new chemicals.

Every manufacturing sector that has opted to send their waste byproducts out of recycling rather than disposal will be saddled with this recording keeping and recording burden. There is still time to take action, but we need your help. We believe that the interpretation offered by the U.S. EPA regarding the reporting of byproducts is not what Congress intended. The waste byproducts offered by the U.S. product manufacturing community are already regulated by U.S. EPA, and the proposal would only increase the regulator burden with no discernable environmental benefit.

Thank you again for the opportunity to appear before you today, and I would be happy to answer any questions you might have on this critical industry topic.

[The prepared statement of Ms. Kinter follows:]

Statement of Marcia Y. Kinter

Specialty Graphic Imaging Association

Before the Subcommittee on Environment and the Economy

"Environmental Regulations, the Economy and Jobs"

February 15, 2011

Good afternoon, my name is Marci Kinter and I am the Vice President – Government and Business Information for the Specialty Graphic Imaging Association, or SGIA. Thank you for the opportunity to address you this afternoon regarding a timely industry concern.

Specifically, I am here today to address a misguided interpretation of the by-products exemption included in the Toxic Substance Control Act's Inventory Update law. This proposed interpretation, offered by the EPA Office of Chemical Safety and Pollution Prevention, will impose a significant reporting burden on the struggling US manufacturing sector without providing additional health, safety, or environmental benefit beyond that already provided under existing EPA and OSHA regulations. It is vital that you remind EPA of Congressional intent to exempt most by-products from the reporting requirements under the TSCA Inventory Update Rule, or IUR. Your interest in this matter is timely as the rule that I am here to discuss is currently undergoing interagency review.

SGIA represents the interests of those facilities that produce a wide array of products using either the screen printing or digital imaging print platform. Products, such as all types of signage, the membrane switch on your microwave oven, the defrost pattern on your car's rear window to the message on this T-shirt are produced by the industry sector I represent. Currently, there are over 25,000 screen and digital printing facilities operating in the US. The screen and digital print community is comprised of small businesses – the average facility size ranges from 15 to 40 employees. As you know, the cost of regulatory compliance poses a significantly higher burden on the small business community.

The TSCA Inventory Update Rule requires the reporting of extensive data concerning the manufacturing, processing and use of chemical substances. I am not here today to discuss the benefits or burdens of the whole TSCA Inventory Update Rule. Instead I would like to focus on a specific aspect - EPA's misinterpretation of the by-product exemption under the proposed amendments to the IUR. In

the proposed rule, EPA provides a deeply misguided interpretation that waste by-products generated during the manufacture of items, like t shirts, are new chemicals if the manufacturer has the temerity to do the right thing by sending the waste by-products for recycling rather than disposing of them.

With this interpretation EPA will impose a significant reporting burden on the manufacturing sector by nullifying Congress' intention to exempt manufacturing by-products from IUR reporting. Furthermore, by requiring reporting for by-products that are sent for recycling, EPA is undercutting their own efforts to promote recycling.

We were shocked to discover that the proposed TSCA IUR would have an actual regulatory impact as we are printers and not chemical manufacturers. While the screen and digital printing processes use chemicals, including inks and solvents, we certainly did not consider ourselves to be chemical manufacturers and therefore subject to TSCA IUR. At the end of the day, the final product that moves out the door is the printed product, such as the t-shirt or membrane switch, not a chemical product. It may seem quite obvious to you, but we are in the business of manufacturing printed t-shirts, not spent solvent. Under their interpretation, sending our waste by-products, such as spent solvents and inks, for recycling would be considered by EPA to be the manufacturing of a new chemical for commercial purposes - subjecting us to registration and reporting of our waste by-products under TSCA. Our companies, as well as the recyclers of these waste-by-products, are already regulated by both OSHA for worker exposures as well as US EPA for proper handling and disposal. Additional recordkeeping and reporting under TSCA IUR of these waste by-products sent for recycling materials represents a significant burden with little or no discernable environmental benefit.

EPA's misguided interpretation will not affect only will those facilities represented by SGIA. Manufacturers of all sorts, from industries as diverse as printed circuit board manufacturers to paper products, will now be burdened by reporting their waste by-products as new chemicals. Every

manufacturing sector that has opted to send their waste-by-products out for recycling rather than disposal will be saddled with this recordkeeping and reporting burden.

In their proposal, US EPA deeply underestimated the impact of their misguided interpretation. EPA failed to assess the impact of this new reporting burden on this large universe of facilities. Instead, EPA's burden and cost assessment considered only facilities that reported in 2006. Our members, which are product manufacturers did not report in 2006, as TSCA has long been held to impact those companies whose primary business is manufacturing and placing chemicals into commerce. Despite the significant burden this interpretation would impose on our struggling manufacturing sector, there is no increase in environmental protection associated with the reporting of waste by-products as new chemicals under the IUR.

There is still time to take action, but we need your help. We believe that the interpretation offered by the US EPA regarding the reporting of by-products is not what Congress intended. The waste by-products offered by the US product manufacturing community are already regulated by US EPA, and the proposal would only increase the regulatory burden with no discernable environmental benefit.

Thank you again for the opportunity to appear before you today. I would be happy to answer any questions you might have on this critical industry topic.

Summary of Testimony
Marcia Y. Kinter
Vice President – Government & Business Information
Specialty Graphic Imaging Association

1. The US EPA's proposed changes to the Toxic Substances Control Act's Inventory Update Rule (IUR) is currently undergoing interagency review and includes a misguided interpretation for reporting of by-products that triggers a significant reporting burden on the US manufacturing industry base without any discernable environmental benefit.

2. US EPA's misguided interpretation of the by-products exemption included in the Toxic Substances Control Act's Inventory Update Law nullifies Congress' intent to exempt to exempt manufacturing by-products from reporting under the Inventory Update Rule (IUR).

3. US EPA's misguided interpretation would classify all recycled waste by-products as new chemicals subject to reporting under the IUR thus establishing a disincentive for facilities to recycle.

4. This interpretation would not only impact the screen printing and digital printing manufacturing base but any product manufacturer, such as those producing electronic circuits, paper board, construction materials, etc., as all have the capacity to produce liquid waste by-products.

5. In developing the proposed changes, US EPA deeply underestimated the impact of their misguided interpretation as the proposal's burden and cost assessment only considered facilities that reported in 2006. Product manufacturers, unaware of the regulatory impact of the IUR, did not report in 2006.

6. Those in the product manufacturing community request help to ensure that Congress' initial intent to exempt manufacturing by-products from reporting under the IUR is maintained as these waste by-products are already regulated by the US EPA and this proposal would only increase the regulatory burden of the small business community.

Mr. SHIMKUS. Thank you, Ms. Kinter, and before I move to Ms. Neu, I was asked by the ranking member, and so without objection, I would like to recognize him for a minute to do an introduction of the two Democrat-sponsored witness.

Mr. GREEN. Thank you, Mr. Chairman. I will be brief. I mainly want to thank both Ms. Neu and Mr. Ryan on short notice for coming here to provide your expertise on the side of what sometimes is good about recycling requirements. So but again, thank you all on short notice. I was telling the chairman I know how much it costs to fly from Houston to D.C. and hopefully you got a better rate than I did. So on short notice but welcome.

Mr. SHIMKUS. I too want to welcome you also, and now I recognize Ms. Neu for 5 minutes.

STATEMENT OF WENDY NEU

Ms. NEU. Good afternoon. My name is Wendy Neu. I am an owner and executive vice president of Hugo Neu Corporation. We are a diversified U.S.-based company that has owned and managed industrial and commercial business assets in excess of $500 million. As well, we have employed up to 1,100 workers at a time in a business that has had export sales in excess of $2 billion in a single year.

As an executive of a mid-sized business with hundreds of millions of dollars at stake in industrial and commercial business assets, it is clear to me that from my industry, regulations promulgated and enforced by the EPA have been and remain essential to the growth, diversification and sustainability of recycling operations, both for the company and for its employees.

Let me provide you with an example of how strong EPA regulations would allow Hugo Neu to more successfully compete globally. It is a policy approach that would level the playing field for American business in a way that creates U.S. jobs. Also, it removes the disadvantages my business now suffers from in competing with companies that don't meet environmental standards and choose to export toxic e-waste to developing countries.

It ought not to go unnoticed that the GAO itself has suggested current regulations regarding e-waste are woefully narrow in scope. One of the industrial operations we own focuses on recycling of used and obsolete post-consumer and commercial electronic equipment, which is commonly referred to as e-waste. The name of our company which processes this e-waste is We Recycle. It is based in Mount Vernon, New York. Like communities throughout our Nation, Mount Vernon, with a population of approximately 38,000 people is desperate for jobs with living wage. I am proud to report that my company does pay a living wage.

The employees who work at our company are focused on repairing or otherwise recycling e-waste. The technology we have developed allows us to recover high value clean streams of commodities. These commodities are then sold to the best industrial consumers domestically or are exported to industrial consumers around the world.

But Hugo Neu Corporation could be doing more, recycling more and hiring more workers if we did not have to compete against the low-road actors in our industry. Unfortunately, inadequate and in-

sufficient regulation by the EPA are stifling the growth of my environmentally responsible business and cutting off a potential for job growth.

Jobs that could be developed at e-waste recycling businesses around the country such as mine are now being exported to China, southeast Asia, and countries in Africa, precisely because the EPA does not effectively limit the export of hazardous electronic waste by unscrupulous collectors in the United States.

Every single country in the OECD, other than the United States, limits the export of e-waste to these countries. They wisely preserve jobs in their countries and limit the spread of toxic waste. If other industrialized countries can do it to create an advantage for their businesses and their workers, then it seems to me that the U.S. Congress ought to do no less for American workers and American business.

I cannot overstate the reality that to cut EPA funding will hurt our business. It is the existence of current EPA regulatory guidance, such as that which now discourages the dumping of at least some e-waste in landfills that has helped our business to grow.

EPA regulations add economic value to our investment because we are a recognized, environmentally responsible company adhering to high standards and known to be well managed.

Our business customers have confidence in our ability to recycle e-waste responsibly. Of course, as I said earlier, much more can and should be done. Indeed, this point was made in a September 17, 2008 Government Accountability Office Report which said this "EPA could amend RIKRA regulations to cover exports of used electronics where risks exist to human health or the environment when reclaimed for reuse or recycling," an action that, if implemented, could bring U.S. export controls more in line with those of other industrialized countries.

The current limited and, in my view, inadequate approach by the EPA needs to be replaced with regulations that will level the playing field for responsible recyclers like my company. A failure by Congress to do so is a choice, from the perspective of my business, to favor a policy that curbs jobs growth, stifles business expansion, and tilts the playing field in a way that advantages low-road recyclers and costs American jobs. Thank you.

[The prepared statement of Ms. Neu follows:]

EPA Regulations Are Essential to My Business

Testimony

of

Wendy K. Neu

Executive Vice President

Hugo Neu Corporation and

Chairperson of WeRecycle! LLC

Before

The House of Representatives

Energy and Commerce Committee

Subcommittee on Environment and the Economy

February 15, 2011

My Name is Wendy K. Neu and I am an owner and Executive Vice President of Hugo Neu Corporation. Hugo Neu is a diversified company based in the United States, founded in 1945, that has owned and managed industrial and commercial business assets in excess of $500 million. Hugo Neu is focused on building, managing, and investing in recycling facilities, water technologies, and clean-tech businesses and commercial real estate. Depending on the assets we own and manage at any given time, we have employed between 250 and 1,100 workers and had export sales in excess of 2 billion dollars in a single year.

From my perspective as a mid-size business executive, with hundreds of jobs and literally hundreds of millions of dollars of investment at stake, I can state unequivocally that regulations promulgated, overseen, and enforced by the U.S. Environmental Protection Agency (EPA) have been and remain essential to the growth, diversification and sustainability of our recycling and clean tech operations.

Let me provide you with one specific example of how strong EPA regulations would allow Hugo Neu to more successfully compete globally. One of the industrial operations we own focuses on recycling of used and obsolete post-consumer and commercial electronic equipment which is commonly referred to as E-waste. Our company's name is "WeRecycle!" and is based in Mt. Vernon, New York. Like communities throughout our nation, Mt. Vernon, with a population of approximately 38,000 people, is desperate for livable wage jobs. The unemployment rate remains above 9% and the Median Household Income is about $33,000. Almost one-fifth of Mt. Vernon's individuals live below the poverty line (18%), while fully 15% of all families in the town live below the official poverty line as well.

Hugo Neu and other investors in WeRecycle! LLC have invested nearly $20 million into the development of WeRecycle! in Mt. Vernon and Meridan, CT, and we currently employ approximately 85 people. We pay a starting salary of $13.25 per hour and provide full medical health coverage, a pension plan, and incentive compensation. Jobs range from highly skilled management positions to less skilled work.

The employees who work at WeRecycle! are focused on repairing or otherwise recycling E-waste. The technology we have developed allows us to recover high value clean streams of commodities. These commodities are then sold to the highest and best industrial consumers either domestically or exported to industrial consumers around the world. Unfortunately, inadequate regulation by EPA is limiting the growth of our environmentally responsible business. What I am saying is we need more EPA regulation to make our business grow. These needed regulations will protect the jobs, health, and safety not only of Americans, but the health of some of the world's most desperately poor people who are now "recycling" electronic wastes under what amounts to medieval conditions.

Right now, jobs that could be developed at e-waste recycling businesses are being exported to China, Southeast Asia and countries in Africa because the EPA does not effectively limit the export of hazardous electronic wastes by unscrupulous collectors in the United States. Perhaps as much as 80% of all E-wastes collected for recycling in the United States winds up being exported to the developing world. Every single country in the OECD other than the United States limits the export of E-wastes, wisely preserving jobs in their countries and limiting the spread of

toxic waste. Our EPA needs to be encouraged to do so as well and it needs the additional funds and support from this Committee and Congress more generally to do its job. Cutting funds for the EPA to do this work will stymie jobs production in our industry. To produce more jobs, we need tougher regulations from EPA limiting the export of E-waste. As a lifelong member of the business community I can state unequivocally that cutting EPA funding to do its work will hurt our businesses and our economy more generally. In fact, it is the existence of current EPA regulatory guidance that now discourages the dumping of E-waste in landfills and combustors that has helped out business to prosper. But much more can and should be done.

According to the Government Accounting Office, EPA's current efforts to facilitate the environmentally sound management of used and obsolete electronics are very limited.

This limited and inadequate approach by EPA needs to be replaced with regulations that will level the playing field for responsible recyclers like my company. EPA must more effectively regulate the export of hazardous E-waste.

Our increased reliance on personal technology -- laptops, cell phones, PDAs, computer monitors, printers -- has resulted in vast quantities of toxic garbage in landfills that could have been reused or recycled. Nearly 2.6 million tons of E-waste ended up in landfills in 2007, and only about 408,000 tons were recycled. If Americans recycled the more than 100 million cell phones that are no longer used, the amount of energy saved would be enough to power approximately 24,000

U.S. households for one year.[1] And an untold number of new jobs would be created; many of them at the company that I help manage.

Some of the materials in personal electronics, such as lead, mercury and cadmium, are hazardous and can release dangerous toxins into our air and water when burned or deposited in landfills improperly. And throwing away metal components, like the copper, gold, silver, palladium and rare earths in cell phones and other electronics, leads to needless mining for new metals.

To quote from the Government Accounting Office:

"Low recycling rates for used televisions, computers, and other electronics result in the loss of valuable resources, and electronic waste exports risk harming human health and the environment in countries that lack safe recycling and disposal capacity."[2]

I know from firsthand experience and many discussions with colleagues that there is growing recognition in the business community about the urgency of the many economic challenges facing the U.S. These include increasing proliferation of dangerous wastes, and the destruction of ecologically essential landscapes. And n the economic front, they include volatile energy and commodity prices as well as continued high unemployment. These challenges are multifaceted and require new approaches that would transform existing practices from those that are resource intensive, polluting, and produce few jobs to those that minimize pollution and its liabilities, and creating significant job opportunities.

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[1] http://www.epa.gov/epawaste/conserve/materials/ecycling/faq.htm#benefits

[2] Electronic Waste: Considerations for Promoting Environmentally Sound Reuse and Recycling," GAO-10-626, at P. 2

The current solid waste management system in the U.S. presents an excellent opportunity to encourage such a shift and the US EPA is in a perfect position to help us do so. In so doing, the Agency also holds the potential for creating large numbers of new jobs throughout the U.S.

Mr. SHIMKUS. Thank you. Now, I would like to recognize the Honorable Mr. Ryan from—the attorney from the county in Texas, and you are recognized for 5 minutes.

STATEMENT OF VINCE RYAN

Mr. RYAN. Thank you very much.

Mr. SHIMKUS. Inspect your microphone for me. There is a button at the bottom of it.

Mr. RYAN. Now it is even greener. Well, that is very appropriate, isn't it? Goes from a very light green to a green green. And may I say again thank you very much for allowing me to appear today and talk about a success story working with the EPA.

I am Vince Ryan, the Harris County attorney. Harris County, Texas is the third most populous county in the U.S. and home to the Nation's largest petrochemical complex and the port of Houston, which is ranked first in the U.S. in foreign, water-borne tonnage. With a strong industrial base, Harris County has fared better than some of the region of the U.S. in these economic hard times. With property taxes declining, which is the basic revenue source for local governments in Texas. Our local government of Harris County also faces a significant budgetary shortfall, yet we understand that providing healthy communities in which our residents can work and strive towards a better quality of life with cleaner air and water quality remain a high priority.

Let me add, I have been county attorney since January 1 of 2009, but before that, I was a Houston City council member. Before that, I was an assistant county attorney, actually the first assistant in that office. So my experience spans almost 30 years dealing with these issues in Harris County and for Harris County. I am here today in my capacity as the elected county attorney, but also representing Harris County government as spoken through the commissioner's court, which is the governing body generally of Harris County government.

And we are sincerely grateful for the work the EPA and EPA region six are doing to end the severe contamination of Galveston Bay, San Sell Bay, and waterways leading to both by the San Jacinto dioxin waste pits. And we urge the EPA, with congressional support, to continue using appropriate and forceful measures where necessary to achieve effective solutions for this site and quite frankly similar sites throughout not just Texas, but the United States. And we urge this committee and Congress to support these efforts.

A little bit of history. Congressmember Green and congressmember Ted Poe who I have known since he was an assistant district attorney and when he was a district judge in Harris County. Both asked the EPA to look into this matter and take it under consideration. On March 19, 2008, the San Jacinto River waste pits Superfund site was listed on the national priorities list. The site with waste ponds and surface impoundments built in the 1960s for the disposal of pulp and paper mill waste is located in a marsh partially submerged on the western bank of the San Jacinto River in Harris County, Texas immediately north of Interstate Highway 10 and a bridge over the San Jacinto River.

High dioxin concentrations have been documented at the site. Sediment water and fish and crab tissue samples collected in the surrounding areas have also been found to have highly elevated levels of dioxin. According to the EPA and our own verification, exposures to dioxin can cause a number of adverse health effects in humans, including cancer, skin disorders, severe reproductive and developmental problems, and damage to the immune and hormonal systems.

May I add this bay area is much like the Chesapeake Bay here that each and every member and their staffs are familiar with. It is surrounded by populated areas, and the day that I first visited after taking office this site, Terry O'Rourke, my first assistant, who is sitting back of me, and I were with some other people. They were working people on a day off with their families fishing while the kids were swimming within feet of the emanating dioxins from this site that had been used for years as a dumping ground in public waters for these types of waste within minutes, I might add, even though there were signs saying don't swim, signs saying don't fish, people were doing it there.

The EPA identified two responsible parties: International Paper Company and McGuiness Industrial Maintenance Corporation, a subsidiary of Waste Management. Now, this other side of the story we have heard quite a bit today this afternoon. These are two major corporate citizens with significant resources, and I am sure every member and staff member here, I was—quite frankly, when I first got involved with this specific issue, we looked at the EPA and saw this snakelike structure of process to get to clean up a site that for years had been known by the public and these two corporate responsible parties of polluting and poisoning people throughout that area.

I am a native Houstonian, grew up in the area. I have been with people fishing all through this area. I never knew of it until in 2009, I had taken office, and we were approached with this.

Harris County government has also become very involved. We, of course, in Texas have a very divided government at the county level, much like the federal level with different elected employment officials. But first we all have come together to say we have got to help the EPA as they try to solve this problem as quickly as possible.

With unique abilities, Harris County has really been active in environmental issues since about 1953 and have accelerated over the time. Again understanding that the industry, the petrochemical industry is a vital part of our economic centrality to really the economy of the United States and to a great extent the world based upon the economies that we have.

Luckily, under even the Superfund's law and working with the EPA, soon there was a critical component which required work to begin. This again EPA working with these corporate responsible parties and to be completed within a short timeframe. Here the actual agreed order of consent was signed on May 2010, and the design choice was outlined.

Mr. SHIMKUS. You are already a minute and a half over time. So you can wrap it up.

Mr. RYAN. Let me just say things are moving, but they are moving more slowly than we would like. The EPA has been very aggressive on this, and we log them and urge your support on areas, especially where clear definition of responsibility is apparent.

[The prepared statement of Mr. Ryan follows:]

TESTIMONY OF HARRIS COUNTY ATTORNEY, VINCE RYAN
HARRIS COUNTY, TEXAS

BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE'S SUBCOMMITTEE ON ENVIRONMENT AND ECONOMY
FEBRUARY 15, 2011

My name is Vince Ryan. I am the elected County Attorney for Harris County, Texas, the third most populous county in the U.S. and home to the nation's largest petrochemical complex and Port of Houston Authority that is ranked first in the U.S. in foreign waterborne tonnage. With a strong industrial base, Harris County has fared better than some other regions of the U.S. in these economic hard times and with property taxes declining, our local government also faces a significant budgetary shortfall. Yet, we understand that providing healthy communities in which our residents can work and strive towards a better quality of life with cleaner air and water quality remain a high priority. I would like to provide you today with a case study where we are working toward this goal in a collaborative and effective partnership with the U.S. Environmental Protection Agency (EPA) and the responsible parties in the much-needed cleanup of the San Jacinto River Dioxin Waste Pits Superfund Site.

Facts. In March, 2007, Congressmen Gene Green (D-Texas) and Ted Poe (R-Texas) asked the EPA to designate the waste pits a Superfund site, and in July of that year, the State of Texas added its name to the request. On March 19, 2008, the San Jacinto River Waste Pits Superfund Site (Site) was listed on the National Priorities List. The Site, with waste ponds and surface impoundments built in the 1960s for the disposal of pulp and paper mill waste, is located in a marsh partially submerged on the western bank of the San Jacinto River in Harris County, Texas, immediately north of the Interstate Highway 10 (I-10) bridge over the San Jacinto River. The Site is located in a highly urbanized area with large number of residents who recreate in an area with abundant waterways that connect to the ecologically diverse Galveston Bay. High dioxin concentrations have been documented at the Site; sediment, water, and fish and crab tissue samples collected in the surrounding areas have also been found to have unsafe levels of dioxins. There are also a number of fish advisories in place in these waterways by the State of Texas to limit consumption of dioxin and PCB-contaminated fish which include all species of catfish and spotted seatrout, and blue crab. Why do we care about exposures from dioxin? Dioxins are

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extremely toxic. Exposures to dioxins can cause a number of severely adverse health effects in humans, including cancer, reproductive disorders and birth defects, skin lesions, and irreparable damage to the immune and hormonal systems.

A Two-Step Clean-Up Process. The EPA has identified two responsible parties: International Paper Company and McGinnes Industrial Maintenance Corporation, and the project is industry-funded. Under Superfund requirements, the EPA is requiring the two responsible companies to conduct a long-term remedial investigation and feasibility study of the Site to understand the nature and extent of the contamination. With cooperation and funding by these companies, work is underway but given the nature of the project, actual steps to determine remediation solutions are a long way in the future. Therefore, to contain the ongoing discharge of dioxin into the waterways, EPA is also requiring the companies to take short-term action (Time Removal Critical Action – TCRA). The short-term containment action which based on the alternatives that the companies provided and as approved by the EPA includes placing a temporary physical protective barrier over the waste site that can last for 7-10 years.

Harris County and Coordination with EPA. Now, where does Harris County fit in? Harris County has been actively involved in environmental protection since 1953 with the creation of Harris County Stream and Air Pollution Authority. Today, Harris County continues in pursuing a robust permitting and enforcement program. Based on this expertise, Harris County Attorney's Office identified the San Jacinto River Waste Pits Superfund Site as a site that needed immediate attention because the continuing discharge of dioxin into wide-reaching waterways has enormous adverse impacts on the environmental and public health. Harris County met with the responsible parties as well as EPA and urged a greater partnership role than is envisioned in these superfund cases for local entities. Traditionally, Superfund cleanups include coordinating with Natural Resource Trustees only (for example, certain named state and federal agencies); and the opportunity for public participation is limited to official public comment periods or public meetings.

With its unique legal, technical, local expertise and knowledge, Harris County requested a seat at the table from the beginning. EPA Region 6 listened and has entered into a memorandum of understanding with Harris County to collaborate on the cleanup of the Site. The coordination and collaboration, including participating in technical meetings, and reviewing and comments on

technical work documents, has led to a harmonious partnership in furtherance of a more effective Superfund process, including a plan to curb dioxin in the short-term. This level of transparency and coordination with a local government is to be applauded.

In another first-of-its-kind, Harris County in coordination with EPA has created a Community Awareness Committee with responsible parties, local stakeholders, and pertinent state agencies that meets on a monthly basis (until recently, every two weeks for almost a year) to collaborate with local partners and to develop initiatives to raise community awareness about the Site and dangers of dioxin pollution in the waterways. Working with the responsible companies and EPA, this committee has been instrumental in developing, for example, pictorial signs for the public that are simple and effective; and a fencing plan that takes into account local knowledge of those using the area around the Site for recreational purposes. The responsible companies have also volunteered and gone beyond what is required by funding research to identify the affected populations, and based on that research, are developing a community relations plan that ensures that the affected populations receive and understand information concerning the Site and the associated hazards.

"World Café" and Community Engagement. Last year, EPA also rolled out its Community Engagement Initiatives (CEI) which have dove-tailed with Harris County's desire for more public input and participation. The CEI is for communities to more effectively participate and influence government decisions related to land cleanup, emergency preparedness and response, and the management of hazardous substances and waste. As part of this CEI, the EPA with state and local partners, organized a "World Cafe" meeting on July 22, 2010 that focused listening actively to the community about the Site. Serving as national model, the meeting was arranged with small round tables and each hosted by a facilitator. After some quick presentations on the Site, each table facilitator sought input from the members of the public on basic issues such as "Where else do you think we should place fish warning signs" to "Are there other tools EPA could use to enhance communication with stakeholders in the San Jacinto community?" This meeting was very successful in fostering open and meaningful discussion of key issues from the community and drove future community awareness initiatives.

Conclusion. Working with EPA, I am impressed by the dedication and hard work of the staff and their ability to focus on the mission for regulatory compliance while remaining transparent,

flexible, and able to change course where appropriate. I urge Congress in supporting the EPA Superfund Program as it undertakes such important and much-needed cleanup of the nation's most polluted sites while through its regulatory mechanisms, works toward protecting the lives of Americans against future contamination. If all goes well, by the end of this year, we will be able to say that together we contained the deadly dioxin that had been flowing into our rivers and our bay for decades. This will be a successful story that deserves adulation and imitation.

Mr. SHIMKUS. I thank you. I now will recognize myself for 5 minutes for questions. I am going to go pretty quick because there is a lot I want to put on the table. So again thank you all for coming.

And first of all, I want to put on the record we are not here debating to eliminate the EPA or stop the work when there is toxicity and there is damage to human health. That obviously is not the proposal. The whole purpose of the hearing is: can we be smart and make sure the rules are important enough in protecting human health while we are protecting jobs? And this new Congress has a focus on job creation.

So with that, I don't have a piece of Illinois bituminous coal. I do have one in my office. That didn't get brought down. Mr. Hopkins, why is that important that you burn Illinois bituminous coal?

Mr. HOPKINS. Well, I am from an area——

Mr. SHIMKUS. Quickly now. Quickly.

Mr. HOPKINS [continuing]. That mines Illinois coal, so we serve our members by using their product to create electricity for them.

Mr. SHIMKUS. The coal found in Illinois is what type of coal?

Mr. HOPKINS. It is Illinois bituminous coal.

Mr. SHIMKUS. So a co-op is different, and really co-ops should be, my friends on the other side, these are agencies that you ought to love because you are not-for-profit. Is that correct?

Mr. HOPKINS. That is correct.

Mr. SHIMKUS. Your board members are highly salaried. Is that right?

Mr. HOPKINS. Our board members are poorly paid.

Mr. SHIMKUS. Poorly paid, volunteers. Just smally compensated. And the owners of the co-op are?

Mr. HOPKINS. The owners of the cooperatives are their members that they serve.

Mr. SHIMKUS. So every time we do something that may affect a regulatory burden, as you said in your testimony, say there is a new capital expansion, you cannot carry a large capital fund for future expansions. You have to go where?

Mr. HOPKINS. We have to go out and look for a loan for the money, and we go to our rate payers, our member owners to pay that bill for that loan.

Mr. SHIMKUS. OK, and I will just hold this up. The same picture. They have seen that at least 6 years. These are Illinois coal miners.

Mr. HOPKINS. Illinois coal miners.

Mr. SHIMKUS. Mining bituminous coal, and because of many companies didn't do—you did it out of complying with the needs to create electricity for your members, but also protect coal miners' jobs. But you did the capital expense to a scrubber, correct?

Mr. HOPKINS. That is correct. We installed a scrubber in 1978.

Mr. SHIMKUS. And the companies that did not do scrubbers, guess what they did to these miners. They fired them. OK, that is the effect of regulations, and we want to applaud you for doing the right thing. Let me—I want to hold us this. You know what this is, Mr. Hopkins? Can you see this?

Mr. HOPKINS. Looks like a clean slate or a blank piece of paper.

Mr. SHIMKUS. No, actually it is——

Mr. HOPKINS. Wall board. I am sorry.

Mr. SHIMKUS. And what is in the middle?

Mr. HOPKINS. That would be calcium sulfate or gypsum.

Mr. SHIMKUS. And where do we get gypsum from?

Mr. HOPKINS. You need to get it naturally from the ground, or you can get it from a FGD on a coal-fired power plant, which we produce 95 percent pure gypsum.

Mr. SHIMKUS. Would this be part of the coal ash debate?

Mr. HOPKINS. It is.

Mr. SHIMKUS. And this is found in everybody's home?

Mr. HOPKINS. Yes, sir.

Mr. SHIMKUS. The particle boards for most people or the wall boards for most people that have been accused of being toxic came from where?

Mr. HOPKINS. Most of them came from overseas.

Mr. SHIMKUS. Came from China. So in this debate, if the EPA is successful in regulating coal ash as a toxic, will you be able to sell gypsum to the person who produces the wall board?

Mr. HOPKINS. We are concerned that the homeowner would not be interested in buying any product that would remotely be related to hazardous waste.

Mr. SHIMKUS. And so then the homebuilders would have to get a different product? OK, my time is brief. I want to go to Mr. Baird. Duplicate regulation, the administration is trying to send signals that they want to be smart on regulatory so they don't duplicate. Aren't you in a Catch-22 on duplication of regulations?

Mr. BAIRD. Yes, sir.

Mr. SHIMKUS. The Forest Service and EPA?

Mr. BAIRD. Yes, sir.

Mr. SHIMKUS. How many jobs would this cobalt mine create?

Mr. BAIRD. It will create directly 185 jobs.

Mr. SHIMKUS. What is the employment rate of the surrounding area?

Mr. BAIRD. Well, the two counties that would benefit have just over 12 percent for Lemhi and just over 14 percent for Shoshone.

Mr. SHIMKUS. What would be the tax benefit to the area, just the local property tax?

Mr. BAIRD. Annual? Well, it is not just the property tax, but the number for all taxes——

Mr. SHIMKUS. OK, the income tax and the employment.

Mr. BAIRD [continuing]. Is $8.8 million per year.

Mr. SHIMKUS. And what is cobalt used for?

Mr. BAIRD. It is used for many high technology purposes, but the biggest single one is for jet engines.

Mr. SHIMKUS. Is it also used in what people would define as green manufacturing?

Mr. BAIRD. It is critical to the Toyota Prius battery. It is also critical for wind power.

Mr. SHIMKUS. Where do we get cobalt right now?

Mr. BAIRD. Right now, the bulk of the super alloy cobalt, because there are two different types, comes from one plant in Norway.

Mr. SHIMKUS. Overseas. We import the product. And I am going to take the prerogative of the chair just to make the point for Ms. Kinter because you are a printer.

Ms. KINTER. Yes.

Mr. SHIMKUS. You use ink.

Ms. KINTER. Yes.

Mr. SHIMKUS. If you take that ink to a recycler, you fall under TASKA and have to file additional paperwork. Is that correct?

Ms. KINTER. Correct, sir.

Mr. SHIMKUS. Which is pretty burdensome for a small business.

Ms. KINTER. Yes, sir.

Mr. SHIMKUS. OK, I wish I had more time. I don't. I will yield 5 minutes to the ranking member from Texas.

Mr. GREEN. Thank you, Mr. Chairman. I am going to try to move quickly too. Mr. Hopkins, I have been a co-op member, and it started under FDR to bring power to very rural areas, and that is where so many in Texas get our power because, you know, a for-profit company can't make any money out there because it is so large, but I appreciate it.

It sounds like you give a great example. EPA could have regulated, and I assume, in response to what happened in Tennessee with the coal ash, this is EPA's solution. But they could have gone under Title D instead of Title C.

Mr. HOPKINS. That is correct, sir. The option for either is in their regulations.

Mr. GREEN. Obviously you have a problem, and I would sit down with your members of Congress, because I know that is what I would do with my industry. And like I said, I believe in co-ops. They are really a good program. I sold the property, so I am not a member anymore. But it was really a good system where you could get it.

Mr. Baird, again you have almost the same situation. The Forest Service leased you the land, and they gave you your insurance requirements, or the—and now EPA is adding to your requirements.

Mr. BAIRD. That is essentially correct, actually by direct duplication. They are going to be causing, or at least they are looking at right now—this is not out yet, but they are looking at putting together hard rock mine financial assurances that will apply to all mines, even if you are already regulated and bonded with the Forest Service or the BLM.

Mr. GREEN. Well, it sounds like this Congress and maybe previous Congress should have said, OK, we have all these federal agencies. You ought to just speak with one voice, and you ought to get your act together before you put it on the private sector, and that makes sense. That doesn't mean we don't need regulations because I also understand what our country, because we know rare earth and precious metals, we need to mine them in our own country.

Mr. BAIRD. Yes, sir.

Mr. GREEN. We shouldn't—Norway is a great place to visit, and I would rather import something from Norway than China, but so much of the other rare earth we get from China, and we need to develop that. So I think there is a solution to that one.

Ms. Minter—I have to admit—I am sorry, Kinter.

Ms. KINTER. That is OK.

Mr. GREEN. In an earlier life, I managed a printing company. We printed a daily newspaper, and I agree that under OSHA because our problem was is that we finished cleaning our plates we would recycle the solvent. And it ought to be the same regulation under

EPA that you would do for OSHA. It would seem like it would because that solvent though is a hazardous chemical, and in my experience from literally the '60s through 1990, when I left there, we had problems with some of the printers actually dumping it out in the street or in the—and there was a way that you needed to track it, whether it be through OSHA or through EPA.

Ms. KINTER. Correct, and I will say, sir, that the U.S. EPA's hazardous waste regulations do a marvelous job of requiring our companies to manifest our hazardous waste as it goes out the door. So the waste is definitely being tracked, but through our efforts when we are trying to encourage the printers to use either low-level hazardous waste or even non-hazardous products to reduce worker exposure. These are the products that are going to get caught in the Catch-22 and look toward duplicative reporting because these are the chemicals that are being sent offsite for recycling or even disposed of as liquid nonhazardous waste correctly that are now going to be considered new chemicals and then subject to even more reporting under——

Mr. GREEN. And that is where I agree with you. Once it is a byproduct of your production.

Ms. KINTER. Correct.

Mr. GREEN. And once you send it to an approved recycler, that should take care of it.

Ms. KINTER. Correct.

Mr. GREEN. And so I think there are things that we could probably do on at least the three cases that have come up that I think is reasonable, and that is why I am glad you are here, because that is our job is to make the Federal Government work. And granted it is a tough job every day, and it is 24/7, but I agree with you.

Ms. KINTER. Thank you.

Mr. GREEN. Let me go to Ms. Neu. You have been—as you know, I have been working on legislation now a number of years to set federal regulations for electronic waste. How is your business affected by the lack of a federal e-waste regulation? Because I assume you work in a number of other states.

Ms. NEU. We actually work in New York and Connecticut at the moment but are planning to expand hopefully into the middle region of the country. The fact that much, probably close to 80 percent is what is estimated of e-waste is exported to developing countries. So in that regard, we are competing with brokers, dealers, who are literally just filling a container up with electronic waste, no processing, no segregation of materials, and shipping it overseas for recycling. So that is one of our challenges.

Mr. GREEN. I only have a few seconds left.

Ms. NEU. Sure.

Mr. GREEN. And I think you made the case that we need some type of national standard instead of state-by-state——

Ms. NEU. Exactly.

Mr. GREEN [continuing]. Both for industry but also to make the recycling efficient.

Ms. NEU. Right.

Mr. GREEN. Mr. Ryan, I hate to call you Mr. Ryan. We have known each other for so many years. Vince, one, I appreciate what you have done, and I was frustrated, and I think Ted Poe and I

were both frustrated originally with EPA. But now we are seeing some progress, and I don't think it would have happened without an elected official and a local community providing a lot of the information that you were that actually helped our regional EPA office.

So there is a reason to have EPA, and sometimes we—it actually will benefit because coming from a very industrial area, every industry along the channel is getting blamed for the high dioxin level in the water, but we couldn't find it until we found out that, 40 or 50 years ago, that was dumped there.

And we ended up—and so all my other plants were really happy because they said we were getting a black eye because of what happened before we had an EPA, and so there is good reason to have reasonable environmental oversight because it can help industry at the same time.

Mr. RYAN. But I would agree with you that now we have got supposed first in the Nation a community awareness program going on where we are educating both the industry and the public about this particular site, but also the greater issues involved. How many other of these sites are—they were known to the industry, I might add. It was known it was a pollution site but not to the extent that we discovered.

Mr. SHIMKUS. The gentleman's time is up. And as Ted Poe would say, and that is just the way it is. Well, in this case, Congressman Poe would want it changed. Ms. Neu, can you give the Committee a credible universally accepted source? You keep quoting the 80 percent of export? And if you could—not right now, but if you would follow up with the committee so we can figure out——

Ms. NEU. Absolutely.

Mr. SHIMKUS [continuing]. And do analysis on that. Now, I would like to recognize Mr. Gardner for 5 minutes from Colorado.

Mr. GARDNER. Thank you, Mr. Chairman. My district in Colorado represents an area that is energy rich, a lot of agriculture opportunities, clean energy opportunities. We have it all. We have wind power. We have oil and gas development. We have solar companies doing great things.

It is interesting to see, over the past several years, farmers on the Eastern Plains who used to have people that would come by and collect their used oil and pay them to collect their used oil so that they could recycle it. And now the farmer themselves are paying to have somebody, the same person, now the farmer is paying to have them collect it. So they used to receive money for their spent oil. Now they are paying to have somebody pick up their spent oil, and in a lot of areas, it is because of increasing regulations.

But as you have heard from so many people on the committee, regulations aren't a bad thing if they are done right and done with a common sense point of view. And so hearing from many of you talk today, a quick question for Ms. Kinter. Your testimony, you talk a lot about—you talk about reporting requirements in your testimony, and your members are already required to file reports for chemicals they have onsite under the Toxic Release Inventory. Are they—they are not—are they opposed to the reporting requirements?

Ms. KINTER. No, they are not opposed to reporting requirements. What we are opposed to is the duplication of the reporting requirements because even under the TRI, they ask us to report for recycling.

Mr. GARDNER. So, the information that concerns byproducts which is required to report—your members are required to report, is that available under other reporting requirements under federal law?

Ms. KINTER. It is already currently available.

Mr. GARDNER. And are you concerned that the proposed IUR's compliance timeline—are you concerned about that as it relates to your members?

Ms. KINTER. Certainly. We are looking at a timeline where the rule will be going final in May, and the first reporting period goes into effect in June of this year for actual information from last year. And if you have a group of manufacturers that has no idea that they had to even start collecting data from last year in order to report for this year, you can see that 30 days to put this information in place, to really start doing your inventory, and then even to look at reporting it over their Internet option, which is the only way that they are going to accept reports. EPA will only accept reports.

Mr. GARDNER. How much time are your members spending on reporting of this kind?

Ms. KINTER. I would have to hazard a guess that, based on all reporting, and I am lumping all the regulatory reporting together because they really don't segregate by specific statute, you are looking at anywhere from 8 hours a week for a small business, and that is including OSHA, and that is TRI reporting.

And I should emphasize it is not just the reporting, but it is the record keeping because a lot of these records are already kept, or—because they also have to do record keeping for their air, for their water, for their waste, for their recycling. It is all very, as we know, just media specific. And so it is very difficult for them to understand why now I am going to tell them that their recycling is no longer recycling.

It is really a new chemical, and under that, you have to gather all this other information. And by the way, if it is a new chemical, we may have to consider do you need to develop a material safety data sheet to send it offsite because you are considered now a chemical in commerce. And this is layer upon layer of regulatory burden to a small business whose real goal is to produce a T-shirt to put out into the market at the end of the day.

Mr. GARDNER. Ms. Neu, are you familiar with some of the e-recycling programs the various States have?

Ms. NEU. The legislation that has been passed?

Mr. GARDNER. Right.

Ms. NEU. Yes, somewhat.

Mr. GARDNER. Is there a State in your opinion that is leading the rest?

Ms. NEU. I think it is hard to say at this point in time because the legislation is relatively new. We just passed a law in New York which is not being implemented until June. So we really haven't seen all the results come in, but I think there is some very good

legislation out there in many States that will increase the volume of e-waste.

Mr. GARDNER. Thank you. Mr. Chairman, I yield back my time.

Mr. SHIMKUS. Gentleman yields back his time. Chair now recognizes the gentleman from North Carolina, Mr. Butterfield.

Mr. BUTTERFIELD. Thank you, Mr. Chairman. If the chair would agree, I would like to yield to the gentleman from New Jersey in the interest of his schedule.

Mr. SHIMKUS. Without objection, I would be happy to recognize the former chairman of the House subcommittee, which I served so honorably under as ranking member.

Mr. PALLONE. And your friend.

Mr. SHIMKUS. And my friend.

Mr. PALLONE. Well, thank you, and I want to thank my colleague from North Carolina for giving me the time and remind the chairman that he and I chaired the recycling caucus. Don't you still chair?

Mr. SHIMKUS. I still do, yes.

Mr. PALLONE. That is what I thought.

Mr. SHIMKUS. Do you?

Mr. PALLONE. Yes, I am the Democrat. You didn't know that?

Mr. SHIMKUS. We love caucuses here.

Mr. PALLONE. I am sorry. I just wanted to take an opportunity—first of all, I wanted to say hello to Wendy Neu, who is a long-time friend, and it was really great to have her here. I actually—I was actually in my office listening to your testimony while I was doing something else, so I did hear what you had to say, Wendy, even though I wasn't here. And I apologize.

But what I wanted to mention is that the purpose of this hearing today obviously is to, and I appreciate the chairman convening it because we are concentrating on the numerous benefits to the economy that stem from some of our environment regulation, and I think of the Superfund and the Brownfields Program.

I often say, Mr. Chairman, that Brownfields was the only legislation in the—and I don't say it in a bad way, but it was the only legislation under George Bush, the only environmental legislation or new authorized program that actually he was supportive of. And I think—I know I was the Democratic sponsor, and one of your predecessors was the Republican sponsors of the bill. So it was very bipartisan.

And Wendy, Ms.— I am going to call her Wendy, has been involved over the years in the Brownfields Program as well as what you testified about today. So I just wanted to ask you, you know, about your company, which I am familiar with, has redeveloped several Brownfield sites in New Jersey as well as other States. Can you just tell us the impact of that on the economy, jobs, what it meant in terms of reuse of those properties? Because I am very proud of Brownfields, and I just wanted you to comment on it if you would.

Ms. NEU. Yes, there have been many opportunities as a result of the Brownfields legislation, and because we are a company that generally exports commodities, we are often located in industrial areas and waterfront areas, which are very much Brownfield sites, particularly in New Jersey and New York.

So it has been very helpful to us to have these sites to be able to position ourselves in strategic locations, which otherwise would not be available land for development. So yes, that has been—but I also want to thank both of you for being such good friends to the recycling community. You have been working with us for a very long time, and we really appreciate that.

Mr. PALLONE. Well, thank you. You know, it was Paul Gilmore.

Ms. NEU. Yes.

Mr. PALLONE. It was Paul Gilmore and I that sponsored the federal Brownfields going back to the early '90s, I think, and President Bush had a signing ceremony in Philadelphia that he invited us to, and I couldn't go. I remember specifically. I wasn't even able to go.

But if I could just mention, again it has always been very bipartisan. It has always been something that we have been able to get support from. I think at the time when we started the authorization, our former governor, Republican governor Christie Whitman was the governor and then was the EPA administrator at the time as well.

And I have just found in my district, Mr. Chairman, in particular, but I know it is all over the State and the country that what happens is, these old industrial sites are basically redeveloped, and then they become new industries or new commercial properties that not only are increased ratables and tax dollars into the communities, but create a lot of jobs in every case.

And a lot of what has been done has been assessment also, and oftentimes they attract private developers that come in and also help with the cleanup, so I just wanted to mention that as one of the things that I know that you have been involved with too.

You were talking about the Hugo Neu site, the scrap yard, right, before?

Ms. NEU. Yes, recycling facility in Jersey City, yes.

Mr. PALLONE. The recycling facility, all right. Thank you. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from Pennsylvania, Mr. Pitts.

Mr. PITTS. Thank you, Mr. Chairman. Mr. Hopkins, in your testimony, you state that you believe your comments also reflect the sentiments of many electric cooperatives. If other small business cooperatives face similar threats to closing their doors, what would taking that many coal-fired generating units offline at once mean for the reliability of electric service throughout the Nation?

Mr. HOPKINS. Well, certainly I am not an expert on the grid as a whole across the Nation, but taking that many coal-fired utilities off the grid could lead to shortages and certainly would lead to increased price of electricity. In particular, for those co-op coal-fired utilities, they would be forced to buy power off the grid at these higher prices.

Mr. PITTS. Now, if you were able to stay in operation, your estimates say it would cost members an additional $11 million or 25 percent of your annual fuel budget. With such a significant increase to your operating budget, how much of that cost would be passed on to the users in the form of rate increases?

Mr. HOPKINS. All of that money would be passed along to our rate payers and our members.

Mr. PITTS. Mr. Baird, you quoted the president's recent executive order in which he said he is firmly committed to eliminating excessive and unjustified burdens on small businesses and to ensure that regulations are designed with careful consideration of their effects.

In your view, is the regulation that you testified about today an excessive and unjustified burden?

Mr. BAIRD. Yes, sir, but to be fair to EPA, it is a program that is developing. It is not an actual regulation yet, but, yes, it would certainly be excessive and burdensome.

Mr. PITTS. Do you think it was designed with careful consideration as to its effects on you?

Mr. BAIRD. I do not, sir.

Mr. PITTS. Are you hopeful that this administration will cancel it?

Mr. BAIRD. I am. I am actually very hopeful that once there is light placed on this and people understand this is truly just a duplication of something that is already addressed on federal lands, by the BLM or the Forest Service, I think we will get this taken care of but the earlier the better.

Mr. PITTS. Mr. Hopkins, what is your opinion on that? Are you hopeful that——

Mr. HOPKINS. That doesn't apply to our business.

Mr. PITTS. OK.

Mr. HOPKINS. Federal lands.

Mr. PITTS. What about Ms. Kinter?

Ms. KINTER. I am sorry. Could you repeat the question again?

Mr. PITTS. Yes, are you hopeful that the administration, this administration, will cancel it?

Ms. KINTER. Yes, very hopeful, sir.

Mr. PITTS. OK, Ms. Kinter, you believe that this new regulatory burden on your small main street printing business will not increase environmental protection. Then why, in your opinion, is EPA persisting with it?

Ms. KINTER. We really don't know. That is a very good question. We were very surprised to learn that our recycling products that our members are sending out the door for legitimate recycling are now considered chemical feedstock for new chemicals. And so we are not really quite sure what their rationale is behind the adoption of this interpretation of byproduct.

Mr. PITTS. Ms. Neu, you testified that cutting EPA funding to do its work will hurt our businesses and our economy more generally is the quote. Do you believe it is government's job more broadly to create economic winners and losers?

Ms. NEU. Well, I think by virtue of any action, we are creating winners and losers, and I fear that any significant cutbacks in EPA will result in very little or no enforcement, which is something that really is of great concern to us. That is what levels the playing field. It is not necessarily new rules, new regulations. It is sometimes just a matter of enforcing existing rules and regulations across the board.

Mr. PITTS. Since your business model is based upon investment, does out-of-control spending by the Federal Government hurt your access to capital?

Ms. NEU. Well, I am not sure that I am in a position to answer that question, but I must say that I think that access to capital is a serious concern today for many businesses. And so I would have to agree with you on that.

Mr. PITTS. Thank you, Mr. Chairman.

Mr. SHIMKUS. The gentleman's time has expired. The chair now recognizes the gentleman from North Carolina, Mr. Butterfield, for 5 minutes.

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman, and thank all of the witnesses for your testimony today. Mr. Chairman, I have been looking forward to working with you. I have joined this committee voluntarily because I think we need a better conversation in this country about environmental policy. As we talk about deficit reduction and other great issues facing our country, we cannot lose sight on this important issue.

To protect the environment, we must have rules. There is no question about that. We must have not unreasonable rules, but we must have what I call common sense rules. History has clearly demonstrated that the American economy has thrived, has actually thrived under common sense rules that protect our environment.

Since the establishment of the Clean Air Act in 1970, GDP has grown by more than 200 percent. If anything, the major economic stumbles have been caused by unsustainable bubbles created by unchecked bad players and a lack of clear and enforceable boundaries, not by common sense rules that seek to preserve our air, water, and quality of life.

And so I support the president's environmental goals, and I support the Environmental Protection Agency. And I look forward to a good robust debate as we continue this process.

Let me address in the time that I have remaining very briefly to Mr. Baird. Mr. Baird, I am told by my staff that according to EPA, the hard rock mining industry has contaminated 3,400 miles of streams and 440,000 acres of land. Does that seem to be a true statement?

Mr. BAIRD. I honestly have no idea what those numbers are based on.

Mr. BUTTERFIELD. Well, the EPA, and I am depending on this data, it says that 3,400 miles of streams and 440,000 acres of land have been contaminated. Would you agree that contamination from hard rock mining should be prevented, or if it——

Mr. BAIRD. Yes, sir.

Mr. BUTTERFIELD [continuing]. Occurs, it needs to be cleaned up?

Mr. BAIRD. Yes, sir, absolutely, but most of what they are talking about there are historic practices that have not been used in many, many years.

Mr. BUTTERFIELD. I am also told that the Federal Government has spent $2.5 billion over the last 10 years cleaning up abandoned hard rock mines. Would you agree or disagree?

Mr. BAIRD. That is probably true. Again of historic operations using practices that are no longer used anymore and could not be done without permitting, without bonding, without all of the issues.

Mr. BUTTERFIELD. Well, $2.5 billion is a lot of money. Do you think it is appropriate for the taxpayers to be on the hook to clean up contamination caused by mining?

Mr. BAIRD. No, sir.

Mr. BUTTERFIELD. So you think it should be the responsibility of the effected industry to do the cleanup?

Mr. BAIRD. Of the PRP, of the people who caused it? Yes, sir, I do.

Mr. BUTTERFIELD. All right, Mr. Chairman, I yield back.

Mr. SHIMKUS. Gentleman yields back. The chair now recognizes the gentleman from New Hampshire, Mr. Bass, for 5 minutes.

Mr. BASS. Thank you, Mr. Chairman. I want to thank you and the ranking member for calling this very interesting panel, interesting in that we are not really being presented with conflicting stories here. There are solutions available to all three of the matters that are brought up by the three witnesses who testified as to problems that they have with respect to redundancy and regulation, overly burdensome regulation, and unnecessary regulation, I guess we would say in the case of the fly ash issue.

And I would hope that the subcommittee could move forward with some sort of action with the EPA to correct all three of these issues, and there may be a dozen or so more that exist that we ought to be looking into.

I also appreciate Mr. Ryan's testimony about the critical nature that EPA—critical role, rather, that EPA has played since its inception in the early '70s to protect human lives, the reduce the instances of environmentally caused illnesses, and to create, in many instances, a reasonable balance between unfettered industrial expansion and overregulation. But there are instances where it hasn't worked out, and we have seen three examples of that today.

So although I do not have any specific questions for any of you, I believe that the testimony is pretty clear that we don't need to double regulate hard rock mining on federal lands, that fly ash from coal plants is an important recyclable commodity, that there ought to be some reasonable review of recycling of materials that have already been properly qualified as certified, that we need some sort of a debate over a federal standard for e-waste, and that an area where there is a heavy industrial development, that there needs to be very careful monitoring.

And I guess I would suggest that this has been informative and interesting, but it needs to be followed up by some action on the part of this subcommittee to correct these problems that can be agreed to in a bipartisan manner, and we can get that legislation moving. And I want to commend the chairman again for having this subcommittee meeting because we should have another one next week or two weeks from now, bring in three more people that are having issues. And that is how we correct these problems before they are uncorrectable.

So with that, I will yield back to the chair.

Mr. SHIMKUS. The gentleman yields back his time, and just in response, I think the gentleman from New Hampshire raises a great issue. Again the intent of today's hearing was to address problems, and really if you are just having a hearing to identify good and bad on both sides, and then ways that you can address, in essence, du-

plication or maybe things that are designed or stated as hazardous that aren't hazardous and trying to get clarification.

I would encourage my colleagues on both sides of the aisle as they go throughout their districts and meet with constituencies to raise concerns, and we could very well continue on this as we try to craft legislation to address these concerns.

I would now like to recognize——

Mr. GREEN. If you would just yield.

Mr. SHIMKUS. I yield.

Mr. GREEN. And I agree. In fact, that is what we were talking here. Maybe our committee on these three cases, and frankly we do this kind of work in our offices all the time with our constituents. But I think it would be much better if it showed—sitting down with EPA and the various agencies, saying the Federal Government ought to speak with one voice, and don't give us two hoops to jump through when you can do one, particularly when we need the power, we need the cobalt. And obviously we believe in freedom of speech, we need printed material.

But I think that can then—I am really—the chairman and I will work with the members on both sides to see if we can do some problem solving.

Mr. SHIMKUS. And now I would like to yield to Mr. Harper from Mississippi for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman, and I appreciate everyone taking time to be here and shed some light on what has become a very difficult issue for us, and that is the balance of regulation and how to do this in a way that it still allows business to do its job. And I can't think of an industry or business in my district that believes that they are under-regulated, whether that is on the State or federal level.

We have a clean coal plant that is being built in east Mississippi in my district that will sequester the carbon and use that for tertiary recovery in wells. And so, we have some things that are going on that I think are very important to look at it.

And, Mr. Hopkins, I understand that in another life you were perhaps an environmental regulator at the State level. Is that correct?

Mr. HOPKINS. Yes, sir, that is correct. I was a field engineer for the Illinois EPA for 6 years, and I was the regional manager for the land division of Illinois, yes.

Mr. HARPER. Well, with your expertise in that and what you are doing now in your business, what is the solution to the coal ash? What do you do? And you are not saying for it to be unregulated. What is a common sense approach that will work?

Mr. HOPKINS. Well, sir, I think the congressman from North Carolina hit the nail on the head. What we need is reasonable regulations. We don't need to go overboard and cause products like coal ash to become a hazardous waste when they could be recycled beneficially.

Mr. HARPER. Ms. Kinter, I had a question. Why do you think that the EPA is reaching the conclusion that you are a chemical manufacturer subject to inventory update rule? How did they get there?

Ms. KINTER. I think when they look at the fact that we recycle chemicals, and then when you look at what happens with the chemicals similar to what we have heard with the coal ash where they are actually manufactured into new products, and which is the beneficial reuse where you want to encourage your industry to actually, rather than dispose of it as a hazardous waste, to look for ways to reuse that product.

Then they look at it as we are gaining a commercial benefit somehow from that, but in all my discussions with my members about, well, do you gain a commercial benefit from doing this? They say no, we have the pleasure of paying for them to take it off our hands, and it is made into whatever the recycling facility does with it. But we don't receive any monetary remuneration for recycling our chemicals. We actually pay someone else to take them offsite and to the recycling facility.

Mr. HARPER. So what should happen?

Ms. KINTER. I think what should happen basically is that they, U.S. EPA, withdraws its interpretation that product manufacturers who happen to recycle are subject to the TASKA IUR update reporting. It is as simple as that. I believe the information is captured by TRI as well as a lot of the other state reporting mechanisms.

Mr. HARPER. You know I would be curious to know your members' experience with involved reporting requirements like those under Europe's chemical registration and management law known as Reach. Has the economic burden forced them to consider closing or relocating? And what impact has that really had?

Ms. KINTER. That is an interesting question. I have started to look into that, and I can provide you more information once I have a fuller picture. But what we are seeing is that those chemical manufacturers over in Europe that are supplying what we could consider a specialty chemical are, in fact, having to cease production because of the costs associated with the Reach registration. It is a very interesting dilemma over there.

But I would be happy to provide you with more details as they become clearer to me.

Mr. HARPER. Thank you, Ms. Kinter. Question that I have on the hard rock mines because we get a lot of rare materials that are needed for many items from that. Is there a concern or risk that we are not going to have access to those in the future?

Mr. BAIRD. That is absolutely true. I forget who on the Committee brought up the rare earths is a critical matter followed only then by super alloy cobalt in terms of making sure that we have enough, and it is not in such limited supply that the price ends up being cost prohibitive for use in all the manufacturing products that we need.

Mr. HARPER. Yield back.

Mr. SHIMKUS. The gentleman yields back his time. Before I adjourn this hearing, I was struck by an article in "The Wall Street Journal" today. I have been following this recycled cooking oil from places like McDonald's that has been used. People use it and they drive cars with it. And they clean it up.

Well, the story at the end of the article, here is a guy quoting "if I go to Costco, I can buy a pallet of vegetable oil" note to Mr.

Sobovaro, one of Colorado greaser on the legal fight "explain to me why that it is considered a hazardous material if it is touches a chicken wing."

So, that is really the issue. Here you have a guy who is taking recycled oil to drive a vehicle, and it is just oil, it is just cooking oil. And if bought the same amount of oil at bulk, it is not a hazardous material, but if he takes it from a restaurant, and if he is using it from a restaurant, then it is not going into a landfill. I think that is part of the issue of jobs, common sense, and bringing back some semblance of, again, common sense, which maybe we will move on legislation based upon a lot of the hearing here.

We appreciate your time and your effort, thank you for that. And I will say the hearing is adjourned.

[Whereupon, at 4:26 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

March 17, 2011

Ms. Karen Harned
Executive Director
NFIB Small Business Legal Center
1201 F Street, NW, Suite 200
Washington, D.C. 20004

Dear Ms. Harned:

Thank you for appearing before the Subcommittee on Environment and the Economy on February 15, 2011, to testify at the hearing entitled "Environmental Regulation, the Economy, and Jobs."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please e-mail your responses, in Word or PDF Format, to Alex.Yergin@mail.house.gov by the close of business on Thursday, March 17, 2011.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Gene Green, Ranking Member,
Subcommittee on Environment and the Economy

Attachments

The Honorable John Shimkus

1. Are you aware of instances in which environmental regulations or regulatory actions go forward without benefit of Small Business Advocacy Review Panels? Please use examples that are in the purview of this Subcommittee: RCRA, CERCLA, TSCA, SDWA.

   There are many rules that would benefit from SBAR panels; however, it is important to keep in mind that these panels only apply to rules that will have a "substantial impact on a significant number of small entities." With that said, an example of a rule that is likely to have such an impact, yet was certified to the contrary by EPA, is its proposed rule on coal combustion residuals from 2010 (75 Fed. Reg. 35,128 [June 21, 2010]). In its comment letter to EPA, the SBA Office of Advocacy wrote that it "has significant concerns that EPA has not fully considered the effects of this rulemaking on small entities and has not presented a sufficient factual basis to support its certification under the Regulatory Flexibility Act... Advocacy recommends delaying further action on this rulemaking until EPA can complete a full review of this rulemaking for small business impacts and ensure its compliance with the RFA."

   In addition, a rule issued in January 2001 subjected thousands of new facilities to the burdens of (i) determining whether they "manufacture, process, or otherwise use" 100 pounds of lead and lead compounds, and, if so, (ii) preparing and filing annual TRI reports. Despite its impact on a significant number of small entities, EPA failed to conduct a SBAR for this rule. The NFIB Legal Foundation (now the NFIB Small Business Legal Center) sued EPA arguing, among other things, that the agency did not follow the Small Business Regulatory Enforcement Fairness Act in promulgating the rule.

2. The Center for Progressive Regulation (CPR) criticized a report from the Small Business Administration's Office of Advocacy claiming the SBA study does not look at benefits as well as costs. In your view was that report fair in its overall assessment of the real-life effects on small businesses? Wasn't this study's purpose to investigate whether there is a disproportionate impact on small businesses? Hasn't SBA consistently found that regulatory impact on small business is disproportionate?

   I disagree with the criticism of the 2010 Crain Study entitled, "The Impact of Regulatory Costs on Small Firms." Yes, I believe the Crain report was a fair overall assessment of the real-life economic impact of regulations on small businesses. The study's purpose was two-fold. First, the study was intended to inform SBA's Office of Advocacy on those issues for which the office has a legal responsibility. SBA's Office of Advocacy is charged with studying the economic impacts of regulation on small business. It is required by law to enforce the Regulatory Flexibility Act which was passed in 1980 to address the disproportionate effects of regulation on small business. The Regulatory Flexibility Act requires agencies to consider the economic impact on small entities when issuing new regulations. SBA's Office of Advocacy is wise to utilize research like the Crain study to perform its legal duties.

Second, the Crain study informs the policymakers about the danger of one-size-fits-all regulation. By documenting the disproportionate economic impact on small businesses, the Crain study prompts agencies to tailor regulations in a way that is sensitive to the unique traits of small businesses. Every year, SBA's Office of Advocacy issues a report on agency compliance with the Regulatory Flexibility Act. This transparent accounting shows, year after year, that agencies can minimize economic impact on small entities while meeting their regulatory goals. This is accomplished by regulators' understanding of the disproportionate impact regulations place on small firms and steps regulators take to level the playing field for the small business community.

3. The CPR critique contrasts the findings of OIRA's 10-year retrospective report on the costs and benefits of economically significant regulations with the findings of the SBA Advocacy's study. Didn't OIRA's report only include rules costing $100 million or more? What's the fraction of all new federal regulations these types of rules represent?

   OIRA's 10-year retrospective only surveyed the costs and benefits of economically significant regulations as defined by Executive Order 12866, which means it only examined regulations that cost $100 million or more. Economically significant regulations only comprise a tiny fraction of all new federal regulations. By working to include all federal regulations, including those that are more than 10 years old, the Office of Advocacy study provides a more accurate picture of the regulatory burden small business owners truly face. It remains the only study of its kind when it comes to assessing the disproportionate impact of regulation on small business.

4. CPR criticized the SBA Advocacy report by suggesting it was using "polling" to calculate the cost of "economic regulations." Is the World Bank's dataset, called the Regulatory Quality Index - which was developed by World Bank researchers specifically for the purpose of measuring and comparing the quality of regulatory institutions across countries – a useful source of information and valid metric to use?

   Yes, the World Bank's Regulatory Quality Index is a useful metric for assessing regulatory impact. The Index uses data from commercial business data providers, like Dun & Bradstreet, as well as governments and non-governmental organizations. It also uses surveys of firms and households. Therefore, the Index uses the same type of data that is used in the majority of U.S. government-produced data on small business (e.g., surveys of businesses, including data from the U.S. Bureau of the Census). These data sources differ significantly from public opinion polling.

5. Do U.S. government-produced data on small businesses come from government surveys of those businesses, including from the U.S. Bureau of the Census?

   Most, but not all government produced data come from government surveys. Some data come from administrative sources. For example, the source for the BLS Business

Employment Dynamics data series is quarterly state tax filings by employers subject to UI laws.

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HENRY A. WAXMAN, CALIFORNIA
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Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

March 3, 2011

Mr. Joseph Baird
Partner
Baird Hanson Williams LLP
2117 Hillway Drive
Boise, ID 83702

Dear Mr. Baird:

Thank you for appearing before the Subcommittee on Environment and the Economy on February 15, 2011, to testify at the hearing entitled "Environmental Regulation, the Economy, and Jobs."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please e-mail your responses, in Word or PDF Format, to Alex.Yergin@mail.house.gov by the close of business on Thursday, March 17, 2011.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Gene Green, Ranking Member,
Subcommittee on Environment and the Economy

Attachments

Subcommittee on Environment and the Economy
Environmental Regulation, the Economy, and Jobs
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The Honorable Cathy McMorris Rodgers

1. **Mr. Baird, you point out that EPA initiated action on financial responsibility rules for hard rock mines 25 years after Congress thought the rules would have been complete.**

    a. **Since then, the regulatory gap on Federal lands was already filled, wasn't it?**

Yes, the regulatory gap on Federal Lands has been filled since CERCLA 108(b) was passed in 1980; in some areas, several times over. Since 1980 mineral exploration and/or or mining operations on Federal Land have become subject to a comprehensive framework of new Federal and State environmental laws and/or major new regulations under, among others programs: the Clean Water Act; the Safe Drinking Water Act; the Clean Air Act; the National Environmental Policy Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Endangered Species Act; the Federal land Policy and Management Act; the Organic Act of 1897; and the BLM and Forest Service surface management regulations for hardrock mining (43 CFR 3809 and 36 CFR 228A respectively) promulgated pursuant to the last two above mentioned laws. These laws and regulations are "cradle to grave," covering every aspect of mining from exploration through mine reclamation and closure. All of the significant regulations and programs under which mining is regulated by the above cited laws were passed, promulgated or otherwise created after the passage of CERCLA.

Under current law, current mining techniques and current reclamation practices there have been few, if any, orphan mining CERCLA National Priority List ("NPL") sites that arose from activities on Federal Land that have been permitted or approved in the last twenty-five years. Thus, current mining is so tightly regulated by Federal and State environmental laws that the chances of newly permitted mines being placed on the CERCLA NPL as orphans is substantially reduced, even without providing financial assurances.

Nevertheless, and more specifically, when CERCLA was passed in 1980, the Forest Service program for financial assurances for hardrock mines was still in its infancy, since it had only been promulgated in 1974. 36 CFR 228. The BLM program was not even in existence when CERCLA was passed; the BLM program became effective in 1981. 43 CFR 3809. Importantly, in 1999, the National Research Council (NRC) of the National Academy of Sciences, in response to a request from Congress, found that the existing environmental regulatory framework for mining on Federal land is "generally effective" in protecting the environment. *Hardrock Mining on Federal Lands,* National Research Council, National Academy Press, 1999 ("NRC Report"), p. 89. Additionally, the Forest Service and BLM programs were subject to comprehensive

updating and revision in 2004 and 2001, respectively, to implement the NRC Report recommendations, among other things. The evolution of the Federal and Nevada State financial assurance requirements and programs is chronicled in the attached White Paper: *The Evolution of Federal and Nevada State Reclamation Bonding Requirements for Hardrock Exploration and Mining Projects.*

Thus, the existing regulatory programs already substantially eliminate the degree and duration of environmental risk associated with the current hardrock mining industry. The NRC Report and the Bonding White Paper referenced above demonstrate that current environmental laws, regulations and practices work together with current financial assurance requirements to ensure today's hardrock mines do not become tomorrow's Superfund sites.

Most importantly, even in 1999, even before these comprehensive changes in the Forrest Service and BLM regulations, the NRC had determined that "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." *Id.* at 90. Thus, rather than propose a new, duplicative, burdensome and cost-prohibitive program, EPA should work with the Federal land management and State regulatory agencies to improve implementation of existing regulations and financial assurance requirements. Unfortunately, EPA is developing a program that will be redundant with Forest Service and BLM programs in direct contravention of the NRC Report recommendation.

b. Does EPA participate in the NEPA process, including the Environmental Impact Statement (EIS) associated each site?

Yes. For hardrock mines on Federal Land, the BLM or Forest Service must implement the evaluation requirements and applicable mitigation measures of the National Environmental Policy Act, most typically, as described in an Environmental Impact Statement ("EIS"). The environmental impacts and the uncertainties associated with project mitigation identified in an EIS provide the factual basis for setting the nature and type of financial assurances for a hardrock mine. EPA already has the option to participate in the preparation of an EIS as a cooperating agency. Under NEPA, a federal, state, tribal or local agency having special expertise with respect to an environmental issue or jurisdiction by law may be a cooperating agency in the NEPA process. A cooperating agency has the responsibility to assist the lead agency by participating in the NEPA process at the earliest possible time; by participating in the scoping process; in developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

Furthermore, EPA has a statutory role in the NEPA process. As described by the EPA Region 6 web site, "Under Section 309 of the Clean Air Act (CAA), EPA is required to review and publicly comment on the environmental impacts of major Federal Actions including actions

which are the subject of draft and final Environmental Impact Statements, proposed environmental regulations, and other proposed major actions."

c. Can EPA challenge any EIS?

Yes. EPA evaluates and comments upon every EIS, as mandated by 42 USC 7609. Moreover, EPA has the authority to take any EIS that EPA deems inadequate to the Council on Environmental Quality in the Office of the President for final decision-making and disposition. This process is described by the EPA Region 6 website: "If EPA determines that the action is environmentally unsatisfactory, it is required by Section 309 to refer the matter to the CEQ." The "CEQ" is the Council of Environmental Quality in the Office of the President of the United States.

Accordingly, EPA already has ample existing authorities to participate in and affect the nature and amount of financial assurances. The only major difference between these existing authorities and EPA's CERCLA 108(b) initiative is that EPA's CERCLA 108(b) initiative would allow EPA to effectively render irrelevant the decision-making of the Federal land management agencies to whom Congress delegated surface management and financial assurance authority. These two agencies have the decades of experience that EPA cannot claim to possess. When asked about duplication of existing BLM and Forest Service financial assurances, EPA Headquarters' response was that it will be up to the Federal land management agencies (BLM and Forest Service), to reduce the amount of the financial assurance they receive in order to avoid duplication. Congress delegated surface management authority for regulating and permitting hardrock mines on Federal lands to the land management agencies working cooperatively with the States. EPA should not be allowed to usurp the time-tested programs developed by the BLM and the Forest Service over the past thirty (30+) years. Direct duplication of Federal agency regulation is wasteful and discourages investment in the critical and strategic materials necessary to create domestic jobs and reduce America's reliance on foreign sources of minerals..

d. How does that relate to the overall financial assurance process?

Please see response 1(b) above.

e. In light of EPA's involvement in the already established process on Federal lands, what do you think is motivating EPA to make this kind of intrusion on mining activities on Federal lands?

It appears that EPA's ultimate objective is to supplant the Federal land management agencies and the states as the sole or lead regulatory and permitting authority for hardrock mines (effectively usurping congressionally delegated authority). Financial assurance is part of the permit enforcement authority and responsibility of the Federal land management agencies. Thus, the

agency that controls financial assurance effectively controls the entire permitting process. Also, we believe EPA does not understand the breadth and depth of the existing BLM and Forest Service programs. This speculation is supported, in part, by EPA's reliance upon outdated and irrelevant data in determining there might be a need for duplicative regulation with the BLM and the Forest Service programs.

2. Mr. Baird, Is it your testimony that you oppose Federal regulation of mining operations and financial assurance or that you are concerned that duplicate regulatory regimes do not add environmental protection, but do increase costs?

We want to make it clear that we do not oppose Federal regulation of mining operations and financial assurance. Neither Formation Capital Corporation, nor the Northwest Mining Association, would support elimination of Federal environmental regulation on Federal Lands. This would mean turning back the clock more than 30 years to a regulatory regime that created the very conditions that caused Congress to enact CERCLA. This would be bad for the environment and bad for the mining industry's efforts to create high paying, year round sustainable jobs. To reiterate, we cannot say it better than the NRC, "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." *Id.* at 90. As we stated above, our primary concern is that EPA will needlessly duplicate already existing federal regulatory regimes under CERCLA 108(b).

Moreover, one of our major concerns with EPA's proposal, if not the major concern, is the increased cost to the industry without any improvement in environmental protection or performance. We have met with representatives of the financial assurance (surety) industry as has EPA. The financial assurance industry representatives have told us and EPA that they do not have financial assurance products to cover the type of program EPA is considering, nor do they have any intent in creating or providing financial assurance products to cover the type of program EPA has described to them and to us. Thus, the only alternative available to mining companies will be cash—cash that otherwise would be available for job creating investments in producing the minerals America requires. Furthermore, the increased costs of an EPA program based on historic NPL data will be an order of magnitude greater than what would actually be required for mines utilizing current practices and permitted under current regulatory programs. The result will be some mines will close prematurely, other mines won't be built, jobs will be lost and America will become more reliant on foreign sources of strategic, critical and necessary minerals.

3. What was the genesis for the CERCLA Section 108(b) actions by EPA?

Several environmental organizations sued EPA in March of 2008 to compel EPA to promulgate and implement financial assurance requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See Sierra Club v.*

Johnson, No. C 08-01409 WHA (March 12, 2008). In February of 2009, the U.S. Federal District Court for the Northern District of California ordered EPA to identify and publish notice of those classes of facilities that may be subject to future financial assurance requirements under Section 108(b) of CERCLA. It is important to note that the court did not order EPA to promulgate new financial assurance requirements for hardrock mining or any other industry. EPA has the discretion on whether, when, and how to implement any regulations under CERCLA 108(b), pursuant to the language in the statute. In July of 2009, EPA identified the hardrock mining industry as the first class of facilities for which it would impose these requirements. *See* 74 Fed. Reg. 37, 213 (July 28, 2009). However, for reasons discussed above, we do not find EPA's determination to be legally correct or good policy on Federal Lands.

4. CERCLA was enacted more than 30 years ago. You testified that mining practices have improved and enforcement is tougher than it was 30 years ago. Please elaborate.

Please see the extensive answer provided to Question #1 above.

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10 N Post St, Ste 220 | Spokane, WA 99201-0705
Phone: 509.624.1158 | Fax: 509.623.1241
Email: nwma@nwma.org | Web: www.nwma.org

THE EVOLUTION OF FEDERAL AND NEVADA STATE RECLAMATION BONDING REQUIREMENTS FOR HARDROCK EXPLORATION AND MINING PROJECTS:

A Case History Documenting How Federal and State Regulators Used Existing Regulatory Authorities to Respond to Shortcomings in the Reclamation Bonding Program

Prepared by:

Jeffrey V. Parshley

Principal Geologist

SRK Consulting

Reno, NV

775/828-6800

And

Debra W. Struhsacker

Environmental Permitting & Government Relations Consultant

Reno, NV

775/826-3800

January 2008

Introduction and Executive Summary

This Northwest Mining Association (NWMA) white paper documents the evolution of the federal and the Nevada state bonding requirements for hardrock exploration and mining projects. Although this white paper focuses primarily on Nevada –the state with the most exploration and mining activity on federal land and the hub of the U.S. gold mining industry – other western states have similar regulatory programs and reclamation bonding requirements for hardrock mineral activities.

Key findings in this white paper include:

- The Nevada mining industry and state and federal regulators recently worked together to update and refine bonding requirements.
    - The resulting modifications to the Nevada bonding program reflect a collaborative effort to develop comprehensive and conservative bonds that consider all likely contingencies based on agency costs to implement, manage, and complete reclamation of sites requiring governmental intervention.
- Existing federal and Nevada state laws and regulations governing hardrock exploration and mining clearly provided the necessary authority and flexibility for regulators to make changes in response to the problems encountered during agency reclamation of several bankruptcy sites.
    - Federal and Nevada regulators – with the mining industry's full participation and concurrence – have significantly improved and expanded reclamation bonding requirements in the last few years based on the lessons learned at the bankruptcy sites.
- Existing federal and Nevada state laws and regulations include comprehensive environmental protection and reclamation bonding requirements for hardrock mines.
    - These laws and regulations already give regulators the necessary tools to protect the environment, to ensure proper reclamation, and to deal effectively with problems, gaps, or unforeseen situations should they develop in the future.
- The recent changes that federal and Nevada regulators made to the bonding program clearly demonstrate that the current federal and state regulations work well.
- The sweeping changes to the nation's environmental and regulatory programs governing hardrock mining that are included in the House Mining Law bill (H.R. 2262) are not needed.
    - The environmental provisions in H.R. 2262 are solutions in search of a problem which seek to fix a system that is working well and does not need "fixing."

Historical Overview of Federal and Nevada Reclamation Bonding Programs

The U.S. Forest Service Has Required Reclamation Bonds Since 1974

The U.S. Forest Service (USFS) has had bonding requirements for mineral projects on National Forest System lands dating back to 1974. The USFS's bonding program is included in Section 13 of the USFS's surface management regulations at 36 C.F.R. Part 228 Subpart A ("the 228A regulations".) In contrast to the original version of the Bureau of Land Management's (BLM's)

regulations, which did not require bonds for small projects, the USFS regulations have always given District Rangers the discretionary authority to require a reclamation bond for any mineral activity that requires a Plan of Operations. Therefore, since 1974 when the 228A regulations went into effect, the USFS has almost always required a bond for all exploration road building, trenching, and drilling projects and for all major mineral projects on National Forest System lands. Like the BLM bonding program described below, when calculating bonds for operations on National Forest System lands, the agency assumes it will perform the reclamation work using government contracting procedures.

BLM Has Required Bonds Since 1981

Since 1981, companies conducting exploration or mining activities affecting more than five acres of BLM-administered public lands have had to secure BLM's approval of a Plan of Operations that includes a Reclamation Plan and a reclamation cost estimate, and have also had to provide BLM with a reclamation bond. This bonding requirement is part of BLM's Surface Management Rules for Hardrock Minerals at 43 C.F.R. Subpart 3809 ("the 3809 regulations.") The amount of the required bond reflects the assumption that BLM – not the company – will perform the reclamation using third-party contractors in accordance with government contracting procedures. This means the reclamation cost estimate is calculated using Davis-Bacon wage rates and includes government administration fees and other charges related to BLM's management of the reclamation effort.

The original 1981 version of the 3809 regulations did not include a bonding requirement for Notice-level projects that disturbed fewer than five acres of public land. As discussed below, in 2001 BLM expanded its bonding program to include Notice-level projects.

During the early years (1981 to 1990) of the 3809 regulations and BLM's bonding program, reclamation cost estimates were typically based on a uniform reclamation cost per acre factor that was simply multiplied by the amount of surface disturbance at a site. Although this approach simplified the preparation and review of bond cost estimates, it also increased the risk of inaccurate cost estimates. In the early 1990s, reclamation plans became considerably more detailed and were designed based on site specific conditions. This produced more detailed and realistic reclamation cost estimates.

Nevada's State Bonding Regulations Started in 1990

Nevada's regulations for "Reclamation of Land Subject to Mining Operations or Exploration Projects" (NAC 519A) became effective in October 1990. The Nevada mining industry supported the development of these regulations and the authorizing statute (NRS 519A).

The Nevada regulations include stringent requirements for reclamation plans and reclamation bond cost estimates for projects on public, state, and private lands. Therefore, with the advent of the NAC 519A regulations, all Nevada mines and exploration projects affecting more than five acres – regardless of land status – require a reclamation bond. The Nevada Division of Environmental Protection/Bureau of Mining Regulation and Reclamation (NDEP) manages the Nevada reclamation bonding program cooperatively with BLM and the USFS under the terms of an interagency Memorandum of Understanding.

BLM Expanded the 3809 Bonding Program in 2001

By the late 1990s, all Plans of Operations had an accompanying detailed reclamation plan and cost estimate upon which the reclamation bond was based. But exploration projects that

disturbed fewer than five acres were still operating under a Notice without a reclamation bond on BLM-administered lands.

In 1999, the National Research Council (NRC) published a study entitled "Hardrock Mining on Federal Lands." One of the recommendations from the NRC study was that BLM should require a bond for all surface disturbing activities, including Notice-level exploration projects affecting fewer than five acres. The mining industry supported this finding and encouraged BLM to modify the 3809 regulations to expand the bonding requirements to include Notice-level exploration projects. In 2001, BLM implemented a new bonding requirement for Notice-level projects.

USFS Updates its Bonding Guidance in 2004

By the 21st century, the USFS, BLM and state agencies had acquired significant experience in reclaiming and closing abandoned and bankrupt mine sites. In order to document this knowledge and experience, and to ensure that reclamation bonds are adequate to fund reclamation and closure, the USFS issued a document entitled "Training Guide for Reclamation Bond Estimation and Administration" in April 2004. This Guide is designed to be used in estimating new bonds and updating existing bonds for projects on National Forest System lands.

Agency Reclamation of Several Bankrupt Cites Revealed the Need for Expanded Bonding Requirements

By the late 1990s, the industry had closed a number of modern mine sites using the techniques commonly included in BLM and Nevada State reclamation plans of that era. However, NDEP and the federal land management agencies (i.e., BLM and the USFS) had closed and reclaimed only a few sites using funds from reclamation bonds.

In the late 1990s – early 2000s timeframe, historically low metal prices forced a few companies to declare bankruptcy. These bankruptcies tested the scope and efficacy of the federal and state reclamation bonding programs – programs that were supposed to provide regulators with sufficient financial resources to reclaim abandoned or bankrupt mines. However, as NDEP and the federal agencies used the reclamation bonds to close and reclaim the bankrupt sites, program-wide deficiencies and inefficiencies became readily apparent. This led to the realization that the bonds for nearly all of the bankrupt sites were inadequate for NDEP, BLM, and the USFS to implement and complete the approved reclamation plans.

The Nevada mining industry, NDEP, and federal regulators readily agreed that this situation was unacceptable and that changes in the bonding requirements were needed. Working cooperatively over the next few years, the industry and state and federal regulators identified the specific deficiencies and found solutions to address each one to ensure that adequate funding would be immediately available to state and federal agencies should any other bankruptcies occur.

This cooperative effort between the mining industry and regulatory agencies in Nevada has resulted in a program that is embraced as being fair, defensible, and accurate. All parties recognize this program may result in somewhat conservative cost estimates. However, the shared commitment to capitalize upon the lessons learned from responding to unexpected situations at the bankrupt sites and to modify the bonding program to eliminate the shortfalls that were due to these unexpected situations makes a conservative approach essential. The resulting bonding program provides comprehensive cost estimates that consider all likely contingencies.

Similar industry-agency collaboration recently occurred in Montana where the Montana Mining Association and the Montana Department of Environmental Quality worked together to update Montana's bonding requirements. This cooperative effort resulted in a bill, HB 460, which Montana Governor Brian Schweitzer recently signed into law to amend the Montana Metal Mine Reclamation statue to provide for temporary bonding in unanticipated circumstances.

The Cooperative Industry – Agency Review Revamped the Bonding Program to Address all Identified Shortcomings

The following are the major issues identified during the review and revamping of the mine closure and reclamation bonding requirements. The identified shortcomings were rectified as described below:

Identified Shortcoming: Some types of costs which would be incurred should a regulatory agency assume responsibility for closing a mine site had not been adequately anticipated or included in the previous cost estimates. Because the agencies' and industry's experience with mine closure at that time was based on planned and orderly closure performed by the mine owner, some costs associated with government management and the timing of mine closure had not been anticipated. For example, some sites required immediate management of process solutions to ensure that the environment was protected, but the process of obtaining the money from the bonds often took several months, during which time bond funds to manage the site were not available. Other emergency funding programs were used to cover this deficiency at that time.

> *Implemented Solution: The Nevada mining industry set up and funded a program to ensure that funds would be immediately available for site management at any site declaring bankruptcy. Now all bonds calculated in the state of Nevada must include the cost for managing the site including all process fluids, for a period of six months under typical care and maintenance conditions.*

Identified Shortcoming: The hourly equipment rates used in the bond cost estimates did not reflect the agencies' costs to contract the work to third parties. The equipment rates used in the bonds were based on a number of sources and varied widely from site to site.

> *Implemented Solution: A small working group comprised of Nevada mining industry professionals and regulators investigated a number of options to provide realistic hourly equipment rates and ultimately decided that the local equipment suppliers' monthly, single-shift rental rates were most appropriate – even though it is highly unlikely that a contractor would only work their equipment for 40 hours per week on this type of job.*

Identified Shortcoming: Some of the bonds assumed that the equipment at the site would be the same types of equipment used for reclamation. Because some of the equipment used at mine sites is larger than the equipment a reclamation contractor would typically have available, this assumption was inappropriate and produced inaccurate reclamation cost estimates.

> *Implemented Solution: Another small working group comprised of Nevada mining industry representatives and regulators reviewed the types and sizes of equipment readily available from contractors and suppliers in Nevada and limited the equipment choices for reclamation bond costs to that equipment.*

Identified Shortcoming: The productivity (quantity of work performed per hour) used for different equipment varied considerably in some of the bond cost estimates. Because the productivity of reclamation equipment has a direct impact on the time required to perform the reclamation activities, it also affects the cost estimate.

> *Implemented Solution: Nevada mining industry experts and the regulatory agencies determined that equipment productivities should be calculated based on accepted, published sources such as equipment manufacturers' handbooks, engineering manuals, and published construction cost databases to provide defensibility and consistency. In addition, typical correction factors were defined to ensure that the productivities represented an average range of conditions. This is believed to represent a conservative approach because the contractors typically used in the western U.S. for reclamation work have highly experienced staff.*

Identified Shortcoming: The costs for and timing of process fluid stabilization and management were inconsistently calculated. The time required to stabilize a site for long-term passive management is directly related to the time needed to reduce the inventory of any remaining process fluids and ensure that the reclamation plan will limit the amount of water that must be managed in a passive management system. Estimating a short- and long-term water balance for a site requires a combination of science, engineering and experience. The industry has spent considerable effort globally in recent years to better understand this process for sites in closure. Most importantly, it is recognized that although common approaches can be applied, each site is different and requires detailed analysis to define the parameters that will affect closure costs.

> *Implemented Solution: Standard approaches and tools that use site specific data have been defined by federal land management agencies and state regulatory agencies along with minimum design criteria and site data required to properly estimate the time and effort required to manage any solutions remaining on-site at closure.*

Identified Shortcoming: The estimate of both long-term site management and monitoring were not always adequate. The requirements and period required for long-term site management and monitoring are highly site-specific. However, the same approach used to bring consistency to the calculation of process fluid stabilization can be used to determine what, if any, long-term management and monitoring is required.

> *Implemented Solution: Site-specific studies and design requirements will determine the need and requirements for long-term site management and monitoring. Often, it is uncertainty that will dictate if or how much funding must be in place for long-term site management. In these cases, trust fund-type approaches are often used to ensure that there will be funding for both expected and unknown future site requirements. Monitoring requirements are typically based on the need to demonstrate stability at the site based on trends in empirical data. This will vary by site, but most regulatory agencies have guidelines for minimum requirements. Nevada's Water Pollution Control regulations allow NDEP to require a 30-year monitoring period, or longer if needed.*

Identified Shortcoming: Some miscellaneous costs were not adequately captured in some cost estimates. The cost for removal of small infrastructure (e.g. power lines, substations, pipelines, etc.) were not included or underestimated. Other miscellaneous costs such as fence

removal or installation, hazardous waste removal, construction or removal of erosion and sediment controls were inconsistently addressed.

> *Implemented Solution: Nevada mining industry personnel and the regulatory agencies cooperatively developed a checklist of miscellaneous costs that must be considered for each site.*

Identified Shortcoming: The cost to mobilize and demobilize (mob/demob) equipment from the sites was often excluded or inadequately estimated. The cost to move equipment to and from a site being reclaimed will be added by a contractor to the overall cost of reclamation. Although this cost primarily included the direct costs to transport equipment and materials to the site, some contractors also include other costs in this line item.

> *Implemented Solution: The specific items that should be included in the mob/demob cost were defined by a small working group and local transport companies were contacted to determine the cost incurred to transport the necessary equipment to and from the site by a third-party transporter. Other common costs such as the establishment and use of office trailers, portable power and sanitary facilities were added to Nevada reclamation bonding guidelines as separate line items.*

Identified Shortcoming: Out of date costs were used in some bond cost estimates. Although Nevada's regulations require that bond costs be updated every three years, the hourly rates often change annually based on economic conditions. Although most annual variations are generally small, cost estimates should be based on current rates.

> *Implemented Solution: NDEP and federal regulatory agencies update equipment, labor and material rates each year and post the current rates on a public web site for use in reclamation bond cost estimates.*

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

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Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225-2927
Minority (202) 225-3641

March 3, 2011

Ms. Marcia Y. Kinter
Vice President,
Government & Business Information
Specialty Graphic Imaging Association
10015 Main Street
Fairfax, VA 22031

Dear Ms. Kinter:

Thank you for appearing before the Subcommittee on Environment and the Economy on February 15, 2011, to testify at the hearing entitled "Environmental Regulation, the Economy, and Jobs."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please e-mail your responses, in Word or PDF Format, to Alex.Yergin@mail.house.gov by the close of business on Thursday, March 17, 2011.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Gene Green, Ranking Member,
Subcommittee on Environment and the Economy

Attachments

SGIA
Specialty Graphic Imaging Association
703.385.1335 • 703.273.0456 (fax)
10015 Main Street • Fairfax, VA 22031
SGIA.org • sgia@sgia.org

The Honorable John Shimkus

What has been your members experience under the Consumer Product Safety Improvement Act? How do those experiences translate here and what lessons should be learned?

Similar to the Consumer Product Safety Improvement Act (CPSIA), implementation of the US EPA's proposal to require reporting of manufacturing by-products appears straight forward. However, based on our experiences with the implementation of the provisions of the CPSIA legislation, this ill-conceived US EPA proposal contains many of the same issues that we have experienced with CPSIA.

Under the CPSIA, unrealistic implementation time lines were set for industry sectors that were unaware of the far reach aspects of the legislative requirements. As a result, the Consumer Product Safety Commission has extended the deadline for several key compliance issues, i.e., testing and certification requirements, until December 31, 2011.

The proposal by US EPA to include all manufacturing by-products as reportable items under the Inventory Update Rule clearly parallels the situation we are experiencing with the CPSIA legislative mandates. As manufacturers of products that do not consider their manufactured by-products, such as hazardous or solids wastes, to be commercially viable products, they will be totally unprepared to both implement and report by the September 2011 deadline that has been established by the US EPA.

Under US EPA's current proposal, manufacturers will be required to track and maintain records regardless of whether or not they may be subject to the rule's requirements so they can properly determine their regulatory status. Further, as the Agency is only allowing electronic reporting, manufacturing facilities will require time to familiarize themselves with the reporting software program.

Based on our experiences with the implementation issues surrounding CPSIA, SGIA strongly believes that the by-product reporting requirements face the same roadblocks, and we should learn from our experiences. Inadequate time to prepare, non-existent training regarding reporting protocols and training on the use of the reporting software, mimic the issues found during the implementation of the CPSIA mandates necessitating a longer time frame for compliance purposes.

If enacted, the US EPA must provide both adequate time and training for businesses, especially small businesses, to gain an understanding of the rule's requirements as well as

SGIA
Specialty Graphic Imaging Association
703.385.1335 • 703.273.0456 (fax)
10015 Main Street • Fairfax, VA 22031
SGIA.org • sgia@sgia.org

prepare for the first reporting cycle. As we have seen with the CPSIA, businesses that are caught off guard with new regulatory mandates require a longer time period to digest the information and prepare a strong compliance strategy.

In addition, if the US EPA does move forward with this policy interpretation, then it will only create more work in the long run. These by-products under discussion, i.e., those that are created as a result of manufacturing a product such as an imprinted textile or membrane switch, should be exempted from IUR reporting as they are captured by other US EPA regulations. By including these items, US EPA will need to develop yet another regulatory package to correct the interpretation. We experienced a similar situation with the adoption and implementation of the CPSIA. By moving too quickly, it was discovered that certain items, such as textiles, and other naturally occurring products, should never have been included in the scope of the legislation. As a result, the CPSC had to focus on correcting this issue, through the development and implementation of a regulatory notice, rather than spending time working on the more critical implementation issues associated with CPSIA.

The collection of information regarding manufacturing by-products should not be the focus of the US EPA within the IUR reporting program. The collection of information regarding the manufacturing and importing of chemicals should be the main focal point of US EPA's actions.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

March 3, 2011

Ms. Wendy Neu
Vice President
Hugo Neu Corporation
120 Fifth Avenue
Suite 600
New York, NY 10011

Dear Ms. Neu:

Thank you for appearing before the Subcommittee on Environment and the Economy on February 15, 2011, to testify at the hearing entitled "Environmental Regulation, the Economy, and Jobs."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please e-mail your responses, in Word or PDF Format, to Alex.Yergin@mail.house.gov by the close of business on Thursday, March 17, 2011.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Gene Green, Ranking Member,
Subcommittee on Environment and the Economy

Attachments

The Honorable John Shimkus

1. **You've stated in your testimony that 80% of all e-waste collected in the US is exported to developing countries. Does this 80% include the commodity grade materials that Hugo Neu and WeRecycle also export into developing countries?**

Response:
No. The clean commodity streams that WeRecycle! exports are not included in this statistic. The 80% figure referred to in my testimony is a commonly referred to statistic. Because harmonized tariff codes are not specific to various electronic fractions, it is not possible to obtain trade data for electronic waste. The 80% figure is attributed to the Basel Action Network (BAN) from their groundbreaking report on the issue of exportation of electronic waste "Exporting Harm: The High-Tech Trashing of Asia, 2002". BAN is widely recognized as one of the major global experts in the field of international waste trade.

This 80% figure includes the export of whole units by "so-called" electronics recyclers here in the United States who export whole equipment into developing countries, and does not include commodities created from processing electronics. These exports are categorized as "equipment for reuse" but are untested and are not packaged to preserve reuse of the equipment. Unfortunately, in the current landscape, it is mostly equipment that is older and/or non-functioning and is deliberately ***mislabeled*** as "equipment for reuse". This is the most egregious form of irresponsible recycling practices.

In addition, a growing number of "so-called" electronics recyclers promote the fact that the equipment being exported to developing countries is "equipment for refurbishment" or "equipment for recycling." The claim made by these recyclers is that the equipment is being sent only to legitimate recycling centers in developing countries. The claim is made that these facilities operate in accordance with appropriate safety and environmental standards. And that these facilities follow the same strict practices and procedures for handling and disposal of toxic waste as we do at WeRecycle! and other responsible U.S. recyclers. Many informed individuals including myself find such claims highly unlikely.

It is my belief that refurbishment and recycling of ***our*** electronic waste should be done here in the United States, in an environmentally responsible manner and that create tens of thousands of sustainable American jobs.

To reiterate, these exports are NOT commodities generated from processing electronic waste. And, to be clear, the commodities that WeRecycle! creates are not included in this figure.

2. **How much of the commodity grade material such as steel, aluminum, glass, and plastic has Hugo Neu and now WeRecycle collectively obtained that was designated for export to non-OECD countries? Once obtained, was it in fact exported to non-OECD countries, such as China and India over the years?**

Response:
I cannot specify with any confidence exactly how much of the electronic waste WeRecycle! processes would have been exported as is to non-OECD countries. However, I believe it may have been a considerable amount. I strongly believe that electronic waste should be collected and processed here in the United States, where we can convert this equipment into clean commodity streams and can responsibly manage the hazardous waste streams generated by responsible processing methods. Once segregated, these clean commodity streams (Aluminum, Steel, Copper, and Plastic) are sold to the best industrial consumers domestically, or exported to industrial consumers around the world in both OECD and non-OECD countries depending on market conditions. The hazardous streams (Batteries, CRTs, Mercury Containing Devices, Printed Circuit Boards, etc.) are sent for further processing (recovery) or for disposal ONLY, in the United States and other OECD countries within the developed world. In addition, gold, silver, platinum and rare earths can and are being recovered in the United States. This approach provides greater assurance that appropriate safety and environmental mechanisms are in place to properly handle these streams.

As far as the streams secured for processing, WeRecycle! is converting electronics (whole or partial units) ***into*** materials such as steel, aluminum, glass, and plastic. As described above, the clean, non-toxic commodity streams are sold and in fact, a large percentage of these streams are sold to China. However, these exports do not violate the laws of the importing country. In practice that means that we work to prevent exports of what is defined as hazardous waste in the Basel Convention to developing countries. This is more than just policy as we in fact are audited by Original Equipment Manufacturers (OEMs) and also certified to be in compliance via our e-Stewards Certification which incorporates international waste trade law into its Standard definitions and requirements.

3. **Some have suggested that we should follow the European Union and its regulations regarding electronics recycling, including the Basel Ban Amendment that precludes European countries from exporting "hazardous waste" into non-OECD countries. With all of this regulation in place, has Europe been successful in keeping all this equipment from moving into these developing countries? Isn't it true that even with all the regulations in Europe that there are reports or documentation that this so-called "hazardous waste" is finding its way into places such as Africa?**

Response:
The challenges associated with reducing or eliminating the export of untested waste electronic equipment is significant. Even with regulation, ferreting out these unscrupulous practices will be difficult and require vigilant enforcement. The difference is that the regulations will describe the prohibited practices. Many organizations will comply immediately. Others will attempt to violate these regulations and face consequences of being caught. The regulations allow for enforcement against firms violating these regulations.

However, it should not go unnoticed that Europe has recently been working hard to clamp down on these exports. The European Electronics Recycling Association has had a "no export" policy in place since 2004. And likewise the WEEE Forum (an industry association charged with implementing the Waste from Electronics and Electrical Equipment Directive in the European Union) is placing the export ban front and center in their new WEEELABEX (Waste from Electronics and Electrical Equipment Label of Excellence) certification. In recent years governments, particularly in Germany, Netherlands and UK have created successful efforts to apprehend and prosecute violators. These have served to send a very strong message that those that engage in illegal exporting will be severely prosecuted.

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