REGULATORY FLEXIBILITY ACT COMPLIANCE: IS EPA FAILING SMALL BUSINESSES?

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REGULATORY FLEXIBILITY ACT COMPLIANCE: IS EPA FAILING SMALL BUSINESSES?

WEDNESDAY, JUNE 27, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 1:07 a.m., in Room 2360, Rayburn House Office Building, Hon. Sam Graves (Chairman of the Committee) presiding.

Present: Representatives Graves, Chabot, Mulvaney, Tipton, West, Ellmers, Hanna, Schilling, Hahn, and Owens.

Chairman GRAVES. We will go ahead and bring our witnesses up and we will get the name tags out and we can get started.

Good afternoon, everyone, this hearing will come to order. I want to thank our witnesses for being here today. I appreciate it very much and we definitely look forward to your—to your testimony. Small businesses are disproportionately burdened by the cost of regulations in comparison to their larger counterparts by virtue of their size and resources. Despite the economic downturn and painfully slow recovery, the regulatory burden on small businesses continues to grow. Increased regulations means small businesses must dedicate more time, more money and resources to comply with the regulations instead of doing what they do best, and that is creating jobs and innovative new products.

To ensure that Federal agencies analyze the impact of new regulations on small businesses, Congress enacted the Regulatory Flexible Act, or the RFA. The RFA requires all Federal agencies to examine the impact of their proposed and final rules on small businesses, small not-for-profits and small government jurisdictions. If those impacts are significant, the agency is required to consider less burdensome alternatives. The RFA has been on the books for some 30-years, but Federal agencies still fail to comply or fully comply with both the letter and spirit of the law and unfortunately, the Environmental Protection Agency is not meeting its legal obligations under the RFA. And by failing to comply with the RFA, the Environmental Protection Agency imposes unnecessary burdens on small businesses instead of using small businesses to, their input to craft better tailored regulations that address specific problems.

Last December, the Regulatory Flexibility Improvements Act of 2011, which was H.R. 527 and I co-wrote along with the House Judiciary chairman Lamar Smith, passed the House, and H.R. 527 will strengthen the RFA and close the loopholes that agencies exploit to avoid complying with the RFA. H.R. 527 is stalled in the Senate and the President has threatened to veto it.

Unfortunately, the failure to act on H.R. 527 seems to be indicative of the administration's attitude towards small businesses in our struggling economy, apathetic, and out of touch. And today we will be hearing directly from small business on how EPA's regulations are affecting their ability to compete and create jobs. And additionally, we will be examining the EPA's compliance with the RFA. And again, I want to thank all of our witnesses for being here today and for your participation. And we will move right on into—right on into your opening statements.

And basically, to explain the lights to you, you each have 5-minutes, and once it gets down to 1 minute the light will turn yellow, and then past the 5-minutes, it will turn red so that you have a moment beyond that to go ahead and give your testimony. But again, we look forward to all of you being here.

And our first introduction, is going to be Mr. Keith Holman, who currently serves as the legal and policy counsel at the United States Chamber of Commerce in their environmental, technology, and regulatory affairs division. Prior to working for the U.S. Chamber, Mr. Holman was the regional counsel for the Environmental Protection Agency and an assistant chief counsel in the Office of Advocacy for the Small Business Administration. As assistant chief counsel, Mr. Holman advocated for the interest of small businesses before the EPA and the Department of Energy and reviewed the small business impacts on Federal rule makers involving air quality. And again, thank you for being here. I look forward to your testimony.

STATEMENTS OF KEITH W. HOLMAN, LEGAL AND POLICY COUNSEL, U.S. CHAMBER OF COMMERCE, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS DIVISION; FRANK KNAPP, PRESIDENT AND CEO, SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE, ON BEHALF OF THE AMERICAN SUSTAINABLE BUSINESS COUNCIL; JEFF BREDIGER, DIRECTOR OF UTILITIES, ORRVILLE UTILITIES, ON BEHALF OF THE AMERICAN PUBLIC POWER ASSOCIATION; AND DAVID MERRICK, PRESIDENT, MERRICK DESIGN AND BUILD INC., ON BEHALF OF THE NATIONAL ASSOCIATION OF THE REMODELING INDUSTRY

STATEMENT OF KEITH W. HOLMAN

Mr. HOLMAN. Thank you, Chairman Graves, and members of the committee. Good afternoon. Again, my name is Keith Holman. I am the legal policy counsel at the U.S. Chamber of Commerce. The Chamber of Commerce has approximately 96-percent of its membership which is small businesses, so the Regulatory Flexibility Act is actually very important to the Chamber and its members. You have asked me to offer the Chamber's views today on how the U.S. Environmental Protection Agency is actually complying with the Regulatory Flexibility Act, or we call it, the RFA. And as you said, between 2010, and excuse me, 2002 and 2010, I was an assistant chief counsel at the SBA Office of Advocacy, and I had primary responsibility for working with the EPA on RFA-compliance matters on their rulemaking. So this is an issue I am very familiar with.

I think it is fair to say that when Congress passed the RFA back in 1980, it is hard to believe it has been around this long, it was—the idea was to give small entities in that small businesses, small associations, and small communities some sort of voice in the Federal rulemaking process. Put simply, the RFA requires Federal agencies to assess the economic impact of their planned regulations on small entities, and to consider alternatives that would lessen those impacts. The RFA requires each Federal agency to review its proposed and final rules to determine if a rule in question will have what is known as a significant economic impact on a substantial number of small entities.

If the rule will, in fact, have that impact, which we call SEISNOSE, the agency must assess the anticipated economic impacts of the rule and evaluate whether there are alternatives that would actually allow the impact of the rule to be minimized on small entities, but would still accomplish the regulatory objectives of the rule.

Now, EPA looked at, you know, particularly as an agency, writes a lot of rules every year. They are one of the most prolific rule-writing agencies of all of the Federal agencies. For that reason, back in 1996, Congress decided to require EPA, when it goes through rulemakings, to go through an additional step other than just looking at the impact of their regulations.

They have to do what is actually known as a small business advocacy review panel. The panel process is triggered whenever there is a rule that they anticipate will have a substantial economic impact on a significant number of small entities. Since 1996, EPA has done more than 30 of these panels. Small entity representatives who speak for the industries that will be impacted by the rule are invited to come in and have face-to-face meetings with EPA, with Advocacy, and with the Office of Information and Regulatory Affairs which is at the Office of Management and Budget.

This is a unique opportunity for small businesses to actually sit down with the agency that is going to regulate them, and say, here is how this rule is going to affect me. It is very valuable. It does take time, and it takes some resources, but in my experience, it has been extremely valuable, very early in the process before you actually get a rule that goes to proposal, before the public ever sees it, you are giving a chance for small entities to actually sit down with the agency, ask questions, get feedback, understand the rule that is actually going to apply to them, and have some ability to help in the design of the rule as it is finalized.

This has been a very, very valuable process. I worked on nine panels during my time at SBA's Office of Advocacy. Those panels were very valuable. Three examples I give in my written testimony were the Cooling Water Intake Panel, the Lime MACT Panel, and something called the MSAT Panel, which was a rule for mobile source air toxics. Why were they good? Because EPA did a very good job of getting the information pulled together early on, meeting with the small entities, doing a really good job of trying to figure out who they were, how they were going to be affected, and what the potential alternatives would be that would help them. Finding the alternatives is crucial.

Since 2009, what we have seen is EPA has not been doing this same good job, particularly with panels. Three things have been problems with panels. They don't do panels when they are supposed to do them. This has been a problem with the greenhouse gas rules, with things like the coal ash rule, and with many other rules where EPA just doesn't do the panel. Or they say, well, we have agreed to a court deadline so we don't have time to do a panel correctly, so they don't go through the steps to do a panel correctly. And I have outlined some situations where that has happened publicly in the last 4-years or so.

Finally, there are situations where you do a panel. They take the time to do the panel, but they don't follow the panel's recommendations. This is a critical problem for the process. Thank you.

Chairman GRAVES. Our next witness is Mr. Frank Knapp. He is the vice chairman of the American Sustainable Business Council and President of South Carolina Small Business Chamber of Commerce. Mr. Knapp, we appreciate you coming in and look forward to your testimony.

STATEMENT OF FRANK KNAPP

Mr. KNAPP. Thank you, Chairman Graves, members of the committee.

Chairman GRAVES. Yeah, you might turn your mic on.

Mr. KNAPP. Thank you very much. Appreciate it. Chairman Graves, members of the committee, I am Frank Knapp, Jr., president and CEO and cofounder of the South Carolina Small Business Chamber of Commerce, and vice chair of the American Sustainable Business Council. Thank you for the opportunity to testify before you today.

The South Carolina Chamber of Commerce is a statewide advocacy organization with over 5,000 members that promotes a more small business-friendly State and Federal Government. The American Sustainable Business Council was founded in 2009, and its members now represent over 150,000 businesses and more than 300,000 entrepreneurs, owners, executives, investors, and business professionals across the country. These diverse business organizations cover the gamut of local and State Chamber of Commerce, micro-enterprise, social enterprise, green and sustainable business groups, local living economy groups, women business leaders, economic development organizations, and investor and business incubators.

I had the opportunity to read the testimony of Mr. Holman, representing the U.S. Chamber of Commerce, and Mr. Merrick representing the National Association of the Remodeling Industry prior to preparing my comments. I commend them for their civility of their remarks and their focus on the Regulatory Flexibility Act as it pertains to the Environmental Protection Agency.

Both gentlemen recognize the importance of the Regulatory Flexibility Act for ensuring that regulations are reviewed to determine if they are too burdensome for small businesses, and if the goals of regulations can be achieved in alternative methods.

They pointed out some instances where businesses, the business community and EPA didn't agree, but they also point out successful RFA stories. In 2004, my South Carolina organization worked with

our South Carolina Chamber of Commerce and the NFIB to pass a Regulatory Flexibility Act modeled after the Federal law. Last August the then-chairman of the South Carolina Small Business Regulatory Review Committee told me that over the previous 7 years, his committee had reviewed over 300 proposed regulations and identified only 10 that raised a concern. His committee worked with the State agencies promulgating these new regulations satisfactorily resolved the issues. The Regulatory Flexibility Act has created an effective process to protect small businesses, even if the process itself needs some attention from time to time.

Mr. Holman correctly identifies one area where the EPA's compliance with the RFA can be improved; more resources for the rulemaking process. While there are voices we hear in Washington critical of the EPA and calls for cutting back or freezing the regulatory process, the reality is, that it can work better for small businesses and the public if the EPA was better funded. With more resources, the EPA can do a better job of meeting the requirements of the RFA to the benefit of a small business. However, more resources for the EPA would not only allow the agency to be more efficient and effective in complying with the RFA, it would also enable the organization to do a better job of protecting the public's and environment's health while unleashing entrepreneurial innovations and creating jobs.

Any responsible new rule that protects the health of our citizens and workers opens a door to newer and better products. Our Nation is loaded with these small business entrepreneurs, just waiting to solve a problem when the demand is created. The Toxic Substance Control Act is so outdated that the EPA's resources are so strained that there are literally over 80,000 chemicals in the Agency's inventory, but it has only been able to require testing for only about 200. Just yesterday, the State of California took the lead on investigating the health hazards of toxic flame retardant chemicals used in furniture and mattresses, while not providing protection from fires.

The EPA should be examining this national hazard, but it doesn't have the resources. Can the materials we sleep in, and sleep on, sit on, be nontoxic and still resist fire? Absolutely. Ask Barry Cik, owner of Naturepedic in Cleveland, Ohio. Naturepedic manufactures baby and crib mattresses that provide proper support, meet government flammability requirements, provide waterproofing, seamless designs and other hygienic features, all without the use of harmful chemicals or allergic materials.

But instead of helping this innovative industry take off and make bedding healthier for families, we protect the use of carcinogen materials of the past by not properly imparting the EPA with the needed legislative resources and support. The public and small business owners want good regulations. A recent national poll of small business owners conducted for the American Sustainable Business Council found that 80 percent support disclosure and regulations of toxic materials; 79 percent support ensuring clean air and water, and 61 percent support moving the country towards energy efficiency and clean energy.

It is very clear that the future of our economy really depends on our tying to sustainable economy. And the EPA really has the op-

portunity if we take this opportunity to empower them and give them the resources to actually move us towards that sustainable economy faster. So thank you very much for the opportunity to testify today.

Chairman GRAVES. Thank you very much, Mr. Knapp.

Chairman GRAVES. Our third witness is Jeff Brediger. He is the director of Utilities for Orrville Utilities which is located in Orrville, Ohio. Mr. Brediger started with Orrville Utilities as a plan engineer in 1987. He served as the American Municipal Powers—on the American Municipal Power's board of trustees as an active member of the American Public Power Association. He is APPA's small generation representative and serves on the Energy, Environment and Government Relations Committees. He has served on several EPA small business advocacy review panels, including the panel on Boiler MACT, major and another area source rules. Mr. Brediger, thanks for coming in from Ohio. I appreciate you being here.

STATEMENT OF JEFFREY A. BREDIGER

Mr. BREDIGER. You are welcome. Mr. Chairman, members of the committee, good afternoon. My name is Jeff Brediger. I am the utilities director for Orrville Utilities in Orrville, Ohio. I am presenting this testimony today on behalf of Orrville Utilities, and American Public Power Association, of which my municipal utility is a member. APPA is a national service organization, representing the interests of more than 2,000 not-for-profit community-owned electric utilities that serve over 46 million Americans. Under SBREFA, 90 percent of these utilities themselves are considered small businesses, and in addition to that, they are serving the small businesses in their communities. Orrville is a small city of about 8,300 located in the northern part of Ohio. Some may recognize Orrville from its association as the home of the J.M. Smucker Company, our largest employer with over 1,500 employees. Our community owns its own coal-fired power plant which has enabled us to offer competitively-priced electricity to our customers since 1917, has helped promote local business development efforts, and has protected our customers from volatile electricity markets. But as environmental requirements tighten, Orrville Utilities face increasingly costs and burdens to provide those important services to our community.

Our greatest concern is the EPA's Boiler MACT rule, which was to be finalized this spring, which after several rounds of legal challenges, reconsiderations, and proposals, we are still waiting for. In 2003, I participated with APPA in the SBREFA review process for the Boiler MACT rule. I also served as a small-entity representative in the latest SBREFA effort on the current proposed rule. The SBREFA process was important to Orrville and other small electric generators because small utilities and small governments were a subset of those being regulated by the Boiler MACT rule and EPA was not focused on the burdens on these small entities.

The primary recommendation from the SBREFA panel proposed that the EPA implement a health-based compliance alternative that would allow entities to avoid significant costs of hydrogen chloride scrubbers when they could demonstrate their emissions

did not pose a significant health risk. This proposed solution would have provided significant cost relief for small entities while maintaining protective of human health. The EPA had the discretion to adopt it under the Clean Air Act, but failed to do so. In our view, the process failed.

When coupled with the President's 2011 executive order on regulatory reform, SBREFA should ensure that the needs of small businesses are thoroughly addressed as a regular consideration of the regulatory process for certain agencies' rules. But the process has fallen short of desired expectations.

In some cases, the EPA has declined to convene a panel to evaluate small entity relief. When panels are convened, they may lack the information necessary to generate effective alternatives. When effective alternatives are generated, the EPA may ignore the results. Our recent experience with SBREFA has been disappointing at best. While the SBREFA process is intended to provide small entities with an expanded opportunity to participate into the development of certain regulations, the process lately has taken on more of window dressing, with the EPA simply checking the box, to indicate a requirement has been met, even if done insufficiently.

In addition, poor preparation by EPA staff has wasted the time and resources of panel participants, and too little time is invested in the panel process to allow participants to properly review and comment on detailed technical materials and issues. Perhaps most disturbing is when the panels produce a viable alternative, only to have the EPA ignore the recommendation coming from those with real world operational experience.

Despite our misgivings regarding our experiences with the SBREFA process, Orrville and APPA thoroughly endorse the concept of a specialized process to seek, consider, and incorporate the specific needs of small entities in the regulatory process.

In our written statement, we do offer specific recommendations for improving the SBREFA process. Also I will add, as a local government, we do share the same concerns. It is not that we do not want to do anything. We struggle with the requirements that are totally unnecessary.

In conclusion, I commend this committee for holding this hearing today. It is clear that some important changes need to be made to the way the EPA performs its duties under SBREFA, and we look forward to those improvements.

I thank you for the opportunity to present this testimony, and I would be happy to answer any of your questions. Thank you.

Chairman GRAVES. Thank you, Mr. Brediger.

Chairman GRAVES. Our final witness is David Merrick, who is the President of Merrick Design and Build, which is a full-services residential and commercial remodeling, designing, and building company located in Kensington, Maryland. Mr. Merrick is an active member of the National Association of Remodeling Industry, and currently serves as chairman of their Government Affairs Committee. Thank you for being here today. I look forward to your testimony.

STATEMENT OF DAVID MERRICK

Mr. MERRICK. Thank you, Mr. Chairman, and members of the committee. I am pleased to present this testimony on behalf of the National Association of the Remodeling Industry. NARI is a nonprofit trade association based in Des Plaines, Illinois. We have 58 chapters in major metro areas nationwide and our membership of 7,000 companies is comprised of remodeling contractors, local suppliers, and national suppliers. Eighty-three percent of NARI members have fewer than 20 employees, and many are one- or two-man operations; a new thought about small business.

I run a design build company in Kensington, Maryland. Merrick Design Build is a full service residential and commercial remodeling design and build company. In 2010, when EPA decided to change the LRRP rules, NARI was disappointed. We worked with several contracting, home building, and remodeling businesses to express our concerns and comments to EPA that we submitted in July of 2010. With the chairman's permission, I would like to submit our comments for the record. They are from July 21st, 2010, and were written by Baker Botts LLP, and submitted to the EPA on amendments to LRRP.

Chairman GRAVES. Without objection.

Mr. Merrick. Thank you, sir. Fundamental to our concerns was the removal of the opt-out provision and EPA's refusal to reconvene a group of small businesses, the U.S. Small Business Administration's Office of Advocacy, and the Office of Management and Budget to ensure flexibility in the rulemaking for small businesses. NARI's concern with the EPA moving forward with a public and commercial building rule are threefold. First, we are concerned that the EPA may proceed without convening a SBREFA small business advocacy review panel. We do not want the same thing to happen when EPA proposed the 2010 amendments to LRRP, that a rule move forward without a SBREFA panel.

Second, NARI is concerned that EPA may move forward with a public and commercial LRRP rule without clear evidence and data showing that lead poisoning risk to children under 6 and pregnant women from construction activities at public commercial buildings.

If the EPA cannot present a clear connection between the activity and the risk to children and pregnant women, then our customers certainly will not understand why their projects have become more expensive.

Third, when EPA moves forward with the rule, NARI would advise that the Agency make rules flexible enough to cover different scenarios. This is what NARI member Kevin Nau advised the EPA during meetings last year. With the chairman's permission, I would like to submit Kevin Nau's letter to EPA, from March 1, 2011, for the record.

Chairman GRAVES. Without objection.

Mr. MERRICK. Thank you. NARI is pleased with the opportunity to advise the committee about how EPA interacts with small business when the Agency develops regulations. The SBREFA process was designed to codify what simply makes sense for small businesses to work with EPA to come up with constructive solutions for complex problems. It seems as though the process works when EPA listens to the input from the Office of Advocacy and from small

business. It does not seem to work when EPA rushes the process or avoids it altogether. We will continue to work with the EPA. We will try and increase our customers' knowledge of LRRP rules, and we will continue to work with remodelers to create—increase EPA certification.

Our dialogue with EPA is important because NARI should be EPA's partners in our efforts to protect children and pregnant women from lead-based dangers caused by remodeling activities. Thank you for your attention to these important matters.

Chairman GRAVES. Thank you very much to all of our witnesses and we will start with our questions. We will start with Mr. Schilling.

Mr. SCHILLING. Thank you, Chairman. The first question I have would be for Mr. Knapp, and thank you all for coming to the panel. I really appreciate it. Did I hear in your opening statement that you say—just clarify this for me. I kind of opened up when I heard it. Did you say more money for the EPA is what is needed? So basically, what I heard, and tell me if I am wrong is, more money for the EPA for more regulation is going to help the economy?

Mr. KNAPP. Congressman, what I heard and what I read in the testimony today, was that there is concern that the EPA is not fulfilling all of the requirements of the RFA; that they sometimes move faster than they should move. What that tells me, as somebody who has been around for a while, is that maybe they don't have the resources; that they may aspire to do these things, but like any organization that does not have specific resources, they start moving things quicker.

And so that is what I meant. I mean, literally, if we want them to do the perfect job for small businesses, and comply with all of the RFA to the letter of the law, then they need to have the resources to do that. And that will serve all of these gentlemen up here much better. And so yes, I hate to say this, but I think that there are—resources and support for the EPA could solve a lot of the problems that you have heard today.

Mr. SCHILLING. Very good. And then, the RFA requires Federal agencies to analyze the impact of regulations on small entities. Do you think this is a good idea?

Mr. KNAPP. Absolutely, it is a good idea. I mean, from our experience in South Carolina—again, a friend of mine who Congressman Mulvaney knows, Monty, you know, he headed that organization for the original chairman for 7 years, and the last 300 regulations being promulgated by State agencies in South Carolina, found 10 that they weren't happy with. They worked with those agencies, and it all worked out.

So yes, small businesses need to have that type of protection, and that type of input that we were talking about into the process with the RFA.

Mr. SCHILLING. Okay, earlier last year, we had the head of the EPA in on the Ag Committee and what we talked about is the apparatuses that they were going to have the farmer actually wear, and one of the questions to Ms. Jackson was, do you know how much these cost? And she said she wasn't sure. Do you know if they are $5,500, or $5,000? But that, you know, in itself says that they didn't bring in the farmer to ask the question. Now, you know,

they have been talking for quite some time about regulating farm dust. Thank you very much, sir.

Mr. KNAPP. Thank you, sir.

Mr. SCHILLING. What I would like to do, Mr. Merrick, how many people do you employee, sir?

Mr. MERRICK. We have 16 full-time employees.

Mr. SCHILLING. And is keeping your workers and clients safe one of your top priorities.

Mr. MERRICK. Keeping our workers and clients safe is a fundamental aspect of business. If we don't take care of our workers, they won't be around, they won't do their job, and if we don't take care of our customers, they won't come back and they won't recommend us to other customers.

Mr. SCHILLING. As a small business owner trying to do your best to comply with EPA rules, what is your greatest fear in dealing with the EPA?

Mr. MERRICK. My greatest fear would be that they don't listen to us or don't ask our advice.

Mr. SCHILLING. And then, I got plenty of time, all right. Basically, members who are certified on a lead-safe work practices lost business because of the lead paint rule, would that be a fair statement?

Mr. MERRICK. The businesses are still out there and there are people doing the jobs. The largest problem right now is the lack of enforcement. EPA has identified almost 650 small entities that this rule will cover, and has certified 123,000 firms, and that is 20 percent.

Mr. SCHILLING. Very good. With that I yield back. Thank you, sir.

Chairman GRAVES. Ms. Hahn.

Ms. HAHN. Thank you, Chairman Graves, for holding this hearing. It has been interesting, and I was—I keep saying I am the new kid on the block, but actually, come next week, I think I will actually have been here a year. And I really have loved being on the Small Business Committee, and I have convened a small business advisory council that advises me on issues and legislation that Congress is, you know, considering how it does impact small businesses. And I have gone around and talked to hundreds, over 100 small businesses myself because I want to know, you know, what can the Federal Government do? Or can we be more helpful? Should we get out of the way? What is the burden? What is keeping you from succeeding, from growing, from hiring? Because I believe, like a lot of people here, that small businesses really are the backbone of our economy. I think they are the key to actually turning this economy around. They are the ones that are actually hiring folks right now.

So we want to do what we can to support them. But when I talk to them, I am not hearing as much about that it is the environmental regulations that are keeping them back. They always love to say, Janice, we need more customers. That is what is going to help us. We want the economy to turn around. We want other people to have jobs so that they can spend their money in our businesses.

And in my community in Los Angeles, it has actually been some of the environmental regulations that have created small businesses. We have had very strict environmental regulations at the Port of Los Angeles, and what it has done is create this whole new technology, this clean-air technology that spawned businesses that used algae to reduce stationary source emissions. It has allowed an electric truck company to actually create the first long-haul electric truck, and this guy has actually sold his electric drive system to China. And he has created about 150 jobs.

So I know regulations can be burdensome. I know that is what we are hearing today. But for me, and Mr. Merrick, you know, I am trying to get—being on this committee, I know that we oversee the Small Business Administration. So I want to get a sense from you in the context of the EPA, and some of these regulations, what has been your experience, or some of your, you know, other small businesses that you know, directly with the Small Business Administration in helping you comply with regulations, or helping explain some of the regulations that are coming down? How has that experience been, and is that an area that we could probably maybe do a better job of?

I mean, it is all about resources with the SBA as well, but is that a better connection with small businesses from the Federal Government's perspective that we can actually help with some of these problems?

Mr. MERRICK. I wouldn't say that the EPA has gone out of its way to be helpful, and I would like to start by making a point about in remodeling what a small business is. Most remodelers are one- or two-man operations, and recordkeeping for them can be a huge burden. Many of them, their idea of recordkeeping is a shoebox that they dump receipts in and dump them on their accountant's lap at tax time. So asking them to do any kind of regulation bookkeeping is a burden on them, and as you pointed out with the new businesses that are created, as new businesses are created, old businesses sometimes have to go away.

And one of the unfortunate side effects of regulations is the smaller one- or two-man businesses simply don't have the resources within their own organization to function with all of the regulations. My primary concern as a small businessman is the economy. And as I look at my business, I am large enough to keep records properly, and I live in fear of the EPA walking into my operation and not criticizing me on the way I protect people from lead paint, but on the records I am keeping about how I did that.

Ms. HAHN. And again, you didn't really comment on the, you know, the Small Business Administration.

Mr. MERRICK. It was a long question.

Ms. HAHN. What is your interaction—I know, and a lot of pontificating. What is your experience with them?

Mr. MERRICK. With the SBA?

Ms. HAHN. Yeah, with the SBA?

Are they helping you comply with some of these, or to understand some of these regulations? Or is that a resource that you even access?

Mr. MERRICK. Yeah, I would say it is a resource that I don't access and I can't honestly answer that question.

Ms. HAHN. Okay. And when I get my bid from the contractor on remodeling, should I triple the time and double the money? Just kidding.

Mr. MERRICK. No, but I do have a card.

Ms. HAHN. Thank you, Mr. Chairman.

Chairman GRAVES. Mr. West.

Mr. WEST. Thank you, Mr. Chairman, and thanks for the panel for being here. And, you know, I think everyone agrees there has to be some, you know, regulation that is out there to make sure that we do have a free market that operates properly and does not put the consumer at a disadvantage. But I think there is a simple maxim out there that the more you regulate something, the less you get of it.

You know, I am down in the State of Florida, and we have the EPA suing our State over this thing called numeric nutrient criteria, which is basically telling our farmers and some of our local municipalities that they have to produce storm drains or runoff water that is parts per billion purer than rain water. And of course, when they were challenged, the EPA couldn't tell them where they got that formula from. You know, we have got a—we are big in the maritime industry down along the coastline there, southeast coast. Twin Vee Catamarans, you know, the gentleman there, Roger, had to hire an EPA-compliant assistant because of all of the regulations that were coming down as far as, you know, construction, and gasoline tank construction, and motors, and things of that nature. And that one EPA compliant assistant caused him to not be able to hire three people to build boats.

And so, you know, my question to you all, and the panel is, you know, do you all believe that the small business, you know, the Flexibility Act, the panel that works with the Regulatory Flexibility Act, they are failing in trying to constrain or rein in the EPA as far as, you know, listening to you and taking into account some of the ramifications thereof on your businesses and industries, what have you, before they issue these regulations.

And before I close out, and get your response, you know, Lisa Jackson came up here, the administrator of the EPA last year before the Energy and Commerce Committee, and she was asked, did she take in the economic impact of the regulations that they are producing? She said no. And that is the problem that I have.

So I would like to know what impact you are seeing and whether you believe the small business Regulatory Flexibility Act and the panel is really meeting up to its intents or are you just getting steamrolled?

Mr. KNAPP. Congressman, thank you very much. By the way, it is a pleasure to meet you.

Mr. WEST. Thank you.

Mr. KNAPP. I am not sure what that is about. Thank you, Congressman.

Mr. WEST. We are all from the south, Mick. You can like each other.

Mr. KNAPP. We try to be polite, don't we?

Mr. WEST. Mick is not polite.

Mr. KNAPP. There is always that balance. There is always that balance between protecting the health and safety of our people and

our environment, and not having that heavy burden. And that is what the RFA is supposed to look at, at least for the small businesses that will be impacted by those regulations. To the degree they are—may not be able to work with everybody, to the extent they need it, I will go again and say that a lot of it comes back to resources. I don't think that the EPA has——

Mr. WEST. I don't think the EPA needs more stuff.

Mr. KNAPP. Well, that is not what I hear here. But that is okay. If you want good quality work out of any organization, whether it be private sector, or public sector, you have got to make sure that it has the adequate funds to do the job. And I don't think that the EPA has any malevolence in it. Can they do better from time to time? Probably can. But so can every organization. But thank you, sir.

Mr. WEST. But in 2011, the Federal Government added over 71,000 pages of new regulations to the Federal Register. That is unconscionable to me. And look, I—22 years in the United States military. I understand accomplishing a mission without having a whole lot of resources. And I think that the focus of the EPA is really counterproductive to our small businesses and our free-market growth. And that is why I am trying to get the understanding. Are they really listening to you? Is there any consequence out there for them not listening to you?

Mr. BREDIGER. The answer is no, they are not listening, in my opinion. The EPA has some very intelligent people on staff. When we have convened these SBREFA panels, we bring a very talented group of people together with the common goal of trying to understand these very complex issues. And from my perspective, we are just choosing to ignore those or water them down, or discount them. For example, take the recent recommendations that the panel made on our Boiler MACT panel to preclude the addition of scrubbers. For our community, we are looking at this rulemaking alone costing anywhere from $8.5 to $12 million per unit, and we have four units, sir, and our budget is only $30 million. These scrubbers alone add in the neighborhood of $2- to $3 million for those overall costs.

The EPA just doesn't seem to want to recognize those costs, or take the data that our panel members bring in the case. They say well, we have done our study. We have done our own economics. But we have seen in my opinion, sir, some of these estimates off by magnitudes of three or four. And the EPA says we have done our estimates, check the box. We have done our job. Time to move on.

Mr. WEST. Well, if I can ask just a short follow-on. The people that you are talking about showing you their work, are they really and truthfully, you know, familiar? Do they have experience in your industry? Or are they just sitting back crunching numbers?

Mr. BREDIGER. Somewhat.

Mr. WEST. Come on now. Throw the dog a bone, okay? You have got to give me a definitive answer. You sound like a politician.

Mr. BREDIGER. I am trying not to be, sir.

Mr. WEST. Okay.

Mr. BREDIGER. Generally not. I would say if you are looking to try to take the expertise that the panel members bring to these

committees, and match that up against who the agency brings in to the table, we have a far superior panel member on board, and that is where a lot of the rub is at. We fail both on defending economics. We are technically more superior in my opinion.

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

Chairman GRAVES. Okay, Mr. Hanna.

Mr. HANNA. Mr. Knapp, how are you doing?

Mr. KNAPP. I am on the hot seat tonight, aren't I?

Mr. HANNA. I don't think so. I think people are sitting here wondering if you are really a businessman or not.

Mr. KNAPP. I can assure you, sir, I have been for a number of years.

Mr. HANNA. Me too. I have a quick question. For the SBREFA reviews, the SBAR, you call it. Mr. Holman, you said significant economic impact or substantial number—for a substantial number of small entities. Those are all of those subjective words.

Mr. HOLMAN. Correct.

Mr. HANNA. Right. Well, what does that mean?

Mr. HOLMAN. What it means is Congress apparently wanted each agency to look at each situation and try to decide for that given rulemaking in that situation, and those regulated entities, what is a significant economic impact and what is a substantial number of small entities. So what most agencies, including EPA have done, is to develop guidance documents for their rule writers, that set out of sort of rules of thumb that they go by, and how they make that determination in each case.

Mr. HANNA. Can you give me an idea of what that looks like because that is also so subjective that it doesn't pin down the agency to have these——

Mr. HOLMAN. I am going to paint a little bit broadly, but EPA generally says if a rule is likely to have more than a 3-percent economic impact on small entities, and it affects—it is a sliding scale, but let's say 1,000 or more small entities are going to be impacted by the rule, then there is no way that they can avoid having to go through the panel process under their guidance.

Mr. HANNA. But you said out of, I think, 300, they had reviewed 10?

Mr. HOLMAN. That is in South Carolina. That is a state rule. That has nothing to do with the Federal RFA.

Mr. HANNA. Wouldn't that suggest to you, though, that the rulemaking procedure is skewed in favor of an agency, whether it is understaffed, or disinterested, would be able to rush to judgment?

Mr. HOLMAN. Yes. And I can actually give you some thoughts on the resource issue.

Mr. HANNA. Go ahead.

Mr. HOLMAN. I mean, I agree that it is tempting to say, wow, you know, we should just throw more money at EPA because they need to do this job correctly because it is an important job. But having watched this process work pretty well during the mid 2000s, I know that EPA can do this job when they want to. They do a good job on panels when they are interested in doing a good job on panels. Resources are not really the problem. It is the fact that this is not a high priority for the Agency at this time.

Mr. HANNA. As a matter of fact, the rules, aren't they—forgive me for interrupting—but aren't they set up to actually advance the procedure more quickly? And wouldn't the fact that they are understaffed tend to give them an excuse to have fewer panels?

Mr. HOLMAN. I think that is—that happens. I think the biggest most obvious reason that they use to say we don't have time to do a panel is we have agreed to a deadline, or we have a deadline put upon us. We just don't have time to do a panel.

Mr. HANNA. So an artificial deadline can be the cause to undermine a rule that is designed to protect businesses, and hence, almost automatically undo the very thing it is designed to do?

Mr. HOLMAN. Yes, and what we have seen in the last few years is more and more what I call multibillion dollar rules that have huge impact on the economy, including small businesses, and that unfortunately, the Agency often treats a small business the same way they treat, you know, a large corporation. And because we don't go through this panel process, there is never a chance of trying to figure out how are these small guys different from the big guys.

Mr. HANNA. Would you say it might be inappropriate for the agency to be in charge of what it decides or doesn't decide to review? Wouldn't it be appropriate to have an outside source that—to decide what panels, what item, what issue should have a panel, which one should not?

Mr. HOLMAN. Ideally, that would be very good if there was an agency like OIRA that would decide, is this an appropriate thing not to be going through a panel.

Mr. HANNA. Right. I mean, I have dealt with a lot of environmental agencies in my life in my own business, and so much can change from individual to individual. You have different inspectors on different days and different outcomes and hugely different costs to whatever I was doing. Thank you very much.

Mr. HOLMAN. Thank you.

Chairman GRAVES. Mr. Mulvaney.

Mr. MULVANEY. Thank you, Mr. Chairman. Mr. Knapp, welcome.

Mr. KNAPP. Thank you.

Mr. MULVANEY. Mr. Knapp, welcome. Good to see a fellow South Carolinian. Mr. West commented on his way out that he didn't really think you were from South Carolina. I assured him that you were. One of the things that I have learned in the short time that I have been here, is that I am going to disagree with folks all the time. We do these hearings all the time, and we always hear opposing views, which I always appreciate.

I have also come to know, however, that I would like to know where the information is coming from. If I am on a hearing and I have Heritage and Brookings, I can understand where they are coming from. If I have an economist from Yale and one from the University of Chicago, I have got a sense for where I am coming from. So any time I have a group that comes in and calls themselves the Small Business Chamber of Commerce from any State, South Carolina or wherever, which at one time or another has supported Dodd-Frank, the public option health care, Cap and Trade, thought the stimulus was too small, supports Boiler MACT, opposed tort reform, and then actually was advocating for a brand-

new State small business government agency, as your organization has done all of those things, I want to talk a little bit about who you all are. And I think it is a fair question. You have heard other folks, you know, say today that they can't believe someone from a small business group is saying some of the things you are saying. The group has actually come up before in conversation. And if we could—actually, before I ask the question, I have got the stuff off your Web site and your affiliated groups, your members and all that, and one of the groups that has been here before us, the Main Street Alliance. You folks are affiliated with that group?

Mr. KNAPP. The Main Street Alliance is an organization we have worked for. We don't have any formal affiliation with them other than we have partnered on issues at the national level before.

Mr. MULVANEY. Got you. And how long has that relationship gone on?

Mr. KNAPP. We have probably been working with Main Street Alliance on issues on and off probably for the last 3 years.

Mr. MULVANEY. Will you play my video, please, is that ready?

[Video was played as requested.]

Mr. MULVANEY. Actually, what I went on to tell Mr. Daley at that time was, at your site, your organization was linked on their Web site as yours is. Later that day, your organization came off of their Web site. So I am going to ask you a simple question. Was Mr. Daley telling us the truth when he said he was not affiliated you folks at all?

Mr. KNAPP. Well, Congressman, if I might, I think that was very unfair you to do that to Bill Daley. He is a friend of mine. He did not know you were going to bring that up. He had no idea where that came from. He is not responsible for what goes on the Web site with Main Street Alliance. So I think that was really, really unfair of you to do that. So that——

Mr. MULVANEY. Why did you think it was unfair, Mr. Knapp?

Mr. KNAPP. It was unfair because the gentleman was there to talk about another issue altogether. And for you to bring up and start talking about the South Carolina Small Business Chamber of Commerce, which was not invited to the table, I don't think it is up to Mr. Daley to defend us. I can do that very well. Thank you.

Mr. MULVANEY. Well, was it up to Mr. Daley to not tell us the truth about his affiliations?

Mr. KNAPP. Mr. Daley was not telling you the truth. He does not run that Web site. He doesn't know who put that on there, or what it says. But all it does is the same as ours. We have a relationship from time to time, with the Small Business Majority, with the Main Street Alliance, with some other organizations. It doesn't mean we are part of them. We just have a good relationships with them, and want to promote them to other people to come to our Web site.

Mr. MULVANEY. I don't remember what Mr. Daley's title is with the Main Street Alliance. I do remember, however, that he had enough influence over the Web site to take your organization off of it before the end of the day.

Mr. KNAPP. And I can assure you that Mr. Daley did not do that because I got contacted by Sam Blair, who is with the administration of the Main Street Alliance. He told me what went on. He sent

me that video, which I was appalled at, and they did remove me because frankly, sir, you intimidated them.

Mr. MULVANEY. I think it is always fair, Mr. Knapp, to know the motivations for the people who are giving testimony here.

Mr. KNAPP. That is fine.

Mr. MULVANEY. And to know who they are affiliated with; know who they really are. And again, if you are going to be this Small Business Chamber of Commerce and come in and say things like, you know what I really think will pump up the economy is to give the EPA more money, then you can fully expect us to start asking some questions about your organization, the Main Street Alliance. In fact, let's talk about your organization.

Mr. KNAPP. Well, no, no, let me interrupt you, sir.

Mr. MULVANEY. No, no, you don't get to do that, actually, Mr. Knapp. We are not on your radio show.

Mr. MULVANEY. Let's talk about your organization. You advertise as having 5,000-plus members. How many of those are members of the South Carolina Academy of Trial Lawyers—oh, I am sorry, the new name is the South Carolina Association for Justice.

Mr. KNAPP. Association for Justice. We provide membership, we grant membership to the associations that belong as trade associations. This has been a long standard of ours. So when the trial—when the South Carolina Association for Justice becomes a member and has a board member, we convey membership on all of them. It doesn't mean that they are paying dues, but we convey a membership.

Mr. MULVANEY. In fact, it is free to be a member of your organization.

Mr. KNAPP. You can. Absolutely, sir. We have always been under the principle that we would rather have more members than more money. Now, that means we live hand to mouth, but it also means that we get to communicate our message to the members, to the people of South Carolina, to the small businesses, and we find that it resonates.

Mr. MULVANEY. But of your 5,000-plus members, and is it 6,000, or is it about 5,000, is that fair? That is what your Web site says.

Mr. KNAPP. Yes, sir.

Mr. MULVANEY. How many of those are you counting are members of the Academy of Association for Justice?

Mr. KNAPP. Association for Justice. It is probably about—I would say that their membership is probably around 1,500.

Mr. MULVANEY. Okay. Then how many of your members in that 5,000 are members of the workers' comp bar?

Mr. KNAPP. They are all—as you probably know, sir, the Injured Workers Advocates and the Association for Justice basically have overlapping membership.

Mr. MULVANEY. Got you. All right. Do you have any home builders who are your members?

Mr. KNAPP. You know, we used to have the home builders as a trade association, and then they dropped off as a trade association member. We still have our heating and air conditioning members of our association.

Mr. MULVANEY. So you don't have any home builders as members?

Mr. KNAPP. No. We do not have the trade association. I cannot answer the question of how many or if we have any home builders themselves. I do not look over our membership lists.

Mr. MULVANEY. So if I asked you the question have you asked your home builder members if they thought it would be a good idea to give the EPA more money, you wouldn't know their response to that?

Mr. KNAPP. I would not know. I have not asked them that question.

Mr. MULVANEY. Do you have any remodelers?

Mr. KNAPP. Yes, we do have remodelers. I know we do.

Mr. MULVANEY. And did you ask them about your presentation here today, that you think giving EPA more money——

Mr. KNAPP. No, sir. We did not poll our membership and ask them what I should say today, as I imagine that most members did not poll every one of their members to ask them what they are going to say today.

Mr. MULVANEY. But you refer to a lot of polling in your statement today. Where do those polls come from?

Mr. KNAPP. Those polls are national polls conducted on behalf, or conducted for the American Sustainable Business Council and the Main Street Alliance and the Small Business Majority, and that is where those polling data come from.

Mr. MULVANEY. Do you have any paving contractors?

Mr. KNAPP. We may have paving contractors. I would be glad to go research this when I get back.

Mr. MULVANEY. And we all reserve the right to ask questions afterwards, so we would be more than happy to send you those things.

Mr. KNAPP. Thank you, sir.

Mr. MULVANEY. I could ask the same thing about convenience store owners, swimming pool installers, auto body shops.

Mr. KNAPP. Yes, sir.

Mr. MULVANEY. I am just stunned, Mr. Knapp, again, as I was with the Main Street Alliance, that somebody comes in and says look, I represent small business, and I really think the way we can fix things is to give the EPA more money. I have never heard that before from anybody other than the EPA, and other folks like the EPA a lot. I am just stunned.

I could ask you the same questions about Boiler MACT, which you support. And I have been through our State. You know, we go home as much as we possibly can, and every small business I go to is scared to death of Boiler MACT. And yet you are here promoting it.

You don't get to ask any questions, Mr. Knapp. Again, we are not on your radio show. Which reminds me, this is not—your work with the South Carolina Small Business Chamber of Commerce is not your full-time gig, is it?

Mr. KNAPP. Although, sir, I do not get paid a full-time salary, or I probably spend the majority of my time on the South Carolina Small Business Chamber of Commerce, and I might add, we have never taken a position on that Boiler issue. Never.

Mr. MULVANEY. Now, a majority of your time—how much of your time is in at the Knapp Agency, your public relations firm that you own and operate?

Mr. KNAPP. Well, I am not sure that this is under the purview of this committee, but I would probably say about 15, 20 percent of my time is with my public relations firm.

Mr. MULVANEY. And how much of it is as the progressive talk show host on WOIC in Columbia?

Mr. KNAPP. I have a 2 hours a day show every weekday afternoon from 4 to 6, and, sir, I invite you to be a guest any time you want to.

Mr. MULVANEY. In fact, I listened a couple days ago when you invited in Mr. Matt Gertz, the Deputy Research Director for Media Matters, for his input. You were looking for a responsible media representative to talk about what was going on in the right wing media, and you invited Media Matters in to do that.

And, again, do you want to give a plug to the radio, it is, what, 1240 AM or something?

Mr. KNAPP. Well, it is 1230 AM on the dial. You can go to youneedtoknow.info and stream it any time you want to.

Mr. MULVANEY. Mr. Knapp, I appreciate you coming here today. You have been a good sport. But, again, I think it is important that we understand exactly who is giving us the testimony. By the way, who invited you to be here today?

Mr. KNAPP. I was invited to be here today, that invitation came through the American Sustainable Business Council.

Mr. MULVANEY. But were you a Republican-requested witness or a Democrat-requested witness?

Mr. KNAPP. No, sir, I was in the minority.

Mr. MULVANEY. Okay. Again, nothing in what I have tried to do here, Mr. Knapp, today is to undermine the veracity of what you are saying. I actually believe that you believe just about everything that you have said.

Mr. KNAPP. Thank you, sir.

Mr. MULVANEY. And that is not my point here. My point here is to let everybody on this committee know who is giving them testimony, to take that into consideration as we sit here and go through the issues.

There is one thing I don't believe, Mr. Knapp, and I will close with this: You said that you hated to say this, but you really think the EPA should get more money. And I don't believe that. I believe that you really do want to say that and you really do believe the EPA should get more money.

With that, I will yield back the balance of my time. Thank you, Mr. Chairman.

Chairman GRAVES. Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. I would like to thank our panel for taking the time to be able to be here. I am a small businessman as well, and one thing that I find incredibly disturbing is that in order to be able to fill out all of the forms, be able to fill all the requirements, we actually have out of the SBA a report saying that we are spending $10,585 per employee to be able to comply.

You know, we are facing an incredible debt in this country, and the best solution to that is to be able to get people back to work in this Nation. To be able to get this economy moving once again, it is going to have to actually come from the private sector.

We know we have a problem with the EPA. One of the first town hall meetings that I held better than a year ago was in the San Luis Valley of Colorado visiting with potato farmers. And our issues are always about water. They didn't bring up water. They brought up the EPA. The overreach and the tentacles seem to be extraordinary. And we all want clean air, we all want clean water, but we are continuing to see an agency that is continuing to expand and to overreach.

I guess I would just like to ask the panel, do you think that it is appropriate to have an agency that is writing rules and regulations, and the only way to be able to reverse those once they go final is having the obligatory act of Congress? Should there be a better way? Should Congress be able to roll up its sleeves and actually get involved in this regulatory and review process before the EPA goes final? Mr. Holman?

Mr. HOLMAN. You know, we have actually—we have supported, the Chamber has supported the REINS Act. There are some questions that come up about how that would work in practice in terms of if it was implemented. But clearly, Congress needs to take some increased role in this process. The fact that we have an agency that essentially no one is home in terms of the oversight of the agency and how they do panels and how they do their business and writing billion dollar rules. You know, last year in 2011, EPA had four rules that are over $1 billion each in the pipeline, more to follow, more coming. We know that.

What we are asking in this particular hearing is at least have some place at the table for small businesses. If you say EPA thinks that is too much work, they don't want to take the time to do it, they don't want oversight from Congress, we would say there needs to be oversight from Congress on that.

Mr. TIPTON. Would you agree with that, Mr. Knapp?

Mr. KNAPP. I agree with Mr. Holman that that poses some problem if Congress has to approve every regulation that is promulgated by an agency. I think the cumbersomeness of that would be amazing, and given our division in Congress, it is hard to get anything done; essentially I think it would shut down all future regulations.

Mr. TIPTON. Are you calling on the U.S. Senate to approve the REINS Act passed by the U.S. House of Representatives?

Mr. KNAPP. No, sir, we are not.

Mr. TIPTON. Mr. Brediger?

Mr. BREDIGER. Back where I come from, we believe that the EPA works under the auspices of Congress, and when we see these regulations rolling out and when we are looking for relief, we seem to have to find our relief in the Federal Court system. That troubles us. We should be coming back to this body seeking the relief and requiring the kind of oversight that is necessary before the genie pops out of the bottle. We seem to be chasing our tail all the way around. We think it is this Congress' job to stop some of these

things before they come out so we can use these panels, for example, to complement the work that should be done.

Mr. TIPTON. So effectively, what you are saying is if EPA is asking for input, maybe it would be a good idea for them to listen?

Mr. BREDIGER. Yes.

Mr. TIPTON. Not a bad idea.

Mr. BREDIGER. Not a bad idea.

Mr. TIPTON. Mr. Merrick?

Mr. MERRICK. To expect that every rule that comes out of the EPA would be perfect and ready for the street every time I think is far-fetched. There ought to be some kind of review process to review the rules once they have been implemented and see how it is working. I know we have gone back to the EPA and they are very gracious about meeting with us. They take our comments and disappear behind the doors and we never hear from them again.

Mr. TIPTON. And are forgotten again. You know, you had mentioned in your testimony that the EPA had a set emission limits that are unachievable based on their failed calculations. Is this a pretty common occurrence?

Mr. MERRICK. I believe that would be——

Mr. TIPTON. Was that from Mr. Brediger?

Mr. BREDIGER. The answer to that is yes. Yes, we have limits that are beyond where technology exists today. Yes, sir.

Mr. MERRICK. And they have limits on our work that are beyond capability too.

Mr. TIPTON. Great. Well, do you think maybe if we really want to be able to fix something, Mr. Knapp, maybe you want to be able to jump in on this as well, the last I was able to read, and the numbers may have been adjusted up or down, but it was about a $10.8 billion budget, something along those lines for the EPA. If we really want to fix the problem, maybe we take some of that money that has already been appropriated rather than putting a burden back on a business and we actually fix the problem. Would that be an approach?

Mr. KNAPP. Well, as you have already heard my testimony, I think part of the problem that these gentleman are experiencing is because of the lack of resources and support for the EPA. So I don't know that by cutting their budget even more and doing something else with it, it is going to get any better outcomes than what they are getting now.

Mr. TIPTON. So forget the goal. Just increase the bureaucracy?

Mr. KNAPP. Sir, it is not a matter of increasing the bureaucracy. But if Congress has given them instructions and provided them with a document that is called the RFA, and they are to carry it out to the best extent to try to work with these organizations, and if they have too quick a deadline and if they don't think they are getting—if they are getting short shrift, then there may be a problem of resources, and that is the way they are dealing with it.

Mr. TIPTON. I am over time. I guess what is really disturbing about that is we continue to hear testimony from a variety of different sources that the EPA does not listen, that it is agenda-driven from within, and the RFA is something that they aren't really paying attention to. The impacts that we are truly seeing on small business across this Nation and in real lives is devastating right

now to the economy, and we need to be able to find a better commonsense balance to it.

So thank you gentleman for being here.

Chairman GRAVES. With that, I want to thank all of you for participating in the hearing. When the EPA fails to comply with the Regulatory Flexibility Act, small businesses suffer, and I think that the quality of rules that the EPA promulgates, I think that suffers also. The EPA should be working collaboratively with small businesses to ensure that small business impacts are analyzed and that less burdensome alternatives are considered.

For the record, I want to say that tomorrow the EPA administrator, Lisa Jackson, is testifying before the Committee on Science, Space, and Technology, and we are going to be submitting a letter for the record outlining the concerns with EPA's compliance with the RFAs that were raised in today's hearing.

In addition, we will continue to exercise our oversight responsibilities to ensure that Federal agencies do comply with the RFA.

With that, I would ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record. Without objection, that is so ordered.

With that, the hearing is adjourned. Thank you.

[Whereupon, at 2:10 p.m., the committee was adjourned.]

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U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

ON: REGULATORY FLEXIBILITY ACT COMPLIANCE: IS EPA FAILING SMALL BUSINESSES?

TO: HOUSE COMMITTEE ON SMALL BUSINESS

BY: KEITH W. HOLMAN
LEGAL POLICY COUNSEL
ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS

DATE: JUNE 27, 2012

BEFORE THE COMMITTEE ON SMALL BUSINESS
OF THE U.S. HOUSE OF REPRESENTATIVES

"Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?"

Testimony of Keith W. Holman
Legal Policy Counsel, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

June 27, 2012

Good morning, Chairman Graves, Ranking Member Velasquez, and members of the Committee. My name is Keith W. Holman and I am Legal Policy Counsel for the Environment, Technology and Regulatory Affairs Division at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. Small businesses are vital to the U.S. economy, comprising 99.7% of all employer firms and generating two-thirds of the net new U.S. jobs over the past 17 years.[1] You have asked me to come before the Committee today to offer the Chamber's view on whether the U.S. Environmental Protection Agency (EPA) is complying with the Regulatory Flexibility Act (RFA).[2] On behalf of the Chamber and our small business members, who benefit from agencies' RFA compliance when they write rules, I thank you for the opportunity to testify here today.

I bring some personal perspective to this question. From 2002 to 2010, I served as an Assistant Chief Counsel in the Office of Advocacy of the Small Business Administration. In that position, I was responsible for ensuring that EPA followed the RFA in its various rulemakings.[3] I worked on many rulemakings where EPA did a good job of complying with the RFA, and several where they did not. My testimony, in part, reflects those experiences.

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[1] Office of Advocacy, U.S. Small Business Administration, *Frequently Asked Questions* (January 2011), available at www.sba.gov/sites/default/files/sbfaq.pdf. Small businesses must often bear a disproportionate burden from federal regulations. In the case of environmental regulations, for example, a business with fewer than 20 employees must bear a per-employee cost burden that is almost five times higher than a business with 500 or more employees. See The Impact of Regulatory Costs on Small Firms, an Office of Advocacy funded study by Nicole Crain and Mark Crain (2010), available at www.sba.gov/advo/research/rs371tot.pdf.

[2] Pub. L. No. 96-354, 94 Stat. 1164 (1981). (codified as amended at 5 U.S.C. §§ 601- 612).

[3] During this time period, I personally served as Advocacy's representative on nine Small Business Advocacy Review Panels convened by EPA. SBAR Panels are discussed in detail below.

I. The Regulatory Flexibility Act

Congress passed the RFA in 1980 to give small entities a voice in the federal rulemaking process. The premise of the Regulatory Flexibility Act is relatively simple: to require federal agencies to assess the economic impact of planned regulations on small entities[4] and to consider alternatives that would lessen those impacts. Prior to passage of the RFA, small businesses often were unaware of new regulations coming out of Washington and powerless to meaningfully affect the design of those rules after they had been proposed. One account of this situation, written in 1964, describes the frustration of small business owners:

> Often businessmen come down to Washington when they are almost purple with apoplexy. A particular piece of legislation or an administrative ruling has been either passed or under consideration for weeks, months, or perhaps even a year. When it is about to be finalized—or even after it has been passed—the businessman shows up in Washington for a 'last-ditch effort.' He must necessarily be aggressive and antagonistic in conflict with a policy or program whose cement had virtually hardened.[5]

Even today, it is true that unless the concerns of a small business can be brought before a regulatory agency **early** in the rulemaking process, the regulatory 'cement will harden' and the rule will be finalized without addressing the concerns. Small businesses typically also must vie against larger businesses for the attention of regulators.

To address this situation, the RFA requires each federal agency to review its proposed and final rules that are subject to notice and comment rulemaking under section 553 of the Administrative Procedure Act[6] to determine if the rule in question will have a "significant economic impact on a substantial number of small entities (SEISNOSE)."[7] Unless the head of the agency can certify that a proposed rule will not, if promulgated, have a SEISNOSE, the agency must prepare an initial regulatory flexibility analysis (IRFA) and make it available for public review and comment. The IRFA must describe the anticipated economic impacts of the rule and evaluate whether alternative actions that would minimize the rule's impact would still achieve the rule's purpose. When the agency issues the final rule, if it cannot certify that the rule will not have a significant

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[4] The RFA applies to three types of small entities: small businesses, small organizations, and small communities. Small businesses are defined by the Small Business Administration at 13 C.F.R. § 121.201. Small organizations are not-for-profit enterprises that are independently owned and operated and are not dominant in their field.(e.g., private hospitals, private schools). Small governments are the governments of cities, towns, villages, school districts or special districts having a population of less than 50,000.

[5] William Ruder & Raymond Nathan, *The Businessman's Guide to Washington*, at 3 (1964).

[6] 5 U.S.C. § 553.

[7] 5 U.S.C. § 605(b). EPA has prepared guidance on how it interprets the terms "significant economic impact" and "substantial number". *See* EPA, *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act* (November 2006).

economic impact, the agency must prepare a final regulatory flexibility analysis (FRFA). The FRFA must summarize any issues raised by the public, describe the steps taken by the agency to minimize burdens on small entities, and explain why the agency took the final action it did. Importantly, the agency must explain why other alternatives were rejected. The objective of these procedures is to ensure that the agency has had the opportunity to hear and understand the specific issues small entities will have when they must comply with a new regulatory mandate.

II. EPA and the RFA

EPA is one of the most prolific rule-writing agencies in the Federal government. In 2011, for example, the agency completed or was actively developing 257 regulations; only the Departments of Treasury, Commerce, and Interior wrote more rules.[8] Moreover, not only does EPA issue a significant number of rules, but many of the rules the agency writes are big, costly rules that affect large sectors of the U.S. economy.[9] In part, because Congress recognized that EPA writes a large number of high-impact rules, EPA became subject to an additional small entity impact analysis requirement in 1996 when the RFA was amended. The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)[10] requires EPA (as well as the Occupational Safety and Health Administration (OSHA)) to convene a Small Business Advocacy Review (SBAR) Panel whenever one of their planned rules is likely to have a SEISNOSE.[11] As a practical matter, the vast majority of EPA rules are certified by the agency as not having a SEISNOSE, and accordingly are not required to go through the SBAR Panel process. In any given year EPA might write more than three hundred proposed rules, but only two to eight rules might actually require a SBAR Panel.

III. The SBAR Panel Process

The Panel process generally adds a total of six to twelve months to EPA's rulemaking process, most of which is preparation time. Panel members include representatives from the SBA Office of Advocacy, the Office of Management and

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[8] Clyde Wayne Crews Jr., Competitive Enterprise Institute, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, 2012 Edition, at 22 (Treasury – 495 rules, Commerce – 324 rules, Interior – 318 rules, EPA – 257 rules).

[9] For example, when President Obama identified seven proposed or planned rules in August 2011 that were anticipated to have ***annual*** compliance costs of $1 billion or more, four of the seven rules were EPA rules. Letter from President Barack Obama to Speaker John Boehner, August 30, 2011, available from www.whitehouse.gov. The EPA rules were: Reconsideration of the 2008 Ozone NAAQS Standard, Utility MACT Rule, Boiler MACT Rule, and the Coal Ash Rule).

[10] Pub. L. No. 104-121, 110 Stat. 847 (1996) (current version at 5 U.S.C. §§ 601-612).

[11] 5 U.S.C. §§ 609(b), (d).

Budget's Office of Information and Regulatory Affairs (OIRA), the EPA program office planning to issue the rule, and EPA's Office of Policy, Economics and Innovation (OPEI). Small entity representatives (SERs)—who speak for the sectors that are likely to be affected by the planned rule—advise the Panel members on the probable real-world impacts of the rule and potential regulatory alternatives. Generally, the Panel members meet with SERs well before formal convening of the Panel. These early meetings are intended to give SERs a sense of the design of the planned rule, the underlying data and legal authority supporting the rule, and early estimates of its economic impacts. SERs have several opportunities to ask the agency questions, and to submit written and oral comments to the Panel members. Within 60 days after the Panel formally convenes, Panel members must prepare a report to the agency containing recommended alternatives for the planned rule. These alternatives have often been incorporated by EPA into the proposed rule. The Panel process is the best opportunity for EPA to get face-to-face interaction with small entities and get a sense of the ways that small entities differ from their larger counterparts in their ability to comply with regulatory mandates. Because the Panel occurs early, before the planned rule is publicly proposed, it also represents the best opportunity for small entities to have real input into the final design of a rule.

IV. Has EPA's SBAR Panel Process Worked Well?

In some cases, EPA ***has*** done a good job of meeting both the letter and the spirit of the SBAR Panel requirement. Examples of Panels where the exchange of information and regulatory alternatives was particularly robust include the Lime MACT Panel (January 2002-March 2002), the Cooling Water Intake Structures Panel (February 2004-April 2004) and the Mobile Source Air Toxics Panel (September 2005-November 2005).

- **Lime MACT Panel**. This Panel involved the setting of a Maximum Achievable Control Technology standard for lime kilns under the Clean Air Act. The industry was very engaged with EPA, and provided detailed information to the agency that allowed alternatives to be adopted to benefit the small companies in the industry. The detailed exchange of data and face-to-face discussions paved the way for a final rule that met the regulatory objective and that the industry could live with.

- **Cooling Water Intake Structures Panel**. This Panel dealt with a Clean Water Act regulation designed to prevent aquatic organisms from being killed when they are trapped in cooling water intake structures at existing small utilities and other facilities. SERs provided extremely accurate mitigation cost data to EPA, and the Panel was able to recommend an intake flow threshold to the agency that met the

objective of the rule while addressing the cost feasibility concerns of the SERs. EPA adopted the Panel's recommendation.

- **Mobile Source Air Toxics Panel**. This Panel involved a Clean Air Act rule to lower benzene emissions from gasoline and reduce evaporative emissions from vehicles, boats, and portable gas containers. SERs from the small refining, boatbuilding, and gasoline container manufacturing industries provided detailed information about the technical and cost feasibility of EPA's rule. Valuable regulatory alternatives were recommended by the Panel and adopted by EPA.

In each of the cases, both the SERs and EPA came away from the Panel process with something valuable. By putting its cards on the table up front and honestly exchanging information with the SERs, EPA learned where the weaknesses in its planned rule were. EPA also was able to find alternatives that still met its goals without needlessly damaging small businesses. The small entities got a rule that they could live with, that took their particular concerns into account. EPA got a rule that was more likely to be accepted and complied with by small entities, instead of a rule that would be fought in the courts for years.

V. When Has EPA's SBAR Panel Process Worked Poorly?

While EPA is highly experienced in dealing with the RFA and conducting SBAR Panels, there has occasionally been tension between the Office of Advocacy and EPA over how Panels have been conducted. Going back to 1997, there have at times been disagreements over issues such as how much supporting data EPA should provide to SERs before the formal convening of the Panel and how detailed the description of the planned rule and its impacts needs to be. While EPA has been concerned that premature public release of details about planned rules will damage the overall rulemaking effort, Advocacy has always sought to ensure that SERs have sufficient information about the rule and its expected costs to be able to make knowledgeable contributions to the Panel discussions.

In 2009, far more serious issues began to arise concerning EPA's administration of Panels. In general, these issues fall under the following three categories:

- **EPA Declines to Hold A Panel When A Panel Should Be Convened**. There have been a number of situations where EPA was asked to convene a Panel and declined to do so, despite clear evidence that a Panel was warranted under the RFA. In 2008 and 2009, Advocacy asked EPA repeatedly to convene a Panel or Panels on its planned greenhouse gas (GHG) endangerment finding for vehicles

and resulting GHG rules.[12] Because of the magnitude of the potential economic impact of these GHG rules on literally millions of small entities, it was important that EPA make the effort to reach out to small entities and understand how they would be affected. Instead, EPA determined that a Panel was not needed, and that informal consultation and public outreach meetings would suffice.

Also in 2009, EPA was asked to convene a Panel to consider the planned Coal Ash Rule, which the Obama Administration later estimated would cost between $600 million and $1.5 billion to comply with,[13] for the rule's impact on small municipal utilities and rural cooperatives. EPA asserted, with very limited data, that potential new coal ash disposal costs for small utilities would not be significant. Clearly EPA would have been better served to conduct a Panel and learn for itself what the true compliance cost for small utilities would be under the Coal Ash Rule.

- **EPA Agrees to A Judicial Or Other Deadline That Provides Insufficient Time To Conduct A Panel.** In recent years, EPA has more frequently engaged in out-of-court settlements with environmental advocacy groups that result in agreements to issue particular rules on a specific timetable. Very often, these timetables do not allow sufficient time for EPA to properly go through the SBAR Panel process. In extreme cases, there may not be enough time to conduct a Panel at all. This has happened in a few situations where EPA agreed to deadlines to issue multiple revisions of MACT standards; when the agency later discovers that a rule will in fact have a SEISNOSE, there is no time for a Panel. In other situations, EPA may not have adequate time to prepare itself, other Panel members, or SERs for the Panel. A Panel's utility is greatly diminished when the agency does not have sufficient information about the rule, the anticipated impact of the rule, and potential regulatory alternatives.

  On January 19, 2011, Advocacy submitted a comment letter to EPA regarding proposed settlement agreements that would require rulemakings under the Clean Air Act to establish New Source Performance Standards for greenhouse gases (GHGs) for utilities and refineries.[14] The letter notes that "Advocacy believes the most productive Panels occur after EPA has done preliminary

[12] *See, e.g.*, Comments of the Office of Advocacy to EPA on the proposed rule "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" (December 23, 2009), available at www.sba.gov/sites/default/files/reg%201223%20EPA.pdf.

[13] *See* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), available from www.whitehouse.gov.

[14] Comments of the Office of Advocacy to EPA on the proposed rule "Proposed Settlement Agreements for Petroleum Refineries and Electric Utility Generating Units" (January 19, 2011), available at www.sba.gov/sites/default/files/epa11_0119.pdf.

development and analysis of regulatory options before the initial outreach to Advocacy and the Small Entity Representatives . . . Advocacy is therefore concerned that the proposed settlement agreements do not provide sufficient time for a full Panel process . . . ."[15] Subsequently, when EPA notified Advocacy that it was convening a Panel on the GHG New Source Performance Standards, Advocacy responded that "SERs have not been provided enough information to project how EPA will structure this regulation or establish the relevant standards. In the absence of information sufficient for SERs to appreciate the impact of the proposed rule and to identify regulatory options that would fulfill EPA's statutory objectives, Advocacy believes that convening this panel is premature."[16] Advocacy made similar objections to EPA's management of Panel for the Utility MACT, another multibillion dollar rulemaking.[17] In a comment letter Advocacy sent to EPA on August 4, 2011, serious concerns were raised that EPA failed to provide adequate information to SERs before convening the Panel, did not identify regulatory alternatives, did not provide deliberative materials to other Panel members, and failed to recommend any regulatory alternatives. Advocacy noted that "EPA advised that preparation for this panel would be abbreviated because of negotiated settlement agreement deadlines . . . The SERs commented that the lack of pre-panel consultation harmed their ability to participate meaningfully and that this was inconsistent with EPA's prior practice."[18]

- **EPA Ignores the Recommendations of A Panel**. Even where EPA takes the time to properly conduct a Panel, occasionally the agency will simply choose to ignore the recommendations of the Panel members. For example, the Boiler MACT Panel strongly recommended that EPA (1) include a health-based compliance alternative in the rule, or provide the legal rationale for excluding such an alternative, and (2) identify additional boiler subcategories, such as limited-use and seasonal units. EPA declined to adopt either recommendation, with no adequate explanation.[19] Both of these regulatory alternatives would have saved regulated small entities considerable amounts without compromising the environmental objective of the Boiler MACT rule. Although it is unusual for

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[15] *Id.* at 3.

[16] Comments of the Office of Advocacy to EPA on the convening of the Panel on "Greenhouse Gas New Source Performance Standard for Electric Utility Steam Generating Units" (June 13, 2011), available at www.sba.gov/sites/default/files/files/epa11_0613.pdf.

[17] EPA estimated the cost of the Utility MACT rule at $10 billion. *See* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), available from www.whitehouse.gov.

[18] Comments of the Office of Advocacy to EPA on the proposed rule Utility MACT Standard for Electric Utility Steam Generating Units" (August 4, 2011) at 4, available at www.sba.gov/sites/default/files/files/epa11_0804.pdf.

[19] Comments of the Office of Advocacy to EPA on the proposed Boiler MACT Standards (August 23, 2010), available at www.sba.gov/advocacy/816/12752.

> EPA to simply ignore the recommendations of Panel members, it has happened in recent years.

Together, these serious lapses point to a disturbing trend: EPA now seems to be indifferent to the quality of the Panels it conducts. In the Office of Advocacy's most recent annual report to Congress, it was noted that:

> Advocacy had concerns with a number of panels . . . and, for the first time, expressed some of these concerns in public letters . . . Advocacy's major concern with the panels was the lack of information provided to the small entity representatives (SERs) about the potential effects of the proposed rule and the lack of significant regulatory alternatives to be discussed with the SERs.[20]

This recent trend is quite unfortunate, because Panels are extremely valuable tools in the rulemaking process when they are conducted properly. When EPA receives high-quality, detailed information from SERs about how a rule will impact them, particularly at that early stage in the rule's development, it results in a far better final rule. While it is clear that conducting Panels requires an investment of additional time and other agency resources, Panels are investments that yield improved rulemakings. In a regulatory environment where multi-billion dollar rules are more and more common, it should not be asking too much of EPA to approach the Panel process as a valuable learning experience, not a check-box exercise that merely slows down the process of issuing rules.

VI. How Could EPA's Compliance with the RFA Be Improved?

EPA needs to build the time and resources into the rulemaking process so that it can conduct thorough, meaningful Panels. The agency must ensure that the regulatory deadlines it agrees to in settlements actually allow sufficient time for RFA compliance. The agency should also give more prominence to the office within EPA that manages Panels and RFA compliance. If EPA's current leadership treated RFA compliance and Panels as the important priorities they should be, the agency as a whole would follow suit. The RFA and the SBAR Panel process will not be the vital tools to ensure a level playing field for small entities that Congress intended them to be if EPA does not take these requirements seriously.

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[20] Office of Advocacy, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility* Act and Executive Order 13272 (February 2012) at 26, available at www.sba.gov/sites/default/files/11regflx_0.pdf.

Again, thank you for giving me the opportunity to testify today. I look forward to answering any questions you may have.

Testimony of

Frank Knapp, Jr.
President & CEO, South Carolina Small Business Chamber of Commerce
Vice Chair, American Sustainable Business Council

U.S. House of Representatives
Committee on Small Business

June 27, 2012

Regulatory Flexibility Act Compliance: Is EPA Failing Business?

Chairman Graves, Ranking Member Velasquez, and members of the Committee, I am Frank Knapp, Jr., president, CEO and co-founder of the South Carolina Small Business Chamber of Commerce and Vice Chair of the American Sustainable Business Council. Thank you for this opportunity to testify before you today.

The South Carolina Small Business Chamber is a statewide advocacy organization of 5000 plus members that promotes a more small-business friendly state and federal government.

The American Sustainable Business Council founded in 2009 and its members now represent over 150,000 businesses and more than 300,000 entrepreneurs, owners, executives, investors and business professionals across the country. These diverse business organizations cover the gamut of local and state chambers of commerce, microenterprise, social enterprise, green and sustainable business groups, local living economy groups, women business leaders, economic development organizations and investor and business incubators.

I had the opportunity to read the testimony of Mr. Holman, representing the U.S. Chamber of Commerce, and Mr. Merrick, representing the National Association of the Remodeling Industry, prior to preparing my comments. I commend them for the civility of their remarks and their focus on the Regulatory Flexibility Act as it pertains to the Environmental Protection Agency.

Both gentlemen recognized the importance of the Regulatory Flexibility Act for insuring that regulations are reviewed to determine if they are too burdensome for small businesses and if the goal of regulations can be achieved in alternative methods. They pointed out some instances where the business community and the EPA didn't agree. But they also point out successful RFA stories.

In 2004 my South Carolina organization worked with our South Carolina Chamber and NFIB to pass our Small Business Regulatory Flexibility Act modeled after the

federal law. Last August the then chairman of the South Carolina Small Business Regulatory Review Committee told me that over the previous seven years his committee had reviewed about 300 proposed regulations and identified only ten that raised their concern. His Committee worked with the state agency promulgating these new regulations and satisfactorily resolved the issues.

The Regulatory Flexibility Act has created an effective process to protect small businesses even if the process itself needs some attention from time to time.

Mr. Holman correctly identifies one area where the EPA's compliance with the RFA can be improved—more resources for the rulemaking process. While there are voices we hear in Washington critical of the EPA and calls for cutting back or freezing the regulatory process, the reality is that it can work better for small businesses and the public if the EPA was better funded.

With more resources the EPA can do a better job of meeting the requirements of the RFA to the benefit of small business. However more resources for the EPA would not only allow the agency to be more efficient and effective in complying with the RFA, it would also enable the organization to do a better job of protecting the public's and environment's health while unleashing entrepreneurial innovations and creating jobs.

Every responsible new rule that protects the health of our citizens and workers opens a door to newer and better products. Our nation is loaded with these small business entrepreneurs just waiting to solve a problem when the demand is created.

The Toxic Substance Control Act is so outdated and the EPA's resources so strained that there are literally over 80,000 chemicals in the agency's inventory but it has been able to require testing for only about 200. Just yesterday the state of California took the lead on investigating the health hazards of toxic flame retardant chemicals used in furniture and mattresses while not providing protection from fires. The EPA should be examining this national health hazard

but it doesn't have the resources.

Can the materials we sleep and sit on be non-toxic and still resist fire? Absolutely. Ask Barry Cik, owner of Naturepedic in Cleveland, Ohio. Naturepedic manufactures baby and crib mattresses that provide proper support, meet government flammability requirements, provide waterproofing, seamless designs and other hygienic features all without the use of harmful chemicals or allergenic materials. But instead of helping this innovative industry take off and making bedding healthier for families, we protect the use of carcinogenic chemicals of the past by not properly empowering the EPA with the needed legislative support and resources.

Then there is Bioamber, a bio-based chemical manufacturer. The renewable chemical industry with all its new jobs is on the launch pad. But while it is developing technology and struggling to be profitable, it is laboring in the shadow of the old guard chemical giants churning out chemicals that avoid the inspection of an under-resourced EPA. Reforming the Toxic Substance Control Act to produce stronger and clearer regulations on hazardous chemicals will result in hundreds of new Bioambers to grow a sustainable economy.

The public and small business owners want good regulations. A recent national poll of small business owners conducted for the American Sustainable Business Council found that 80 percent support disclosure and regulations of toxic materials, 79 percent support ensuring clean air and water and 61 percent support moving the country towards energy efficiency and clean energy.

It is in this area that support for the EPA is vital not only to protect our health from toxic emissions and the high costs to our economy that results, but also to protect our existing small businesses from the negative effects of carbon emissions resulting in rising sea levels and more severe weather events, a very crucial issue for all and certainly our coastal areas in South Carolina. Effective EPA regulations will drive a new energy economy that will create millions of new jobs, reduce energy costs and make our country truly energy independent. That

is the kind of economic impact that a properly supported and resourced EPA can have that will benefit all small businesses, not just the ones impacted by the RFA.

Here is the question asked in the title of this hearing—"Is EPA Failing Small Businesses?" The EPA's compliance with the Regulatory Flexibility Act isn't failing small businesses but it could do a better job of working with small businesses if, as Mr. Holman points out, it had more resources.

Now is the moment to support the EPA to enable it to really live up to its potential to help our small businesses and our economy in promulgating fair and transparent regulations on toxic chemicals and air and water pollution. In the same poll I mentioned above it found that 86 percent of small businesses see regulations as a necessary part of a modern market-based economy. The American Sustainable Business Council believes that we don't have to choose between regulations to protect our health and environment and creating jobs to grow our economy. That is the old way of doing business.

Our future prosperity is clearly tied to developing a sustainable economy through business innovation. Businesses can take care of our people and environment and make a profit all at the same time. And a properly supported and resourced EPA can help us get to this sustainable economy faster.

Thank you for the opportunity to speak to you today.

WRITTEN STATEMENT OF

JEFFREY A. BREDIGER, DIRECTOR OF UTILITIES

ORRVILLE (OHIO) UTILITIES

ON

"REGULATORY FLEXIBILITY ACT COMPLIANCE: IS EPA FAILING SMALL BUSINESS?"

HEARING BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

JUNE 27, 2012

Mr. Chairman and members of the Committee. Good afternoon. My name is Jeffrey A. Brediger, and I am director of utilities for Orrville Utilities in Orrville, Ohio. I am presenting this statement today on behalf of Orrville Utilities and the American Public Power Association (APPA), of which my municipal electric utility is a member.

APPA is the national service organization representing the interests of the nation's more than 2,000 not-for-profit, community-owned electric utilities that serve over 46 million Americans in 49 states (all but Hawaii). Public power utilities include state public power agencies, municipal electric utilities, and special utility districts that provide electricity and other services to some of the nation's largest cities such as Los Angeles, Seattle, Omaha, San Antonio, and Jacksonville, but also some of its smallest towns. The vast majority of public power utilities serve small and medium-sized communities – in fact, 70 percent of public power utilities are located in communities with populations of 10,000 people or less. Under the Small Business Regulatory Enforcement and Fairness Act (SBREFA), over 90 percent of the nation's public power utilities are themselves considered small businesses, in addition to serving the small businesses in their communities.

Orrville is a small city of about 8,300 located in the northern part of Ohio. Some may recognize Orrville from its association as the home of the J.M. Smucker Company, our largest employer with over 1,500 employees. Orrville is also home to a number of other nationally prominent companies, including the Smith Dairy Company (1909), the Schantz Organ Company (1873), the Will-Burt Company (1918), and the Quality Castings Company (1933)—which is Orrville Utilities' largest customer, accounting for approximately 40 percent of retail electricity sales.

Orrville prides itself on being a city of diversified industry. For nearly 150 years, Orrville has built a reputation as a flourishing community with a supportive business climate where major corporations, family businesses, and entrepreneurs can start and grow a business in the midst of strategic U.S. market areas. In fact, approximately 20 industries have been operating in Orrville since 1970 or earlier, demonstrating a well-established foundation for successful businesses. Today, new industries are also calling Orrville home, and the city's companies currently employ more than 3,000 people who live primarily in Orrville and the surrounding Wayne County area.

Orrville offers companies a number of competitive advantages including a skilled workforce with a heritage of a good work ethic, perhaps passed down from the pioneering generations who started their farms and small businesses in the area more than 170 years ago and built the city into a prosperous center for commerce. Other advantages include: the excellent Orrville School District, Aultman Orrville Hospital, proximity to numerous colleges and universities, affordable housing, and Orrville's municipally owned electric power plant.

Orrville's Experience with the Boiler MACT Rule / SBREFA

As a public power community that also owns its own power plant, Orrville has been able to offer competitively priced electricity to our residential, commercial, and industrial customers, which has helped promote local business development efforts and has helped protect our customers from volatile electricity markets. But as environmental requirements tighten, Orrville Utilities faces increasing costs and burdens to provide these important community services. We have been active in the battle against a number of unreasonable regulations proposed by the Environmental Protection Agency (EPA), most notably the Industrial, Commercial, and Institutional Boiler Maximum Achievable Control Technology (Boiler MACT) rule, which was due to be finalized by EPA this spring after several rounds of legal challenges, reconsideration, and re-proposal. When asked about the status last week, EPA indicated it is "still working on it."

In addition to being a member of APPA, Orrville is a member of American Municipal Power, Inc. (AMP), a nonprofit joint action agency serving a membership composed of 129 public power members in seven states. Through AMP and APPA and representing Orrville, I have been involved in the Boiler MACT rule since 2003. Orrville's power plant serves generators of 25 MW or less, which is small enough to be covered by the Boiler MACT rule instead of the rules governing larger utilities. As a small utility and as a small government with a population of less than 50,000, the City of Orrville is considered a "small entity" under SBREFA. Representing Orrville and other small generators, I participated with APPA in the SBREFA review process for the Boiler MACT rule in 2003, and also served as a Small Entity Representative (SER) in the latest SBREFA effort on the current proposed rule on reconsideration.

The SBREFA process was important to Orrville and the other AMP generating members because small utilities and small governments were a small subset of those being regulated by the Boiler MACT rule, and EPA was not focused on the burdens on small entities. In fact, AMP challenged the first Boiler MACT rule on the basis that EPA had failed to follow the SBREFA process by not convening a small business advocacy review (SBAR) panel to consider the impact on small municipal utilities and others. EPA was more careful to follow the procedural requirements of SBREFA for its second try at Boiler MACT rulemaking. However, EPA chose not to adopt the primary recommendation from the small business panel. The panel recommended that EPA implement a health-based compliance alternative that would allow small entities to avoid the significant cost of hydrogen chloride (HCl) scrubbers when they could demonstrate that their emissions did not pose a health risk at their fence line. This proposed solution would have provided cost relief for small entities while remaining protective of human health. EPA had the discretion to adopt it under the Clean Air Act, but it chose not to.

We are still waiting for relief on Boiler MACT. In comments filed on the reconsidered Boiler MACT rule in February 2012, AMP remarked that:

> "...the rule remains unduly burdensome and unsupportable, particularly for small, coal-fired municipal utilities. Small municipal utilities have faced disproportionate impacts under each iteration of this rule, and will continue to face disproportionate impacts under the Proposed Rule. Municipal utilities play an important role that is not filled by any other entity. Municipal utilities provide reliable and affordable cost competitive electric service to small communities, increase electric grid reliability, attract high-quality jobs to local communities, and act as a buffer to price spikes and supply shortages during times of peak usage. These are important functions that the Proposed Rule threatens to regulate out of existence. EPA has the regulatory authority to avoid that adverse result."[1]

We remain hopeful that the final rule will reflect our concerns. A copy of AMP's filed comments is attached for the record.

I would also like to briefly mention our appreciation for the passage by the House last October and the support of most of this Committee's members of H.R. 2250, the EPA Regulatory Relief Act, which specifically would provide EPA with an additional 15 months to fully consider new data related to the Boiler MACT rule in order to "get it right." In addition, the legislation would provide a full five years for impacted units to meet the rule's capital-intensive compliance limits and would ensure that any such limits could actually be met by units under real-world and not theoretical conditions. As you know, a Senate effort to attach this bill to the surface

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[1] February 21, 2012, Comments of American Municipal Power, Inc., Docket ID No. EPA-HQ-OAR-2002-0058, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (76 Federal Register 80598, December 23, 2011).

transportation bill failed in March. But the debate has highlighted the ongoing need to seek modifications to this unacceptable rule, whether through legislation, legal, or regulatory avenues.

SBREFA Process: Goals v. Results

As previously mentioned, I have been involved directly with the SBREFA review process regarding the Boiler MACT rule. As you know, SBREFA was enacted in 1996, amending the Regulatory Fairness Act of 1980 (RFA). The SBREFA process requires EPA, the Occupational Safety and Health Administration (OSHA), and the new Consumer Financial Protection Bureau (CFPB) to "convene a panel whenever a regulation is to have a significant impact on a substantial number of small entities."[2] Further, in its Report on the Regulatory Flexibility Act, FY 2011, the U. S. Small Business Administration (SBA) noted that "President Obama issued Executive Order 13563 [issued January 18, 2011] requiring every Federal Agency to create a process to systematically review its rules with an eye toward reducing the burden imposed by those regulations. The President's memo further directed that the agencies' explicitly justify any decision not to provide flexibility for small businesses."[3] Coupled together, these processes should ensure that the needs of small businesses are thoroughly addressed as a regular consideration of the regulatory process, particularly for rules originating at EPA, OSHA, and CFPB. Unfortunately, this laudable goal has met with mixed results.

While SBA's 2012 Report to Congress on the Regulatory Flexibility Act indicated that SBAR panels under SBREFA have resulted in regulations that have reduced regulatory costs by $11.7 billion for a number of agencies, we note that – as least in our experience – the process has fallen short of desired expectations. In some cases, EPA has declined to convene a panel to evaluate small entity relief. When panels are convened, they may lack the information necessary to generate effective alternatives. When effective alternatives are generated, EPA may ignore the results. Small entities are not getting the regulatory relief we need.

Of the approximately 30 SER panels conducted to date, about two-thirds have pertained to EPA rules. While we are not aware of the details of other agency SER panels, Orrville and APPA can comment on the four SER panels for various regulations impacting electric utilities conducted over the last eight years:

- July 30, 2004: Cooling Water Intake Structures (Sec. 316(b) of the Clean Water Act)
- June 2011 (not completed): New Source Performance Standards (NSPS) for Greenhouse Gases (GHG) / CO2 (Clean Air Act)

[2] U. S. Small Business Administration, 2012 Report on the Regulatory Flexibility Act.

[3] U. S. Small Business Administration, Report on the Regulatory Flexibility Act, FY 2011, Feb. 2012, pp. 1 and 5.

- July 13, 2011: Mercury and Air Toxics Standards (MATS) (Clean Air Act)
- November 2008 - August 2011: Boiler MACT (Clean Air Act)

In addition to these four, which are discussed below, one request by small business and the utility industry for EPA to convene a SER panel on the proposed Resource Conservation and Recovery Act (RCRA) regulation on coal ash (or coal residuals) was declined. Thus, the agency failed to look at alternatives to regulating all coal ash as hazardous waste that would benefit small utilities, small governments, and those small businesses that may be beneficially reusing coal ash in various products. These industries include road construction and wallboard and other home construction material manufacturers that use coal ash as a recycled product.

Cooling Water Intake Structures: In 2004, EPA convened a Clean Water Act SER panel that successfully identified regulatory options and alternatives to requiring cooling towers in each location and at each existing power plant regardless of size, location, and species of affected fish. While the final 316(b) rule has not yet been issued, the SER process seemed to work in this instance, and a lower-cost outcome was evident in the proposed rule. The SER process did a good job in identifying impacts, costs, and some regulatory alternatives for smaller electric utilities while still respecting the need to mitigate against impingement and entrainment of aquatic organisms in the intake pipes at electric utilities. If the SER-recommended alternatives are included in the final 316(b) rule, the process will have provided real relief for small entities.

NSPS for GHG / CO2: EPA failed to identify real-world regulatory alternatives for coal plants to meet a natural gas equivalent standard, nor did EPA seek advance comments or opinions about the feasibility of carbon capture and storage (CCS) technologies that have not been commercially demonstrated. In both of these instances, the SER panel process was not provided sufficient time for consideration and was not thorough in the scope of its review. For example, as opposed to the agency providing technical information for the SER panelists' review, such information was provided to EPA staff by the panelists in response to perceived flaws in EPA's rationale. Panelists also noted to EPA that some of the agency's ideas would violate its own Clean Air Act policies on New Source Review. In the case of CCS and only at the request of SBA, a mere ten minutes were provided to address the promising yet complex issues surrounding CCS and its lack of commercial demonstration. As a result of these deficiencies, the SBA considers the panel "aborted" or incomplete, as the panel never resumed meeting to complete its work.[4]

MATS: In the case of the MATS rule (which applies to coal- and oil-fired units exceeding 25 MW in size), EPA did not adequately identify subcategories or provide for discussion of workplace standards to help reduce regulatory impacts to smaller utilities that operate units impacted by the rule. EPA also did not identify alternative compliance time options in a SER panel process or address these issues in the proposed or final rule. The public power community

[4] See letter from SBA to EPA's Lisa Jackson and OMB's Cass Sunstein, June 13, 2011 (also attached).

provided comments and documentation as to the need for additional compliance time, which were largely ignored, despite the fact that other industries regulated by different MACT standards have been granted additional time if the compliance date was not feasible or achievable.

Boiler MACT: In the case of the Boiler MACT SER, EPA rejected the use of subcategories based on size to allow emission limits to be set based on the performance of other similar small entities. EPA failed to apply one of the options that the agency has successfully used for other industries that have smaller units, but not to provide relief for municipal electric utilities. Despite repeated requests, EPA also rejected the use of the health-based emission limits in the re-proposed rule – despite the fact that they were approved as part of the original Boiler MACT rule. The SBAR panel, which EPA convened to identify ways EPA could reduce the impact of the Boiler MACT rule on small entities, identified the health-based alternative for HCl is as the most important step EPA could take to reduce the crushing cost burden on small entities like municipal utilities. Scrubber technologies impose significant costs on small entities. A health-based alternative would allow a small entity to demonstrate that its HCl emissions at the fence line do not pose a threat to human health. If that concentration is considered safe, the small entity would not be required to spend millions of dollars on a control device to reduce HCl emissions. The health-based alternative is essential to small municipal utilities because we can avoid millions in unnecessary costs and continue to provide the services our communities have come to expect. Despite this recommendation, EPA made an arbitrary decision to eliminate the health-based alternative from the proposed rule, while at the same time imposing HCl limits that are 30 percent more stringent than those finalized in March 2011.

In summary, public power's recent experience with SBREFA has been disappointing at best. While the SBREFA process is intended to provide small entities with an expanded opportunity to participate in the development of certain regulations, the process lately has taken on the look of window dressing, with EPA simply "checking the box" to indicate that a requirement has been met, even if done insufficiently. Poor preparation by EPA staff has wasted the time of SER panel participants. Too little time is invested in the panel process to allow participants to properly review or comment on detailed technical materials and issues. These conditions are also making it increasingly difficult to enlist small entity representatives to participate in the process. Perhaps most disturbing are the panels that produce a viable alternative, only to have EPA ignore the recommendation coming from those with real-world operational experiences.

Moving Forward

Despite our misgivings regarding our recent experience with the SBREFA process, Orrville and APPA thoroughly endorse the concept of a specialized process to seek, consider, and incorporate the specific special needs of small entities in the regulatory process. In fact, APPA at its national

conference earlier this month passed a resolution supporting the expansion of the SBREFA process to rules emanating from all federal agencies, reflecting a key provision in H.R. 527, the Regulatory Flexibility Improvements Act, which passed the House last December but which now languishes in the Senate. A copy of the APPA resolution is attached for the record. In addition, we offer the following specific suggestions for improving the RFA and the SBREFA SER panels:

- EPA's Air Office should be more vigilant about compliance with RFA, and the process for SBREFA SER panels should be conducted in a more timely and more thorough manner, including identification and analysis of regulatory alternatives and costs evaluated in clear terms and provided in writing to the small entity panelists at least two weeks in advance of any meetings or conference calls.

- EPA must not be allowed to ignore the results of the SER panel process. By rejecting the Boiler MACT health-based alternative, EPA undercut the legitimacy of the process and cast doubt on whether small entity relief is a true priority.

- The EPA should conduct another SER panel on regulatory options and alternatives before finalizing the NSPS for GHG / CO2 for the power sector since the NSPS SER panel from June 2011 was never completed.

- The EPA should conduct a SER panel before revisions to the 1982 Effluent Limitation Guidelines (ELGs) for the utility sector under the Clean Water Act are proposed. The ELGs should look at precipitators as well as other less expensive technology as options to "Zero Liquid Discharge" as a way to reduce selenium from power plants. The EPA has not yet scheduled a SER panel and the deadline for proposal is November 24, 2012. The EPA should convene that SBREFA SER panel no later than 60 days before the proposed rule goes to the OMB for inter-agency review for the SER process to have a productive effect.

Conclusion

In conclusion, I commend the Committee for holding this hearing today. It is clear that some important changes need to be made to the way EPA performs its duties under SBREFA. We look forward to those improvements. Thank you for the opportunity to present this testimony, and I'd be happy to answer any questions.

Testimony of

David Merrick, MCR, UDCP
National Association of the Remodeling Industry (NARI)

U.S. House of Representatives
Committee on Small Business

June 27, 2012

Regulatory Flexibility Act Compliance: Is EPA Failing Small Business?

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Introduction:

Mr. Chairman and Members of the Committee, I am pleased to present this testimony on behalf of the National Association of the Remodeling Industry (NARI). Today I will try and describe how the U.S. Environmental Protection Agency (EPA)'s Lead Renovation, Repair, and Painting (LRRP) rule is affecting remodelers and how the EPA can do a better job working with organizations like NARI to protect our customers and our customers' families.

NARI is a non-profit trade association based in Des Plaines, Illinois. We have 58 Chapters in major metro areas nationwide and our membership of 7,000 companies is comprised of remodeling contractors, local suppliers, and national suppliers. 83 percent of NARI members have fewer than 20 employees and many are 1 or 2 man operations. NARI's core purpose is to advance and promote the remodeling industry's professionalism, product and vital public purpose. NARI members voluntarily subscribe to a strict Code of Ethics which NARI rigorously enforces.

I run a design build company in Kensington, Maryland. Merrick Design and Build Inc. is a full service residential and commercial remodeling, design, & build company. We have been serving customers in lower Montgomery County and Northwest DC since 1989 when I founded the company. We focus primarily on residential renovation and repair and our work includes some commercial projects, including churches, schools, day care centers, professional offices and restaurants.

In addition to running my business, I serve as Chairman of NARI's Government Affairs Committee. I stay very involved with NARI's Metro DC Chapter and I am a member of the National Federation of Independent Business (NFIB).

Background on EPA's Lead Renovation, Repair, and Painting Rule:

NARI has always been proud of its training and certification programs and we have a long history of educating remodelers on lead paint hazards. In fact, NARI worked with the U.S. Department of Housing and Urban Affairs (HUD) to run a lead paint training program in 1998. Curriculum NARI developed for that program continues to be used today and NARI remains dedicated to training remodelers in how to ensure their customers are not harmed from lead paint.

As a practical matter, please keep in mind that if EPA simply recognized the work practices inherent in how we remodel homes, we may have saved a lot of trouble that has overshadowed the issuance, re-issuance, amendments, and court settlements related to EPA's LRRP rulemakings.

NARI did not think that EPA's rulemaking in 2008 was perfect. It still lacked some of the flexibility inherent in the different situations that arise unique to different projects. However, the "opt out" provision in the 2008 final rule was one flexibility provision that arose from the small business panel process that is part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) process this Committee is discussing today.

When EPA finalized LRRP in August of 2008, NARI made it a top priority to inform our members of their responsibilities and to direct members to trainers so they could become certified. NARI members received information on LRRP via numerous articles in our main membership publication, *The Remodelers Journal*; NARI's e-newsletter, *The Spec Sheet*; and in our e-notice, *Tuffin' It out*. NARI publishes and distributes Issue Briefing Papers, and we continue to devote space to the LRRP on NARI's Web site, www.nari.org/leadsafety.

In 2010, when EPA decided to change the LRRP rules, NARI was disappointed. We worked with several contracting, homebuilding, and remodeling businesses to express our concerns in a comment to EPA we submitted in July of 2010. In addition to the problems we had with EPA changing the rules when we were pushing NARI members to get certified and learn what EPA had finalized just 2-years earlier, we had substantive concerns with many of the provisions in EPA's 2010 proposal.

Fundamental to our concerns were the removal of the "opt-out" provision and EPA's refusal to re-convene a group of small businesses, the U.S. Small Business Administration's Office of Advocacy, and the Office of Management and Budget to ensure flexibility in the rulemaking for small businesses.

In a different part of EPA's 2010 proposal, EPA did listen to small businesses. Part of what EPA proposed to do in its 2010 LRRP proposal was to add end-of-job requirements for remodelers and contractors. We had significant problems with the "clearance testing" proposal, mostly because it would have added a layer of costs and complexity to jobs for contractors who were still struggling to comply with the 2008 rule. Plus, our customers still did not understand that their projects were more expensive because of EPA requirements. NARI felt strongly that adding "clearance testing" would have pushed more and more contractors away from the EPA-certification process, adding costs to projects without a direct correlation to making our customers' homes safer.

EPA agreed with us that "clearance testing" requirements would impose more costs without additional benefits and last July they decided not to impose new regulatory mandates on remodelers, home builders, and contractors.

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Legislation to restore the "opt-out" provision:

Recently, Members of the House of Representatives introduced a bi-partisan bill that would help make EPA's LRRP rules work better to protect young children and pregnant women and to add the flexibility needed for remodelers to best serve our customers. H.R. 5911 restores the "opt out" provision in a way that relies on EPA to determine what projects would reduce cost without sacrificing safety. NARI supports that legislation and hopes this Committee will take a close look at it and offer its support.

EPA's proposal to extend LRRP requirements to cover work on the exterior of public and commercial buildings:

It seems like EPA's desire to pile onto its 2008 final rule continues. EPA is considering extending LRRP requirements to cover work on the exterior of public and commercial buildings. To EPA's credit, they reached out to small businesses last year to try and flush out how their thinking would impact us. NARI was glad that Kevin Nau, who runs a design build company in Maryland, was able to consult with EPA when the agency was considering convening a Small Business Advocacy Review Panel under SBREFA.

NARI's concerns with EPA moving forward with a public and commercial building rule are three-fold. First, we are concerned that EPA may proceed without convening a SBREFA Small Business Advocacy Review Panel. We do not want the same thing to happen when EPA proposed its 2010 additions to LRRP, that a rule move forward without a SBREFA panel. It seems as though EPA's attention to court-ordered deadlines can take a higher priority than considering small business input in rules. I would ask this Committee to try and change that. Research from the U.S. Small Business Administration's Office of Advocacy shows that we are disproportionately harmed by federal regulations. When it comes to EPA rules, the Office of Advocacy research shows firms like mine shoulder more than 3 times the cost of large businesses, when it comes to federal regulatory compliance. The SBREFA panel process is intended to level the playing field. NARI supported legislation this Committee approved last year (H.R. 527). I hope that that legislation, and oversight by this and other committees in Congress, impress upon EPA that small business input may be more important than meeting a court deadline.

Second, NARI is concerned that EPA may move forward with a public and commercial LRRP rule without clear evidence and data showing lead poisoning risks to children under 6 and pregnant women from construction activities at public and commercial buildings. If EPA cannot present a clear connection between the activity and the risk to children and pregnant women, then our customers certainly will not understand why their projects will become more expensive.

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Third, when EPA moves forward with the rule, NARI would advise that the agency make the rules flexible enough to cover different scenarios. This is what NARI member, Kevin Nau, advised the EPA during meetings last year.

NARI's working relationship with EPA:

NARI prides itself in relationship with EPA. We honestly believe that our goals, to protect our customers' families, are the same as EPA's. With that in mind, we meet regularly with EPA officials to make sure they know how their policies impact remodelers.

During our meetings with EPA, we express our frustration over the low number of contracting firms that are EPA-certified (an LRRP requirement for working on homes built before 1978). Last month, EPA announced that 122,476 firms in the construction and remodeling sector are EPA Lead-Safe Certified Firms. According to the Joint Center for Housing Studies at Harvard University, there are 652,206 remodeling businesses in the United States. Not all of the EPA-certified firms are remodelers (they may be painters, window installers, plumbers, flooring installers, etc.). Even if all the EPA-certified firms are remodelers, that would mean EPA has certified less than 20% of the remodeling firms nation-wide.

NARI believes there are several reasons why so many firms are not certified. Many non-certified firms are able to under-bid those professionals who have spent the time and money to become EPA-certified. Since cost is driving our customers' decisions to go ahead with projects, those non-certified contractors are getting more jobs. That is a troubling scenario because of the risk that presents to homes occupied by young children or pregnant women. We believe that better targeted enforcement activities will help to reverse this trend. We have advised EPA to focus its LRRP enforcement on situations where non EPA-certified contractors are doing work in violation of LRRP rules. In the 2-years since EPA has been enforcing LRRP, there are fewer than 10 cases filed by federal enforcement authorities against non-certified contractors for work practice violations.

Additionally, home owner awareness of LRRP has to increase. Last year, NARI worked with Meredith Corporation's Better Homes and Gardens' homeowner research panel to gauge awareness of EPA's LRRP rules. Unfortunately, 53% of the respondents were unaware of the rules.

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Conclusion:

NARI is pleased with the opportunity to advise this Committee about how EPA interacts with small businesses when the agency develops regulations. The SBREFA process was designed to codify what simply makes sense; for small businesses to work with EPA to come up with constructive solutions for complex problems. It seems as though the process works when EPA listens to the input from the Office of Advocacy and from small businesses. It does not seem to work when EPA rushes the process or avoids it altogether.

We will continue to work with EPA. We will try and increase our customers' knowledge of LRRP rules and we will continue to work with remodelers to increase EPA-certification. Our dialogue with EPA is important because NARI should be EPA's partners in our efforts to protect children and pregnant women from lead-based dangers caused by remodeling activities.

Thank you for your attention to these important issues.

Congressman Mick Mulvaney

Questions for the Record

Committee on Small Business Committee Hearing entitled

"Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?"

For Mr. David Merrick, President of Merrick Design and Build, Inc., testifying on behalf of the National Association of the Remodeling Industry:

Q: In your written testimony, you provide a number of criticisms of EPA regulation. Do you believe there should be no EPA regulation no matter what, or are there some types or kinds of regulations that you believe are satisfactory?

Q: I understand that in late June, the Federal Circuit Court of Appeals for the D.C. Circuit ruled in favor of the EPA, denying homebuilders and others the ability to challenge the EPA's lead paint rules. In that ruling, the judge said that EPA's small business process was not judicially reviewable. Yet, in your testimony, you take issue with EPA's small business process. Despite the court's ruling, how do you think the EPA should conduct the small business process?

Q: The National Association of the Remodeling Industry (NARI) has several certifications and its members, like you, pride themselves as going beyond compliance to perform the best service for your customers. You probably go beyond what EPA requires as well. If you are already following best practices and going beyond what the EPA requires, do you in fact run in to problems with the EPA's RRP rules?

Q: In your testimony, you commented that EPA is not enforcing enough against non-certified contractors. Can you please elaborate on why NARI wants EPA to do a better job enforcing its rules? Would additional enforcement require additional EPA funding to follow your advice?

Q: Lead dust can be dangerous to everyone, especially those who work on site. Would restoring an opt-out put your workers at risk?

Q: Are there any other dangers you foresee in restoring the opt-out, such as lead dust dangers to children or pregnant women, or cost-cutting by remodelers using the opt-out inappropriately?

Congressman Mick Mulvaney

Questions for the Record

Committee on Small Business Committee Hearing entitled

"Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?"

For Mr. Frank Knapp, President and CEO of the South Carolina Small Business Chamber of Commerce, and testifying on behalf of the American Sustainable Business Council:

Q: You state in your written testimony that "the South Carolina Small Business Chamber is a statewide advocacy organization of 5000 plus members that promotes a more small-business friendly state and federal government." To that point:

1) How many of these members are also members of the South Carolina Association for Justice?
2) How many of these members are also members of the Injured Workers Advocates and/or the worker's compensation bar?

Q: In arriving at your count of 5,000 members, if an individual is a member of both the South Carolina Association for Justice and the Injured Worker's Advocates (worker's compensation bar), do you count that individual as one member or as two?

Q: How many of your 5,000 members are dues paying members verses persons who provided an email address to receive your newsletter?

Q: You mentioned in your testimony before the Committee that you did not poll your membership to determine their views on the EPA and what policies your organization should advocate for with respect to the EPA. You also stated that the data you site and rely in your written testimony to establish your policy positions is collected from polls conducted by organizations such as the American Sustainable Business Council, the Small Business Majority, and the Main Street Alliance. Please provide copies of these polls.

Q: Have you ever polled your own organization's membership before establishing any policy position of the South Carolina Small Business Chamber of Commerce? If so, please provide the issues on which your membership was polled, the date of the poll, the results of the poll, and the policy position your organization took with respect to the polled issue.

Congressman Mick Mulvaney
Questions for the Record
Committee on Small Business Committee Hearing entitled
"Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?"

For Mr. Frank Knapp, President and CEO of the South Carolina Small Business Chamber of Commerce, and testifying on behalf of the American Sustainable Business Council:

Q: You state in your written testimony that "the South Carolina Small Business Chamber is a statewide advocacy organization of 5000 plus members that promotes a more small-business friendly state and federal government." To that point:

1) How many of these members are also members of the South Carolina Association for Justice? As I stated at the Committee hearing, I estimate that the SC Association for Justice has approximately 1500 lawfirms as members.

2) How many of these members are also members of the Injured Workers Advocates and/or the worker's compensation bar? Also as I stated at the Committee hearing, most of the members of the Injured Workers Advocates are also members of the SC Association of Justice so there is overlap.

Q: In arriving at your count of 5,000 members, if an individual is a member of both the South Carolina Association for Justice and the Injured Worker's Advocates (worker's compensation bar), do you count that individual as one member or as two? One

Q: How many of your 5,000 members are dues paying members verses persons who provided an email address to receive your newsletter? This would be proprietary information.

Q: You mentioned in your testimony before the Committee that you did not poll your membership to determine their views on the EPA and what policies your organization should advocate for with respect to the EPA. You also stated that the data you site and rely in your written testimony to establish your policy positions is collected from polls conducted by organizations such as the American Sustainable Business Council, the Small Business Majority, and the Main Street Alliance. Please provide copies of these polls. The poll cited at the Committee hearing can be found at http://asbcouncil.org/sites/default/files/files/Regulations_Poll_Report_FINAL.pdf

Q: Have you ever polled your own organization's membership before establishing any policy position of the South Carolina Small Business Chamber of Commerce? If so, please provide the issues on which your membership was polled, the date of the poll, the results of the poll, and the policy position your organization took with respect to the polled issue. Like members of Congress on almost every issue on which they vote, the SCSBCC does not poll its members to formulate positions on issues. Instead we have a Board of Directors consisting of small business owners representative of our membership. This Board of Directors establishes the SCSBCC policy on issues.

David Merrick, MCR, UDCP
President of Merrick Design and Build, Inc.
Kensington, MD
On Behalf of the National Association of the Remodeling Industry (NARI)

Response to Questions for the Record
Congressman Mick Mulvaney
Committee on Small Business
Hearing entitled: "Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?

Q: In your written testimony, you provide a number of criticisms of EPA regulation. Do you believe there should be no EPA regulation no matter what, or are there some types of regulations that you believe are satisfactory?

A: The remodeling business is a service business and NARI's customers are homeowners. NARI is supportive of measures that are protective of our customers and enhance our members' ability to grow their businesses. NARI offers six certifications, from Certified Remodeler (CR), Certified Kitchen and Bath Remodeler (CKBR), and Certified Lead Carpenter (CLC), to Certified Remodeling Project Manager (CRPM), Green Certified Professional (GCP), and Universal Design Certified Professional (UDCP). Additionally we provide our members with both online and in person training. NARI's certifications and training help remodelers perform quality work while guaranteeing safety for their employees and comfort for their customers' families. NARI's certifications are not intended to replace local, state, and federal regulatory requirements. We believe that NARI's standards compliment the intention of regulators. For that reason, NARI is supportive of regulatory efforts to prevent lead poisoning, and to promote energy efficiency, worker safety, and environmental protection.

While NARI is supportive of regulatory intentions, we respectfully want regulators to choose options that minimize red tape so that remodelers can provide cost-effective services for homeowners. NARI believes that federal regulators should follow recommendations from the U.S. Small Business Administration's Office of Advocacy and strike the correct balance between regulatory constraints and free enterprise.

Q: I understand that in late June, the Federal Circuit Court of Appeals for the D.C. Circuit ruled in favor of the EPA, denying homebuilders and others the ability to challenge the EPA's lead paint rules. In that ruling, the judge said that EPA's small business process was not judicially reviewable. Yet, in your testimony, you take issue with EPA's small business process. Despite the court's ruling, how do you think the EPA should conduct the small business process?

A: NARI believes that regulatory agencies benefit from pre-proposal input from small businesses. The Regulatory Flexibility Act was amended in 1996 by the Small

Business Regulatory Enforcement Fairness Act (SBREFA). That amendment set out a process to allow small business stakeholders to constructively guide the U.S. Environmental Protection Agency (EPA) toward regulatory solutions that can maximize environmental safeguards while minimizing regulatory burden. We believe that EPA makes better decisions when it fully considers the views of small businesses and tailors its regulatory proposals based on those views. It would be unfortunate if EPA chooses to ignore constructive advice from NARI and other small business groups based on a legal interpretation.

NARI is hopeful that EPA will look to our membership for advice when the agency is looking at ways to protect the public from lead paint dangers caused by construction. NARI shares EPA's goal in wanting to protect homeowners and their families. When EPA solicits input from NARI, our on-the-ground expertise will help the agency craft regulations that work.

Q: The National Association of the Remodeling Industry (NARI) has several certifications and its members, like you, pride themselves as going beyond compliance to perform the best service for your customers. You probably go beyond what EPA requires as well. If you are already following best practices and going beyond what the EPA requires, do you in fact run in to problems with EPAs RRP rules?

A: Luckily, I have not been subjected to an EPA enforcement action. And, if my goal to protect my customers were all that mattered, I would have nothing to worry about. However, the paperwork requirements worry me and other remodelers because there is always a chance we do not file something correctly. For that reason, I would like EPA to move towards performance standards, where I can focus my attention on protecting my customers' families. That approach would alleviate the headaches I have worrying about whether a "renovate right" brochure is stapled to the correct job file folder and whether my records are arranged properly.

Q: In your testimony, you commented that EPA is not enforcing enough against non-certified contractors. Can you please elaborate on why NARI wants EPA to do a better job enforcing its rules? Would additional enforcement require additional EPA funding to follow your advice?

A: Currently, law-abiding remodelers are at a competitive disadvantage. We are spending time and money to make sure we are compliant with EPA's RRP rules. Some of the costs associated with EPA requirements make our jobs more expensive. Unfortunately, in this economy, many homeowners choose lower-priced contractors who are not EPA-certified. EPA's failure to enforce against non-certified contractors has bolstered that underground economy. NARI does not believe cracking down on non-certified contractors is a matter of EPA prioritizing its efforts and, therefore, such an effort would not require additional EPA funding.

Q: Lead dust can be dangerous to everyone, especially those who work on site. Would restoring an opt-out put your workers at risk?

A: NARI agrees that lead dust can be dangerous for workers. NARI conducts preparation programs for its certifications. These programs all include safety topics such as the EPA's and OSHA's requirements for dealing with lead issues. Restoring an opt-out to EPA's rules, that would allow for homeowners to choose a less costly remodeling alternative when no children or pregnant women are at risk, would not change a remodeler's obligation to follow OSHA's Lead in Construction regulations. Adherence to OSHA's Lead in Construction rules protects a remodeler's employees when they are doing work on homes built before 1978.

Q: Are there any other dangers you foresee in restoring the opt-out, such as lead dust dangers to children or pregnant women, or cost-cutting by remodelers using the opt-out inappropriately?

A: The biggest danger to homeowners and their families is a lack of knowledge and appreciation for the dangers of lead paint. That lack of understanding exists now. In June 2011, NARI conducted a survey of 930 homeowners, on their understanding of LRRP. Fifty-three percent of those surveyed were unaware of this rule. Fifty-nine percent indicated they would do the work themselves to save money, and 51% specified they wished for the alternative to opt-out of the rule. Twenty-nine percent replied that they would likely hire a non-EPA certified contractor to do the work in order to save money on a home improvement. The lack of awareness has serious consequences. For instance, many do-it-yourselfers pose a serious risk to themselves and their families because they do not know about the dangers of lead dust. Educating the public on hazards from lead that may be caused by construction activities is a challenge that NARI wants to take on with EPA's help. Restoring the opt-out will not affect the importance of educating the public on lead poisoning.

SQUIRE SANDERS

Squire Sanders (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114

O +1 216 479 8500
F +1 216 479 8780
squiresanders.com

Douglas A. McWilliams
T +1 216 479 8332
douglas.mcwilliams@squiresanders.com

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Environmental Protection Agency
Mailcode 2822T,
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Docket ID No. EPA–HQ–OAR–2002-0058, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (76 *Federal Register* 80598, December 23, 2011)

This comment is submitted on behalf of American Municipal Power, Inc. ("AMP"). AMP is a nonprofit corporation serving a membership composed of 129 public power members in seven states. These comments are submitted on behalf of AMP's generating members who operate fossil fuel utility boilers in the Ohio cities of Orrville, Painesville, Shelby, Dover, and Hamilton. Each of these cities operates one or more municipal utility boilers serving electric generators of 25 megawatts or less, which have been included in the Industrial, Commercial, and Institutional Boiler and Process Heater MACT ("Boiler MACT") Source Category.

AMP submitted extensive comments on the Boiler MACT rule proposed June 4, 2010,[1] and submitted a Petition for Reconsideration of the final rule published March 21, 2011.[2] AMP incorporates those comments and petition (including all attachments) by reference here, and requests that EPA include in the administrative record for this rulemaking all documents submitted to EPA Docket No. EPA-HQ-OAR-2002-0058 at any time.

EXECUTIVE SUMMARY

AMP supports EPA's decision to re-propose the National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters ("Boiler MACT") in response to the numerous public comments and petitions for reconsideration submitted to EPA. The rule as proposed at 76 Fed. Reg. 80598 (Dec. 23, 2011) ("Proposed Rule"), however, fails to correct the most fundamental flaws articulated in public comments and petitions. The

[1] 75 Fed. Reg. 32005 (June 4, 2010).
[2] 76 Fed. Reg.15608 (March 21, 2011) (hereinafter "March 2011 rule").

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rule remains unduly burdensome and unsupportable, particularly for small, coal-fired municipal utilities. Small municipal utilities have faced disproportionate impacts under each iteration of this rule, and will continue to face disproportionate impacts under the Proposed Rule. Municipal utilities play an important role that is not filled by any other entity. Municipal utilities provide reliable and cost competitive electric service to small communities, increase electric grid reliability, attract high-quality jobs to local communities, and act as a buffer to price spikes and supply shortages during times of peak usage. These are important functions that the Proposed Rule threatens to regulate out of existence. EPA has the regulatory authority to avoid that adverse result. By adopting the changes recommended below, EPA can fulfill its duties under the Clean Air Act without disrupting the vital public services that small municipal utilities provide.

EPA appropriately requested comment on the impact of the reconsidered rule on small entities. 76 Fed. Reg. 80625. As discussed in greater detail below, the emission limits for the coal-fired subcategories have become significantly more stringent on reconsideration, which increases the disproportionate burden on small entities in these subcategories, including AMP's generating members. Therefore, it is appropriate as part of the reconsidered rule for EPA to revisit the recommendations to mitigate the burden on small entities that came out of EPA's Regulatory Flexibility Act process for small businesses and other small entities. The Small Business Advocacy Review Panel, which EPA convened to identify ways EPA could reduce the impact of the Boiler MACT rule on small entities, identified the health-based emission limit ("HBEL") as the most important step EPA could take to reduce the crushing cost burden on small entities like municipal utilities. The Panel's recommendation is even more apt on reconsideration; the most important change EPA can adopt to reduce the rule's adverse impact on municipal utilities is to allow small entities the opportunity to petition for a site-specific HBEL for HCl. Without this relief, scrubber technologies for HCl impose significant costs on small entities that cannot be justified based on environmental benefits. An HBEL would allow those small utilities whose emissions do not pose a threat to human health or the environment to avoid millions of dollars in unnecessary compliance costs and allow them to remain viable and cost competitive electricity providers in their communities. EPA has the opportunity to mitigate the stranglehold this rule will place on small entities, many of whom are being heralded as the engines of job growth in this economy. Given our economic circumstance, and the disproportionate impact of this rule on small entities, it would be arbitrary and capricious for EPA to set aside one of the key tools Congress provides to EPA in the Clean Air Act for mitigating unnecessary costs. At minimum, EPA should provide this alternative to small entities when they can demonstrate their HCl impact falls below a health-based threshold.

EPA has unquestionable authority to adopt HBELs under section 112(d)(4) for pollutants "for which a health threshold has been established." A health threshold has been established for HCl below which concentrations have no measurable adverse health effects. In 2004, EPA concluded that technology-based limits for these pollutants were unnecessary, in certain circumstances, to assure the "ample margin of safety" required by section 112(d)(4). EPA has changed course with no adequate explanation as to why the thorough analysis it completed in 2004 – and defended rigorously thereafter – is no longer sufficient. EPA should exercise its authority to provide critical relief for small entities, consistent with the recommendations of the Small Business Advocacy Panel, in the form of a site-specific health based option for the HCl emission limit.

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EPA should also provide the maximum time allowed by law for facilities to come into compliance with the final Boiler MACT rule. AMP supports EPA's decision to reset the 3-year compliance date with the publication of the reconsidered rule. EPA should also use its authority under section 112(i) to provide a categorical 1-year compliance extension for all units installing additional controls to meet the rule requirements. Municipal utilities face additional challenges in implementing necessary changes within a three-year window due to the special political process that municipal utilities must follow. Many municipalities face multiple layers of approvals, public notice requirements, and complicated bidding processes that are not shared by those in the private sector. For municipal utilities, it is imperative that EPA grant as much time as possible for sources to come into compliance.

AMP supports EPA's decision to require work practice standards during periods of startup and shutdown. However, AMP does not support the additional work practices (and their associated recordkeeping and reporting obligations) EPA added to the Proposed Rule. The additional work practice standards EPA is requiring will place a significant burden on small utilities, who have limited personnel available to track the training, oxygen measurements, and other data EPA is requesting for startup and shutdown events. Boiler operators are already employing best practices for reducing emissions during periods of startup and shutdown, both to comply with EPA's requirement to operate equipment consistent with good pollution control practices and for business reasons. EPA's extra requirements merely serve to increase paperwork and the likelihood of inadvertent technical deviations without providing any environmental benefit.

AMP also supports EPA's acknowledgment that units should have a bright line to determine when units are subject to a numeric emission limit and when they are subject to a work practice standard. However, AMP does not support a blanket definition of startup and shutdown for all units using a 25 percent load threshold. Each boiler has a different point at which operation becomes "stable" and is no longer "starting up" or "shutting down." For coal-fired stoker units, this is generally around 60 percent load. For pulverizers, it is around 50 percent, though these values can differ from unit to unit. Boiler operators must be able to make adjustments during these startup and shutdown periods to maintain safe operation of the boiler and to avoid damaging equipment. The startup and shutdown of any unit will be dependent on a variety of factors, and cannot be defined in terms of either load or timing for all types of units across the board. Facilities must be able to establish unit-specific startup and shutdown definitions to ensure safe operation of their boilers.

AMP supports EPA's decision to not require specific startup fuel for any units or subcategory. Not all fuels are available in all locations, and most sources are only permitted to burn specific fuel types. EPA has not performed a cost/benefit analysis to evaluate the economic and environmental costs of installing new natural gas pipelines to get the gas to units in remote locations or the cost of retrofitting existing units to accommodate a new fuel for startup purposes. EPA appropriately defers to local decisions on how to safely and efficiently start a boiler. AMP continues to support EPA's determination to regulate without dictating fuel choices and EPA's decision to not require specific startup fuels for units in this source category.

AMP also supports EPA's decision to require work practice standards in lieu of numeric emission limits for dioxin/furan. As noted by AMP and many other commenters, the dioxin/furan levels from the

units in the Boiler MACT source category are too low to be reliably measured or controlled. EPA has ample authority under section 112(h) to require a tune-up work practice standard in lieu of a numeric emission limit to facilitate efficient combustion to minimize organic HAP in these circumstances.

EPA should also impose a work practice standard in lieu of a numeric CO limit, as it did in the Utility MACT rule.[3] Unlike most other sources subject to the Boiler MACT rule, AMP's generating members compete with larger utilities subject to Utility MACT. In the Utility MACT rulemaking, EPA determined that work practices were appropriate to control organic HAP, because organic HAP were too low to reliably measure, even in these larger utility boilers. EPA can also justify CO work practices for the small utilities subject to Boiler MACT. They also have organic HAP too low to reliably measure and they are small entities in need of relief. EPA also discovered that, due to these low levels of organic HAP, it was not possible to establish a CO limit that would act as a supportable surrogate for utilities. EPA did not perform this detailed analysis for sources subject to the Boiler MACT rulemaking, but the organic HAP results submitted to EPA for small utilities and other small entities in this source category indicate a significant amount of data that is below the level of reliable measurement. EPA cannot assume that CO is an appropriate surrogate for the small utilities in this source category given this information. Because CO cannot be used as a surrogate for small utilities, and because organic HAP levels are likely too low to measure reliably for these entities, it is appropriate to establish a work practice standard for CO in the final rule instead of a numeric emission limit for the small utilities subject to Boiler MACT.

EPA set emission limits that are unachievable for any existing source by improperly calculating MACT floors. By selecting the top performing 12 percent of sources for *each* pollutant to establish MACT standards, rather than the top performing 12 percent of sources across *all* pollutants, EPA has flouted its statutory obligation to set standards based on the performance of "sources." *See* CAA § 112(d). Furthermore, these standards were based on inadequate and biased data. In the case of CO limits for pulverized coal units, EPA established emission standards for hundreds of sources based on test results of only two units and then failed to adequately incorporate variability into the emission limits. EPA also tied its own hands by collecting limited stack test data from a subset of high-performing sources and failed to use available "emissions information" to estimate emissions from sources lacking test data. This resulted in EPA considering snap shots of emissions information from only a small subset of the best-performing units and led to unreasonably stringent MACT standards that do not represent the top 12 percent of *all* sources "for which the Administrator has emissions information." EPA must re-calculate MACT floors in a manner consistent with the requirements of section 112 of the Act.

AMP supports EPA's inclusion of a limited use boiler subcategory. Limited use boilers spend a significant portion of their operating time in start-up and shut-down mode, and operating times are often unpredictable. This makes it impossible to schedule and test these units at or near full load. Furthermore, these units generally would not collect sufficient data to establish 30-day averages for operating limits. To demonstrate compliance with the emission limits and operating limits, these sources would be required to operate more often than they would otherwise, resulting in increased emissions. Defining a limited use subcategory that restricts operation of these boilers to 10 percent of their annual rated capacity, instead of 10 percent of annual operating hours, would ensure that sources could

[3] 77 Fed. Reg. 9304, 9369 (Feb. 16, 2012).

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continue to use these backup units in a limited way with limited emissions without the complications of defining an operating hour for units with extended periods of startup or shutdown or inadvertently creating incentives for unsafe or inefficient operation.

AMP does not support EPA's use of operating limits as a means of demonstrating continuous compliance with the emission limits. By requiring sources to operate at the minimum (or maximum, as applicable) value established during a performance test, EPA is imposing a more stringent emission limit on the source every time a source tests below its allowable emission level. This serves as an impermissible beyond-the-floor emission limit that EPA adopted without considering costs or other criteria required by statute. Operating parameters may be appropriate triggers for corrective measures to ensure a control device is properly operating. To that end, AMP supports EPA's proposed removal of the CO CEM requirement and use of an O2 trim system in its place. Most facilities already operate trim systems to help monitor combustion, and are familiar with their operation. Furthermore, their location at the source of combustion is a more accurate measure of combustion efficiency than a downstream monitor in the stack.

AMP supports a 30-day averaging period for all operating parameters. Municipal utility boilers may experience a variety of load conditions and other variables that may affect performance, and providing a 30-day averaging period will give these units necessary flexibility to demonstrate compliance. AMP further requests EPA to clarify that the 30-day rolling average also applies to operating load and oxygen limits. These parameters currently do not have a defined averaging period, and this clarification is necessary to avoid confusion in the regulated community.

EPA should also clarify that the emission limits, work practice standards, and operating limits apply "at all times ***the affected unit is operating***" and not "at all times." The current language of the Proposed Rule creates an ambiguity that could be interpreted to require sources to meet control device operating limits and demonstrate compliance when the emission unit is not operating and is not generating emissions. This would create an unreasonable and unnecessary burden for small municipalities that struggle to keep on top of already onerous recordkeeping and monitoring requirements. EPA should take this opportunity to clarify the rule and avoid this absurd result.

EPA should also clarify that sources do not automatically reset operating limits during each stack test. If the purpose behind operating limits is to establish a benchmark operating rate that is indicative of compliance, sources should be able to demonstrate compliance with any operating limit that was established during a compliant stack test. EPA should clarify that sources have the *option* of resetting operating parameters with subsequent stack tests, but are not *required* to do so.

AMP appreciates EPA's willingness to abandon its unsupportable PM CEM requirement for coal-fired units greater than 250 mmBtu/hr, but does not support EPA's proposal to require PM CPMS for these units instead. Like the PM CEMS, PM CPMS are unproven technology and redundant in light of the Compliance Assurance Monitoring and opacity monitors already in use by all of AMP's generating members. Requiring a PM CPMS adds no environmental benefit but it does add significant cost. EPA has offered no explanation for requiring additional monitoring on a subset of units (>250 mmBtu/hr),

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while relying on other parametric monitoring (such as continuous opacity monitors already installed) for other units. This requirement is arbitrary and unreasonable and should be removed from the final rule.

AMP appreciates the multitude of flexible compliance alternatives EPA has incorporated into the proposed rule, including the TSM alternative, the CEM and fuel analysis options, and the output-based limits. AMP also appreciates the flexibility of the emissions averaging provisions, but requests that EPA make adjustments to the Proposed Rule to make it more usable for municipal utilities. First, the 10 percent penalty provision should be removed. EPA did not include such a penalty in the 2004 rule, and offers no explanation for including it in this rule. The rule as written contains adequate safeguards to ensure emission limits are met. Second, EPA should remove the restriction on units equipped with a CEM or PM CPMS. Units that demonstrate compliance using stack tests are capable of developing 30-day averages based on their stack tests and utilization records to create an apples-to-apples comparison to units utilizing a CEM. Excluding units operating CEMs and PM CPMS creates a disincentive to use these flexible compliance options and it excludes many small entities from this regulatory relief, because, like AMP's small entities, they operate one or more units with continuous monitoring. EPA has articulated no justification for either the 10 percent penalty or the exclusion of CEM/PM CPMS units, and should remove these restrictions from the final rule.

AMP appreciates EPA's efforts to mitigate the impact of this rule in certain instances, but more is needed to focus this relief on the small entities disproportionately affected by this rule. AMP also has serious concerns about the achievability and legality of the emission limits and compliance methods contained in the Proposed Rule. On behalf of its generating members, AMP respectfully requests that EPA adopt the changes recommended herein in the final Boiler MACT rule.

I. EPA Should Adopt a Health-Based Emission Limit for HCl

EPA has long recognized its authority to adopt health-based emission limits ("HBELs") pursuant to CAA § 112(d)(4). Section 112(d)(4) authorizes EPA to consider, "[w]ith respect to pollutants for which a health threshold has been established . . . such threshold level, with an ample margin of safety, when establishing emission standards under [112(d)]." Congress's intent in including section 112(d)(4) was to avoid setting HAP emission limits that go well beyond what is needed to protect the public. In formulating this section of the CAA, Congress recognized that "[f]or some pollutants a MACT emissions limitation may be far more stringent than is necessary to protect public health and the environment."[4] As a result, Congress included section 112(d)(4) as an alternative standard setting mechanism for HAPs "where health thresholds are well-established . . . and the pollutant presents no risk of other adverse health effects, including cancer. . . ."[5]

In the 2004 Boiler MACT rule, EPA determined that the MACT floor limits established for HCl were in some cases more stringent than necessary to protect public health, and established an HBEL as a compliance alternative for solid fuel-fired boilers. The HCl limits EPA found more stringent than necessary were 0.02 lb/mmBtu and 0.07 lb/mmBtu for new and existing units, respectively.[6] Since that

[4] S. REP. NO. 101-228 (1990) at 171.
[5] *Id.*
[6] 69 Fed. Reg. at 55270.

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time, EPA has continued to impose even more stringent HCl limits on solid fuel-fired boilers. In the March 2011 Rule, EPA imposed an HCl limit of 0.035 lb/mmBtu on existing units. Despite recommendations and numerous comments from the regulated community (including the Small Business Advisory Review Panel), EPA declined to include an HBEL in that rule. In the Proposed Rule, EPA has proposed an HCl limit that is ***more than 30% more stringent*** than the March 2011 rule and ***almost 70% more stringent*** than the 2004 rule for solid fuel-fired units. These significantly more stringent limits only bolster support for EPA's initial 2004 determination and the recommendations of the Small Business Advisory Review Panel ("SBA Review Panel"). EPA has articulated no explanation for abandoning its 2004 approach or ignoring the advice of the SBA Panel. A final rule that does not include an HBEL option would be unsupportable.

a. It Would Be Arbitrary for EPA to Ignore the Advice of the Small Business Advocacy Panel Given the Increased Stringency of the HCl Limits

The Regulatory Flexibility Act ("RFA") requires EPA to analyze the impacts of its rules on small entities (including small government entities) for rules that will have a significant impact on a substantial number of small entities.[7] To assist with this analysis, EPA convened the SBA Review Panel to recommend ways the Agency could alleviate the rule's impacts on small businesses and governments. The Small Business Advocacy Review Panel identified HBELs as "***the most important step*** EPA could take to mitigate the serious financial harm the Boiler MACT would otherwise inflict on small entities using solid fuels nationwide. . . ."[8] All of AMP's generating members now anticipate needing controls to comply with the proposed HCl limits. Even the best-performing AMP member must now concede that fuel management may not be a sufficient strategy to meet an emission limit of 0.022 lb/mmBtu. Given the increased stringency of the HCl limit in the Proposed Rule, it is likely that many more entities would be forced to install controls than under the March 2011 rule.

EPA estimated a median compliance cost for small public entities of $1.1 million, with cost-to-revenue ratios greater than 10 percent.[9] EPA has estimated no change in costs for these entities, despite proposing more stringent emission limits on coal-fired units for nearly every pollutant. Furthermore, AMP provided EPA with additional cost information in the 2010 AMP Comments that demonstrated many entities will experience significantly higher annual costs. The City of Orrville and the City of Painesville have independently evaluated the cost of controlling HCl emissions at their coal-fired electric utilities and determined that the capital cost for a single unit would reach $5-16 million, with annual operating costs between $900,000 and $1.2 million. The City of Painesville operates three boilers, and the City of Orrville operates four. These facilities would incur $3-4 million in operating costs each year *for HCl control alone*.[10] Many small entities will be unable to absorb these unnecessary costs and be forced to severely curtail or shutdown operations entirely. This would significantly hinder municipal

[7] 5 U.S.C. § 603.
[8] SBA REVIEW PANEL, FINAL REPORT at 23 (emphasis added).
[9] Memorandum from Tom Walton to Brian Shrager, re: Regulatory Impact Results for the Reconsideration Proposal for National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters at Major Sources (Dec. 1, 2011).
[10] This represents $33,000 per customer in capital costs and an additional $3,000 per customer for annual operating costs.

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utilities' ability to provide reliable electrical services to their communities, grid support during high demand periods to avoid brownouts, and quality work opportunities for local residents. Adopting MACT standards that force small entities to severely curtail or eliminate operations is contrary to the intent of Congress, which has stated that "MACT is not intended to . . . drive sources to the brink of shutdown." HOUSE REP. NO. 101-490, Part 1 (1990) at 328. But that is precisely what will happen to small entities under the Proposed Rule unless changes are made.

Adoption of an HBEL for acid gases would significantly reduce this cost burden for small entities by allowing them to meet emission limitations that are protective of human health and the environment without spending millions on unnecessary control equipment and operating costs. Under both the RFA and the Unfunded Mandates Reform ACT ("UMRA"), EPA is obligated to consider the costs of its rules on small government entities and to analyze the costs of alternative regulatory approaches. EPA has not done so. EPA never analyzed the significant costs that might be avoided by offering an HBEL option for HCl, despite the fact that the SBA Review Panel's number one recommendation was adoption of an HBEL.[11] Instead, EPA vaguely asserted a lack of information and implementation issues that do not exist. In the final March 2011 rule, EPA cited the "potential environmental impacts and cumulative impacts of acid gases on public health."[12] EPA performed a thorough analysis of the HBEL alternative in 2004, and concluded it could establish an HBEL that was protective of human health and the environment with an ample margin of safety. Furthermore, the 2004 HBEL alternative required each source wishing to use the HBEL to perform a site-specific risk analysis to ensure that the public would be adequately protected.

EPA further attempted to justify its exclusion of an HBEL option by citing the co-benefits of collateral non-HAP emission reduction that would occur under the technology-based limitation. Specifically, EPA cited reductions in SO_2, non-condensable PM, and other non-HAP acid gases.[13] The Clean Air Act does not permit EPA to consider non-HAP collateral emission reductions in setting standards. Section 112(d)(2) provides an express list of factors that EPA may consider in setting section 112(d) standards. That list includes "the cost of achieving such emission reduction, and any ***non-air quality*** health and environmental impacts and energy requirements." (emphasis added). This list does not include consideration of non-HAP air quality benefits, which are likely to be minimal at best. In the coming years, many of these sources will be required to reduce SO_2 and PM emissions because of other regulatory requirements, such as the revised NAAQS standards. It would be unreasonable for EPA to base its refusal to include an HBEL on reductions in pollutants that are already managed by other programs. EPA cannot support its refusal to properly analyze the HBEL option under the RFA and UMRA by citing non-existent "potential" impacts and air quality benefits that are likely to occur with or without the Boiler MACT rule.

EPA has articulated no legitimate reason for ignoring the advice of the SBA Review Panel, which was convened for the express purposes of helping EPA to analyze the impact of the Boiler MACT rule on small entities. The Panel's recommendations are even more relevant now that EPA has proposed to

[11] EPA properly analyzed the costs savings in 2004, and determined it would save approximately $2 billion in unnecessary control costs.
[12] 76 Fed. Reg. at 15643.
[13] 75 Fed. Reg. at 32032.

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reduce the HCl limit by an additional 30 percent. EPA did not adequately consider and analyze regulatory options to reduce the impact of the rule on small government entities as required by the RFA and UMRA, and has acted arbitrarily and capriciously in rejecting the SBA Review Panel's recommendations using meritless arguments.

b. It Would Be Arbitrary for EPA to Disregard Its Prior Adoption of Health-Based Emission Limits

When EPA first promulgated the Boiler MACT rule in 2004, it included HBELs for HCl and manganese. These standards required a site-specific risk assessment to demonstrate that emissions from the site were low enough to protect human health with an ample margin of safety. The standards also required actual emission testing to verify emission rates used in the risk assessment, and required sources to include relevant site parameters such as stack height and fence locations in its Title V operating permit.[14] These standards required accountability, and were more than adequate to protect human health and the environment without forcing struggling small entities to invest millions in unnecessary control equipment. EPA and the Department of Justice vigorously defended these HBELs in the final 2004 rule and in the ensuing litigation. EPA dedicated 17 pages of its brief to explaining why its HBELs complied with the requirements of section 112(d)(4). In that brief, EPA acknowledged making the following determinations: (1) both HCl and manganese have reference concentrations and have not been shown to be carcinogenic, (2) the HBELs provided an ample margin of safety, (3) "health-based standards would not reduce the HAP-related health benefits from the rule because only those facilities with emissions that did not pose a health risk would qualify for the alternative standards," (4) it is inappropriate to consider potential cumulative risks until the residual risk stage of the NESHAP process, and (5) "the potential collateral benefits of controls were not a proper reason to impose control costs under the HAPs program on facilities with HAP emissions that did not pose a public health risk." EPA argued that each of these positions was reasonable, in accord with the law, and entitled to deference. EPA has offered no explanation for its about-face on this issue.

Although EPA has discretion in setting HBELs, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by [a] prior policy." FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009). EPA has offered no explanation for its change in position, or even acknowledged its prior defense of HBELs in the 2004 Boiler MACT rule. In particular, the two main arguments EPA relies upon for refusing to establish an HBEL for HCl – the concern over cumulative risks and collateral benefits – are *directly contrary* to the conclusions EPA reached in items (4) and (5) above. EPA's failure to acknowledge its prior determination and failure to explain why it has raised as questions issues that previously were resolved render its decision not to propose HBELs arbitrary and capricious.

[14] See 69 Fed. Reg. at 55227-28.

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c. Including a Health-Based Emission Limit Alternative for Small Entities Is Supported by the Record

AMP and numerous other commenters provided EPA with significant legal and factual support for including HBELs in the final rule, and demonstrated that EPA's concerns were unfounded. EPA has offered no legitimate justification for ignoring this data and refusing to adopt an HBEL. EPA's actions are even more problematic in light of the Proposed Rule, in which EPA has imposed even more stringent HCl limits than in the March 2011 rule. Municipalities have been hit particularly hard by the economic downturn, as federal and state money and local tax revenues have declined sharply since 2008. They face severe budget constraints that are driving difficult resource allocation choices. Congress gave EPA a tool to mitigate cost when relaxed limits are adequately protective, and EPA should use this tool to mitigate some of the burden on small entities and small governments. Given all of the data now before the Agency, it would be arbitrary and capricious for EPA to publish a final rule that sets HCl limits that are far more stringent than necessary to protect human health and the environment.

EPA could avoid this arbitrary and capricious finding and avoid violating the RFA by crafting an HBEL alternative for those units operated by qualifying small entities under the RFA. EPA has ample authority for adopting an HBEL for HCl, and doing so here would harmonize EPA's actions with the findings it made – and never refuted – in the 2004 Boiler MACT rule. If EPA is unwilling to include a blanket HBEL for HCl in the final rule, the rule should, at minimum, include a provision allowing small entities to petition for an HBEL on a site-specific basis. Because the petition process would be limited to small entities, the number of potential petitions would be limited to a manageable number. Site-specific evaluations would allow for an evaluation of potential cumulative impacts from nearby sources and provide sources an opportunity to demonstrate that they can adequately protect human health and the environment without wasting millions of dollars on unnecessary controls. Preserving the possibility of a site-specific HBEL through a petition process will provide necessary relief to small entities without compromising human health or the environment and without necessitating a complete rewrite of the HCl standards in the final rule.

II. EPA Should Reset the Compliance Date to Provide Existing Sources with the Maximum Compliance Time Allowed by Law

EPA proposed resetting the Boiler MACT compliance date for existing sources to the date three years after publication of the reconsidered final rule.[15] AMP supports resetting the compliance date, and encourages EPA to use the discretion granted under CAA § 112(i)(3) to grant a categorical 1-year extension to all sources installing control equipment to comply with the standards. The uncertainty generated by the complicated history of this regulation has made it impossible for sources to begin compliance planning prior to issuance of the final reconsidered rule. Even now, sources are uncertain of the final emissions limits, what controls may be necessary to achieve these limits, and whether they will be regulated by the Boiler MACT rule or the CISWI rule. The Boiler MACT rule will establish limits for multiple pollutants that require multiple controls and facilities cannot analyze the trade-offs posed by

[15] 76 Fed. Reg. at 80605.

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various control options until the final emission limits are published.[16] Sources must also be cognizant of other regulations imposing emission limits for different pollutants when adopting a Boiler MACT control strategy. For example, a facility cannot implement a CO reduction strategy that will result in a NOx increase if the facility is located in a non-attainment area or is otherwise subject to stringent NOx emission limits. Some control options may affect pollutants subject to a National Ambient Air Quality Standard and changes in the concentration, temperature, velocity and height of the exhaust gas may adversely impact air dispersion modeling results triggering new concerns and complications. These complexities will require extensive and detailed planning that cannot take place until EPA finalizes the Boiler MACT emission standards.

Approximately 1600 boilers will be required to reduce emissions to comply with the expected final Boiler MACT rule. EPA estimates that investments in control equipment will cost more than $5 billion. As noted in the comments submitted by Paul Noe of the American Forest and Paper Association, submitted on behalf of a group of industry representatives (hereinafter "AF&PA Industry Comments"), these costs are significantly underestimated and are more likely to exceed $14 billion. In a challenging economy, justifying and acquiring the necessary capital for these improvements will require lengthy negotiations with banks and other financial institutions. Facilities requiring control upgrades will be required to devote significant resources to capital planning purposes. This burden is particularly acute for municipal utilities that do not have personnel dedicated exclusively to environmental compliance planning. Municipally-owned utilities must work through their local council or other political organization to initiate capital planning, solicit and approve bids, finalize compliance plans and allocate necessary funding, which adds significant time to an already complicated compliance planning process. For the City of Orrville, the entire process from initial planning to installation of control equipment is expected to take 4.5 years, assuming no significant adverse public reaction or delays.[17]

The 1600 sources expected to require new control equipment or retrofits will also place an enormous demand on state permitting and regulatory authorities, engineering design firms, stack testing companies, and fabricators. Sources subject Boiler MACT will not only be competing with each other for access to qualified engineers and equipment they will also be competing with sources subject to the updated NOx and SO_2 NAAQS, the Cross-State Air Pollution Rule, the Utility MACT, and various Risk and Technology Review sector rules. Given these realities, it is appropriate for EPA to establish the latest compliance date allowed by law.

In particular, as it has done in at least one prior MACT standard, EPA should grant a categorical one-year extension to the proposed 3-year compliance date. In promulgating MACT standards for marine tank vessel loading operations, the Agency determined that the rule "shall allow existing sources regulated solely under section 112 four years to be in full compliance with the emission control

[16] For example, presence of SO_3 can have a significant negative impact on the Hg removal that is achieved by activated carbon injection, and use of catalysts for NOx and CO control can oxidize SO_2 in flue gas to SO_3. However, presence of SO_3 in flue gas tends to improve PM collection efficiency of ESPs by lowering ash resistivity and also may improve dioxin capture.

[17] *See* Declaration of Harm, Boiler MACT Major Source Administrative Stay (Apr. 22, 2011) (included as Attachment A).

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requirements promulgated under section 112."[18] EPA observed that "section 112(i) of the Act specifically allows EPA to provide sources with a waiver of up to 1 year to achieve full compliance" and that a categorical extension was warranted in that case because "standards containing similar compliance dates for a large number of sources would result in numerous facilities competing for a limited number of experienced contractors in order to meet the standards at the same time."[19] Thus, EPA clearly has construed § 112(i)(3)(B) as authorizing categorical compliance extensions.[20]

III. EPA Should Retain the Work Practice Standard Adopted in the March 21, 2011 Final Rule During Periods of Startup and Shutdown

AMP supports the inclusion of work practice standards for periods of startup and shutdown, but sees no need (and EPA has articulated no reason) to adopt work practice standards different from those adopted in the March 2011 Boiler MACT rule. In that rule, EPA properly determined that it was not feasible to establish numeric emission limits for periods of startup and shutdown due to the limited duration of startup and shutdown and the increased emissions that could result from requiring extended operation in this mode to facilitate testing to quantify emissions. Furthermore, the stack test data relied upon to establish emission limits does not reflect periods of startup and shutdown. In lieu of numeric emission limits, EPA developed a work practice standard pursuant to CAA § 112(h) that required sources to minimize emissions during periods of startup and shutdown using the manufacturer's recommended procedures or the procedures of a unit of similar design.[21] In the Proposed Rule, EPA proposed additional work practice standards, claiming that "[g]eneral duty requirements do not constitute appropriate work practice standards under section 112(h)."[22] EPA provided no reason for this change in position. Nothing in CAA § 112(h) suggests that a work practice standard of minimizing emissions using accepted emission reduction procedures is inadequate.

a. Additional Work Practice Standards During Startup and Shutdown Are Unnecessary

The additional work practices EPA has proposed create unnecessary recordkeeping and reporting burdens that increase costs without any additional environmental benefits. The duty to minimize emissions consistent with recommended procedures would necessarily include adherence to good combustion practices. Boiler operators have a business incentive to operate their boilers as efficiently as possible. Furthermore, optimal O_2 concentrations will vary by boiler and design. Many existing units, and all of AMP members' generating units, were constructed prior to 1970, and do not have manufacturer's instructions indicating optimal O_2 concentrations. "Similar units" that are significantly newer may not necessarily share the same O_2 optimization range. For these units, boiler operator knowledge and general good combustion practices for similar units would be a more

[18] 60 Fed. Reg. 48388, 48392 (Sept. 19, 1995).
[19] *Id.*
[20] The DC Circuit decision in the PCWP MACT case, *NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007), does not take away EPA's authority to grant categorical 1-year compliance extensions. For further analysis of this opinion, see AF&PA Industry Comments.
[21] 76 Fed. Reg. at 15642.
[22] 76 Fed. Reg. 80615.

appropriate benchmark for optimal combustion than a numeric O_2 concentration that may or may not represent the most efficient combustion for that unit.

Similarly, the proposed boiler operator training requirements are unnecessary and serve only to create additional recordkeeping and reporting requirements and increase the cost of the rule. The Proposed Rule already requires boiler operators to "at all times, operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions."[23] To satisfy this condition, and to operate the boiler in a safe manner, boiler operators receive appropriate training. Adding a training work practice standard adds nothing to the rule except additional recordkeeping and reporting requirements that do not serve any beneficial environmental purpose.

These additional recordkeeping and reporting requirements impose particular hardship on small municipal utilities that do not have personnel dedicated solely to environmental compliance. Each additional recordkeeping and reporting obligation created by the Boiler MACT rule must be carried out by boiler operators in addition to their general operating duties. Superfluous recordkeeping and reporting obligations that serve no environmental purpose should be eliminated wherever possible to avoid unnecessary compliance costs that could be better allocated to meaningful emission reduction investments. This is particularly the case here, where EPA has offered no reason for abandoning its previous work practice approach.

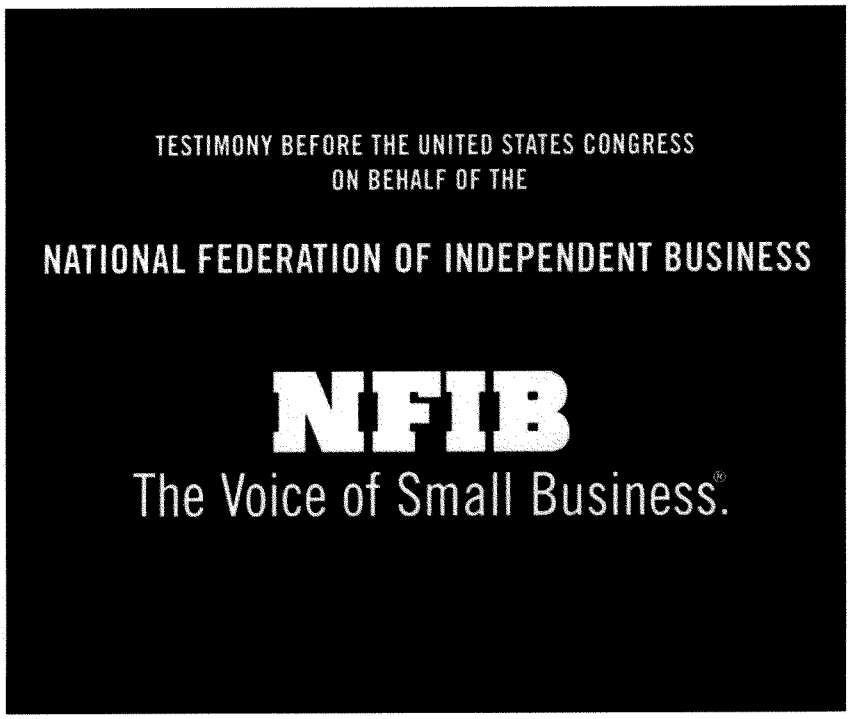
b. Startup and Shutdown Definitions Must Be Established on a Site-Specific Basis

EPA has included a threshold of 25 percent load in its definitions of startup and shutdown.[24] Setting a threshold for all units is inappropriate, particularly a threshold based on percent load. Some units have a minimum stable operating load that is higher than 25 percent (e.g., stable operation for a stoker boiler may not be reached until 60 percent load). In addition, some control devices cannot be turned on until exhaust gas temperatures reach a certain level, and must be shut off before the temperature dips below this threshold. The ESPs at the City of Painesville, for example, cannot be turned on until the exhaust temperature reaches at least 250 degrees Fahrenheit. At lower exhaust gas temperatures, stack gas can condense on the precipitator plates and cause corrosion. The temperature is dependent on multiple factors, and is not necessarily correlated to a specific load level. AMP agrees that periods of startup and shutdown should be defined for each unit to clearly identify when numeric emission limits apply; however, facilities must be able to define periods of startup and shutdown on a site-specific basis to properly identify the appropriate parameter(s) indicative of stable operating conditions.

c. It is Inappropriate to Establish Time Limitations on Startup and Shutdown Periods

EPA requested comment on whether a maximum time should be included in the startup and shutdown definitions. Such a requirement is unnecessary, as safety and proper operation of the boiler and associated equipment dictate the amount of time that is needed for startup and shutdown. This

[23] 76 Fed. Reg. at 80629.
[24] 76 Fed. Reg. at 80654.



Statement for the Record for the

House Committee on Small Business

Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?

June 27, 2012

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

The National Federation of Independent Business (NFIB) appreciates the opportunity to submit this statement for the record to the Committee on Small Business for the hearing entitled "Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?" NFIB is the nation's leading small business advocacy organization representing over 350,000 small business owners across the country, and we appreciate the opportunity to provide our perspective on this issue.

The disproportionate burden placed on small business by regulation in general, and environmental regulation in particular, has been well documented. In response to this negative impact on small businesses, Congress in 1996 passed the Small Business Regulatory Enforcement and Fairness Act (SBREFA) which amended the Regulatory Flexibility Act (RFA) to require agencies to take additional analyses into account before promulgating rules affecting small businesses. As part of this important reform, the Environmental Protection Agency (EPA) was specifically required to conduct Small Business Advocacy Review (SBAR) panels made up of small business owners prior to issuing a proposed rule when the EPA expects the rule will have a significant impact on a substantial number of small entities.

NFIB has found these panels to be effective when EPA provides a full-faith effort to not only conduct SBAR panels, but heed the recommendations of those panels. Unfortunately, there remain instances where the agency ignores the requirement or fails to listen to ways to make rules more cost effective. As a result, excessive environmental regulation continues to plague small businesses, evidenced by a 2010 U.S. Small Business Administration Office of Advocacy study that found that small businesses with 20 or fewer employees spend an alarming 364 percent more per employee per year to comply with such regulation than their larger counterparts.[1]

To illustrate challenges small businesses have faced with regard to the EPA's adherence to the spirit of the RFA and SBREFA, this statement will focus on the agency's Lead: Renovation, Repair and Painting (LRRP) rules.

An example of the EPA recently ignoring the advice of an SBAR panel is the agency's May 6, 2010 LRRP rule that removed a provision known as the opt-out.[2] The opt-out, originally part of the EPA's 2008 LRRP rule, allowed a homeowner to forego certain lead-safe practices if the homeowner certified that he or she occupied the residence and that no children under the age of six or pregnant women live in the home. The opt-out stemmed from the 1999 SBAR panel report that the EPA should consider limiting the scope of the rule to pre-1978 housing as well as accept comment on other ways to make the rule more cost-effective.[3] The opt-out provision was originally implemented in the spirit of this recommendation.

Yet with no new data to inform its decision, the EPA removed the opt-out. That single decision doubled the number of homes covered by the LRRP rule to 78 million and added more than $336 million per year in compliance costs to the regulated community.

Worst of all, the EPA limited input from small businesses during this decision making process. Instead, the EPA worked primarily with the interest groups that sued them, ultimately coming to a legal settlement that required the agency to get rid of the opt-out. Small businesses were only

able to offer comment after a plan forward had been put in place. This type of action is surely not in the spirit of the RFA or SBREFA.

As a result, small businesses are now forced to seek a legislative solution to the problem the EPA created. NFIB strongly supports the Lead Exposure Reduction Amendments Act (H.R. 5911), a bi-partisan measure recently introduced recently by Rep. John Sullivan. This bill would reinstate the opt-out and significantly reduce the cost of the rule to small businesses while protecting the health of children under six. It is unfortunate that such a bill is necessary, but we hope that it will receive the support of the Committee. SBREFA was passed by Congress with the goal that the EPA would take the recommendations of SBAR panels seriously, so that Congress would not have to move after the fact to make commonsense changes to regulations. Had the EPA simply stuck to its original decision, the issue would be moot.

As a result of this experience, small businesses are now concerned about how the EPA will listen to their recommendations pertaining to the upcoming RRP rule on public and commercial buildings. On one hand, the EPA has already sought small business input and appears willing to convene an SBAR panel prior to issuing a proposed rule. On the other hand, the agency is under a court-ordered deadline stemming from a settlement agreement with interest groups that did not represent small businesses at all.

Further troublesome is the fact that the EPA has admitted, and its science advisory board has corroborated[4], that there is little data at this time to justify a rule covering public and commercial buildings.

It is our hope that the Committee on Small Business holds the EPA to its requirements under the RFA and SBREFA as the agency proceeds on this rule that will surely have a significant impact not only on small businesses in the remodeling industry, but those small business owners looking to upgrade their facilities in order to be able to compete.

Thank you again for the opportunity to provide comments on the EPA's adherence to the RFA. NFIB remains eager to work with members of the Committee on Small Business to provide regulatory relief to our nation's small business job creators. We also look forward to working with the Committee to help ensure that the EPA adheres to its responsibilities under the RFA in all of its current and future rulemakings.

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[1] http://www.sba.gov/advo/research/rs371tot.pdf
[2] 75 Federal Register 24802-24819
[3] *Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule: Lead-Based Paint; Certification and Training; Renovation and Remodeling Requirements*. March 3, 2000
[4] U.S. EPA. *Approach for Developing Lead Dust Hazard Standards for Public and Commercial Buildings.* SAB Review Draft. December 6-7, 2010.

House Committee on Small Business

Regulatory Flexibility Act Compliance: Is EPA Failing Small Business?

June 27, 2012

Statement for the Record by the

National Association of Home Builders

1201 15th Street NW

Washington, DC 20005

This written statement is respectfully submitted on behalf of the National Association of Home Builders (NAHB) in order to highlight the Environmental Protection Agency's non-compliance with the Regulatory Flexibility Act (RFA). NAHB is a national federation representing more than 120,000 members involved in single family and multifamily home building, land use planners and developers.

The nation's housing industry has suffered the worst economic downturn since the Great Depression and continues to bear the brunt of staggering unemployment (18% in construction), lack of access to capital, and increasing regulatory and administrative hurdles that threaten housing's recovery. With the new home construction market still at historic lows, the effort to find work in retrofitting and upgrading older housing (remodeling) has been attractive to many builders. Unfortunately, recent amendments and changes to the EPA's Lead Renovation Repair and Painting rule (RRP) have further constrained small businesses in the remodeling industry that are making every effort to comply. These changes have significantly increased the cost associated with the rule and the EPA has never reevaluated the impact of this regulation, which was one of the many safeguards that the RFA is expected to provide.

Background

In 2008, the EPA finalized the RRP rule establishing new requirements for contractors and remodelers working in homes built before 1978. The RRP rule prescribes a series of safe work practices, contractor certification requirements, and cleaning verification as a way to address impacts associated with the disturbance of lead-painted surfaces in older housing. Specifically designed to address potential lead exposures to children under six years of age and pregnant women, the RRP rule requires contractors and remodelers working in older homes to obtain certification from the EPA and to undergo an eight-hour training course on lead-safe work practices. The RRP rule applies to all work performed by contracted "for hire" professionals and, importantly, does not apply in cases where homeowners undertake renovation work themselves.

NAHB supports the RRP rule as finalized in August 2008. In fact, NAHB members conducted extensive research on a number of older, vacant homes with known lead hazards in order to help develop the list of "prohibited work practices" that ultimately became a part of EPA's final regulation. After the rule was finalized, NAHB immediately began working to ensure our members, and the remodeling industry at

large, were aware of the rule, its provisions for lead-safe work practices, and the value of hiring lead-safe trained contractors.

Removal of the "Opt Out" Provision and Non-Existent Test Kits

The first important change to the RRP was finalized on July 6, 2010, and eliminated a consumer's ability to waive compliance requirements if no children under six or a pregnant woman resides in the home. Not only does this change further restrict a consumer's choice about critical renovation work in older homes, but it also dismantles everything EPA originally included in the 2008 RRP to ensure that it was not overly costly to small businesses. As a means of regulatory flexibility, the EPA allowed homeowners in pre-1978 homes that do not have young children or a pregnant woman to waive a contractor's compliance obligations, or "opt out" of the RRP, when undertaking renovation work. The EPA stated that the inclusion of the "opt out" provision decreased the number of homes subject to the RRP from 77.8 million down to 37.6 million.[1] Furthermore, EPA states that the removal of the "opt out" costs an additional $507 million for small businesses in the first year alone.[2]

Thus, without even giving the original rule a chance to work, the EPA immediately amended it by taking away a key measure that made it easier for small businesses to absorb the regulatory impact. According to the U.S. Census Bureau's American Community Survey, approximately 38,317,131 owner-occupied housing units built before 1979 do not have a child under six living there, roughly 88.5% of all the housing stock in the U.S. built before 1979.[3] With the removal of the "opt out" provision, those homeowners no longer have the option of foregoing the costs of compliance with RRP when hiring a professional remodeler to work on an older house. For the small contractors, these additional costs have to be passed onto the consumer which increases the chances a consumer will hire another, likely uncertified, contractor to do the work, or worse, do the work themselves and actually increase the likelihood of disturbing lead-based paint. The restoration of the "opt out" provision would allow households that do not have young children or pregnant women the chance to undertake professional renovation work – most frequently energy efficiency upgrades – without facing compliance costs for a regulation that legitimately does not apply to anyone in the household.

In addition to incorporating the "opt out" to reduce the number of homes subject to RRP, the 2008 RRP also relied on the predicted existence of a test kit that, at the time the rule was enacted, was not available. EPA expected the more accurate test kit to be commercially available by September 1, 2010, and explicitly rejected other options to reduce cost of the regulation because of the anticipated test kit.[4] The new test kit (Phase II) was to supposed to replace the first version (Phase I), which EPA acknowledges has a significantly high false-positive result rate. If contractors use the kits to test pre-1978 homes for lead before renovation work begins and results are negative, (meaning there is no

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[1] *U.S. EPA, Economic Analysis for the TSCA Lead, Renovation, Repair, and Painting Program Opt-Out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities, ES-2. (October 2009).*
[2] *Economic Analysis for the 2009 Proposed Rule (page ES-4)*
[3] *U.S. Census Bureau, American Community Survey. 2007 Public Use Microdata Files.*
[4] *73 Fed. Reg. 21712 (April 22, 2008).*

presence of lead-based paint) then they can bypass RRP compliance. However, with an overly-sensitive test kit with false positive rates ranging from 47%-78%, RRP requirements will be imposed onto renovations where there is no lead present at regulated levels. EPA said it was committed to having more accurate kits, thereby reducing the number of false positives and saving costs on RRP compliance. In fact, EPA's cost calculations rely upon the availability of the Phase II kits beginning in September 2010. As of today, Phase II test kits are still not available and EPA has no estimate as to when they will be available.

Although EPA is still allowing contractors to use Phase I test kits, the entire benefit of having better kits that would reduce the compliance costs for small businesses has been entirely overlooked. After months of informal pleas to EPA to adjust the RRP to account for the substantially higher compliance costs, NAHB formally petitioned EPA to undertake a rulemaking and develop a revised economic analysis on September 27, 2010. The EPA has never responded to NAHB's petition or other requests about the test kits. With inaccurate and overly-sensitive test kits, and the removal of the "opt out," there is little opportunity for relief for remodelers undertaking renovation work in pre-1978 homes. All of the attempts by EPA to mitigate costs of compliance with RRP have been subverted by removing the "opt out" provision and by never delivering a reliable test kit to the market for contractors or accounting the resulting increase on compliance costs.

Regulatory Flexibility Act & EPA Compliance with Section 609(b) Panel Requirement

Section 609(b) of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) and the Dodd-Frank Wall Street Reform & Consumer Protection Act (Dodd-Frank), requires three agencies to solicit small business input beyond the normal notice-and-comment channels. The EPA, the Occupational Safety & Health Administration (OSHA), and the newly formed Consumer Financial Protection Bureau (CFPB) must all work with the Small Business Administration's Office of Advocacy (SBA) and the White House Office of Management & Budget's Office of Information & Regulatory Affairs (OIRA) to convene a Small Business Advisory Review (SBAR) panel of small entity representatives before completing an Initial Regulatory Flexibility Analysis in conjunction with a proposed regulation. Section 609(a) requires the "covered agencies," (EPA, OSHA, and CFPB) to convene a panel "when any rule is promulgated which will have a significant economic impact on a substantial number of small entities." An agency is not required to convene a SBAR panel where the agency certifies that the proposed rule will not have a significant impact on a substantial number of small entities (SISNOSE), or where the agency seeks a waiver from the panel requirement from SBA (section 609(e)).

Despite the clear requirements presented in section 609(b), EPA has failed to comply with the spirit, and in many cases the letter, of the RFA. Since the RFA was amended to include section 609(b), EPA has held 42 SBAR panels, according to information on its web site. Over this same time period (1997 to 2012), EPA has enacted literally thousands of regulations. In the semiannual regulatory agenda for the second half of 2011, the agency listed 62 regulations as in the "final rule stage," that is, where publication of a final or interim final rule is the next step. As EPA has stated, not every regulation or amendment is listed

in the Semiannual Regulatory Agenda. Thus, in only 6 months, EPA anticipated finalizing more significant regulations than it held panels for in 15 years.

Along with the addition of section 609(b), SBREFA amended the RFA by adding section 611, which allows judicial review of several of the act's provisions, such as an agency's certification of no SISNOSE and the sufficiency and timing of final regulatory flexibility analyses. However, section 611 does not provide judicial review for SBAR panels. Because there is no agency with authority to implement or enforce the RFA, the sole instrument that regulated entities have to ensure that agencies comply with the RFA is judicial review.

Panels provide small businesses a rare opportunity to directly participate in the rulemaking process and engage with regulators on the rules that impact them. NAHB urges Congress to amend the RFA to allow for judicial review of all of the act's provisions.

NAHB recently encountered a situation where the court held that there is no way to judicially challenge an agency's decision concerning SBAR panels. NAHB challenged EPA's removal of the aforementioned "opt-out" provision. The agency was sued, and in 2009 agreed as part of a legal settlement to propose revisions to the 2008 Rule, including the removal of the "opt-out" provision ("Opt-Out Amendment.") EPA adopted the Opt-Out Amendment as proposed in 2010. Given that the RRP Rule applies overwhelmingly to small businesses, EPA acknowledged that the Opt-Out Amendment would substantially impact a significant number of small entities, and it issued an Initial Regulatory Flexibility Analysis with its proposal. However, instead of convening a SBAR panel, as the RFA requires, EPA instead relied on a panel it convened in 1999. This panel, while focused on the issue of a lead-based paint regulation for remodeling activities, did not mention, much less evaluate, the inclusion of an Opt-Out provision in the rule. In its comments, NAHB called on the agency to convene a SBAR panel and the EPA refused. NAHB filed suit against EPA's promulgation of the Opt-Out Amendment, and sought to challenge the agency's failure to convene a SBAR panel by demonstrating that the lack of a panel rendered the Final Regulatory Flexibility Analysis illegally insufficient (fundamentally flawed).

On June 22, 2012, the D.C. Circuit decided the case in EPA's favor and held that it did not have jurisdiction to review any claims related to the SBAR panel provision in the RFA. Because the Panel had never considered an opt-out, and was not able to take factors such as the currently poor economic health of the industry into account, EPA may have decided the issue differently if it had the benefit of new information from small entities. Thus, under the current RFA, EPA can make unilateral and unreviewable decisions about whether and how to convene a SBAR panel, which is likely resulting in regulations that heavily and unnecessarily burden small entities.

Conclusion:

NAHB members worked closely with EPA during the development of the original RRP and hoped that it could be implemented, as finalized, and help promote healthy, lead-safe renovation work. Unfortunately, the EPA is redesigning the RRP into a regulatory nightmare that will discourage critical efficiency upgrades and increase costs for renovations in older homes.

As you considering the impact of regulatory burdens on small businesses today, NAHB respectfully asks the Committee to consider the additional burdens placed on our industry. Furthermore, NAHB urges the Committee to require EPA to undertake a rulemaking and new economic analysis to demonstrate the full cost of compliance now that there is no qualifying test kit, and restore the "opt out" so that our small business members can return to work and help consumers save energy and improve the value and efficiency of their largest store of personal wealth: their home.

NATIONAL ASSOCIATION of REALTORS®

Maurice "Moe" Veissi
2012 President

Dale A. Stinton
Chief Executive Officer

GOVERNMENT AFFAIRS DIVISION
Jerry Giovaniello, Senior Vice President
Gary Weaver, Vice President
Joe Ventrone, Vice President
Jamie Gregory, Deputy Chief Lobbyist

500 New Jersey Ave., NW
Washington, DC 20001-2020
Ph. 202-383-1194 Fax 202-3837580
www.REALTOR.org

July 11, 2012

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Graves:

On behalf of the 1 million members of the National Association of REALTORS®, thank you for holding this hearing on the U.S. Environmental Protection Agency's (EPA) compliance with the Regulatory Flexibility Act (RFA). When fully complying with this important law, the EPA has repeatedly demonstrated it can protect the environment and reduce unnecessary regulatory burden on small business as well. More recently however, the Agency appears only to be going through the motions rather than fully embracing this proven law. We would urge the EPA to reverse course and take advantage of the RFA to produce smarter, safer regulations in the future.

Background
The RFA sets basic procedures for consulting stakeholders and preparing regulatory impact analysis that considers small business. Historically, federal agencies have ignored the small business impact of one-size-fits-all regulation. Regulations create an uneven playing field among businesses: By raising less revenue over which to spread the cost, small businesses are disadvantaged relative to their large competitors when it comes to regulatory compliance. Yet, maintaining competition not only keeps prices low but also provides jobs, innovation and growth in the economy. Protecting the environment is an important public policy goal, but so is eliminating excessive regulatory burden on small business. This law simply reminds the regulatory agencies to pursue both objectives where possible.

EPA is Not Convening Small Business Panels
In addition to analysis and consultation, the EPA – one of the biggest issuers of one-size-fits-all regulations – must convene a panel with SBA's Office of Advocacy and the Office and Management Budget to review the draft analysis, consult small businesses, and make recommendations including ways to write a rule so it meets environmental laws but minimizes small business impacts; by law, a panel has just 60 days to do all this. This ensures the Agency has timely feedback on the regulatory options and data it is considering to make decisions.

However, the EPA does NOT appear to be convening panels required by the RFA in several rulemakings, including:

- Waters Subject to the Clean Water Act. There has been a long-running legal dispute over which waters are subject to federal regulation. The Act refers to "navigable" (boat-able) waters but when the EPA tried to expand the term via regulation, it was overturned by the U.S. Supreme Court.

Twice. Most recently the EPA is proposing to expand the term through guidance. By doing this – via guidance instead of regulation, the Agency would avoid the RFA and miss another opportunity to understand the impacts and options for small business. Guidance is one loophole in the RFA that should be closed.

- Lead Paint in Commercial Buildings. In this case, the EPA correctly decided that a panel is required before proposing a regulation (http://www.epa.gov/rfa/lead-pncb.html). But the court-ordered deadline for the proposal is July 20, 2012 and the Agency has yet to formally convene one. We question how an agency can take full advantage of a 60-day panel process when the deadline is less than 2 weeks away.
- Greenhouse Gases. The EPA may choose not to hold a panel upon certifying a regulation will not have "a significant economic impact on a substantial number of small entities" (sec. 609). The basis of the certification for the Endangerment Finding however, was this action was not itself a rule. For the Tailoring rule that followed, EPA's rationale was it delayed Clean Air Act permit requirements resulting in a "positive impact" on small business (74 Fed. Reg. 55348). However, the SBA, which monitors RFA compliance, wrote:

  > "EPA's RFA certification accompanying the proposed GHG endangerment finding is grounded on the narrow, technical argument that the finding, in and of itself, does not actually impose any direct requirements on small entities. Once finalized, however, the GHG finding legally and irrevocably commits the agency to regulating GHGs under the Clean Air Act."

  Also the law refers to "impacts," not "negative impacts." Even if we accepted the EPA's argument that the law is only for "minimizing" impacts, the Agency could have decided on "good government" grounds to hold a panel anyway. A panel could have explored ways to maximize the rule's benefits. Instead, the Agency again opted for a hyper-technical reading and exploited another potential loophole of the RFA.

Small Business Panels Are Being Severely Hampered

The EPA has issued guidelines for what are "significant economic impacts" and a "substantial numbers" of small business. However, the Agency appears to have underestimated these impacts in several rulemakings, raising questions about whether the Agency is incorrectly certifying rules.

- Lead Paint in Residential Buildings. According to EPA, the testing requirements would cost $300 million per year (2010$). However, industry research has shown that the true impact was closer to $420 million annually. This was before the EPA unilaterally deleted the opt-out provision expanding the requirements to many childless homeowners who will now have to pay more for contractors certified in lead-safe work practices that benefit no one.
- Lead Paint in Commercial Buildings. By consulting small businesses, the RFA produces better data and options for regulatory decision making; this is the secret of the law's success in producing smarter regulations. The commercial lead paint rule is a perfect candidate for the RFA. EPA's own science advisory board has reported on the lack of data related to lead hazards on children in and around commercial buildings. It is puzzling how an Agency could produce the safest regulation without this data.

The Agency also appears to be narrowly interpreting which small businesses to consult under the RFA. The EPA would invoke another RFA loophole (Mid-Tex v. FERC, 773 F.2d 327 (1985)).

- Lead Paint in Commercial Buildings. NAR submitted small business owners for panel participation, but these regulations involve the work practices of remodelers. Although the cost of heightened work practices is likely to be passed through to the building owners, they were not deemed "directly impacted" and therefore not eligible for participation. By this logic, real estate agents, who mostly assist but occasionally will sell, buy, or manage their own properties, are not likely to be consulted on any rulemaking, and it would be the EPA's loss. REALTORS® operate according to strict ethical guidelines and often have the best, first-hand information about the market to be regulated as well as how small businesses are most likely to respond. Nothing in the Mid-Tex decision would preclude the Agency from consulting additional small businesses. The goal here should be to make the most of a process that eliminates excessive regulatory impacts, not to invoke hyper-technical readings that exclude small representatives who may not be directly regulated but could bear the full impact of the rule in any case.

Conclusion
Thank you again for this hearing and the opportunity to comment on EPA compliance with the RFA. Preserving competition is as important to the Nation as environmental protection, and this important law ensures that the EPA strives for both where possible. The RFA merely formalizes procedures for conducting regulatory analysis and consultation; it does not prevent agencies from regulating nor should it slow them down if they are conducting adequate analysis and consultation already. We would urge the EPA to halt the recent trend and re-embrace a law proven to produce smarter, safer rulemakings for lead paint, waters of the U.S., and greenhouse gases.

Sincerely,

Maurice "Moe" Veissi
2012 President, National Association of REALTORS®

Design Build
GROUP

March 1, 2011

Lucinda Power
Office of Policy
Regulatory Management Division
U.S. Environmental Protection Agency
Washington, DC

Transmittal via e-mail

Dear Ms. Power:

Thank you for the opportunity to comment on the pre-panel outreach materials for the Renovation, Repair, and Painting Program for the Exterior of Public and Commercial Buildings.

Design Build Group is a full service remodeling company based in Odenton, Maryland. We have 5 employees and last year we had approximately $2.4 million in revenues. We work on residential and commercial remodeling projects and we are EPA Lead-Safe Certified. I am President of the Greater Baltimore Chapter of the National Association of the Remodeling Industry (NARI).

A large part of Design Build Group's business is devoted to demolition projects, both complete and partial (where the exterior is demolished, but the internal structure/skeleton is retained). Because of the unique nature of our work, much of the ideas EPA has for Exterior RRP may not be practicable. I offer these insights to provide EPA with information on how to tailor their approach without the unintended consequence of ignoring how Exterior RRP will impact demolition work.

Q: What work practices do you follow now when encountering lead-based paint on the exterior of public and commercial buildings?

A: The main work practice I utilize is applied for all our jobs and that is to maintain our site. That means to keep the site free from clutter, dust, and other stuff that conveys sloppiness, unprofessional conduct, or unsafe work practices.

Q: How do you currently handle waste from jobs that involve lead-based paint from the exteriors of public and commercial buildings?

A: The waste from our projects goes into dumpsters on-site. Here in Maryland, the majority of dumpster waste is handled through transfer stations where workers separate the waste. We have the option of maintaining different dumpsters and separate the waste ourselves, but it is too expensive for us to do that. The reason I mention how we handle construction debris in Maryland is because that makes the idea of bagging waste from demolition projects impracticable. Not only would bagging waste be cost prohibitive at my work site, the transfer stations do not want the waste in dumpsters to be in bags because it takes too much time for them to open the bags and separate the waste.

Q: Can you think of ways to add flexibility to this rulemaking for small businesses?

A: Yes, I believe that it may be good to map out different scenarios because the work practices are so different. Scenario 1 could be complete demolition. It may make sense to limit complete demolition during high winds for

NARI
MEMBER

designbuildgroup.net | PO Box 539 | Odenton, MD 21113 | phone: (410) 674-2646 | fax: (410) 674-0278 | MHIC# 125052

fear that dust and debris may cause harm. Scenario 2 could be partial demolition. Again, it may make sense to limit partial demolition during high winds for fear that dust and debris may cause harm. Scenario 3 could be rehabilitating building exteriors. Scenario 3 would involve grinding and scraping - where work practices and EPA regulation may make sense.

Here (below) are some descriptions of the costs estimates related to Exterior RRP:

Sample Project: 15,000sf Strip Mall Renovation, Approx. 300'x50', 20' High (10 tenants)

Scenario 1 - Complete Demolition
Cost of implementing LRRP work practices: Potentially impossible to implement. The heavy equipment and size of structural members would prevent any type of containment. Creating vertical containment would completely cost prohibitive.

Scenario 2 - Partial Demolition & Rehabilitation
Cost of implementing LRRP work practices: Extremely expensive. Depending on the size of and extent of facade restoration it could increase costs by 20-25k if only the front was repaired or rehabilitated. If a complete restoration was called for it could rise to 40-50k depending on the extent of containment. The cost of site postings, clean up and personal safety equipment would be a minor portion of the cost.

Scenario 3 - Partial Rehabilitation and/or Painting
Cost of implementing LRRP work practices: Expensive. The containment costs for the stripping, sanding or grinding are where the majority of costs are. The cost of site postings, clean up and personal safety equipment would be a minor portion of the cost. The estimated costs would depend on so many variables including the extent of paint failure, temperature, moisture, etc. Preparation of paint surfaces is very labor intensive so the costs associated for LRRP would be exacerbated by time, i.e. more suits, respirators, etc. Maintaining plastic containment in windy conditions would be problematic and expensive.

Remember these three scenarios are based on a fairly small building. Imagine the cost of containing a ten story building.

Another important thing to remember about the renovating and remodeling business is this: **Every job is unique and challenging.** The scale and level of difficulty varies between every job whether it is commercial or residential. No two jobs ever seem to be the same. How we implement a one size fits all rule (LRRP) is what creates the true challenge.

How can I stay in business, playing by the rules, when the majority do not?

I would like to thank you for choosing Design Build Group, Inc. and giving us the opportunity to participate in the review process.

Sincerely yours,

Design Build Group, Inc.

KRN—

Kevin R. Nau
President / CEO

NARI
MEMBER

designbuildgroup.net | PO Box 539 | Odenton, MD 21113 | phone: (410) 674-2646 | fax: (410) 674-0278 | MHIC# 125052

MIKE COFFMAN
6TH DISTRICT, COLORADO

ARMED SERVICES COMMITTEE

NATURAL RESOURCES COMMITTEE

SMALL BUSINESS COMMITTEE

BALANCED BUDGET
AMENDMENT CAUCUS
CHAIRMAN

Congress of the United States
House of Representatives
Washington, DC 20515–0606

1222 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-7882

DISTRICT OFFICE:
9220 KIMMER DRIVE
SUITE 220
LONE TREE, CO 80124
(720) 283-9772

Congressman Mike Coffman Statement For The Record
House Small Business Committee Hearing
"Regulatory Flexibility Act Compliance:
Is EPA Failing Small Businesses"
June 27, 2012

Mr. Chairman, I commend you for holding this hearing today on the effects the Environmental Protection Agency (EPA) may be having on small businesses.

In particular, I want to highlight an issue with the EPA that has been of significant concern to small business owners and local government officials in my congressional district in Colorado.

The EPA is currently in the process of promulgating stormwater regulations which will have a devastating impact on the business community and on local governments. Most stormwater runoff is created when rain and snowmelt flow over land or impervious surfaces. As the runoff flows over these surfaces such as paved streets, parking lots, and building rooftops, it at times accumulates debris, sediment or other pollutants that could adversely affect water quality if the runoff is discharged untreated.

While it may be necessary to establish rules governing these runoff waters due to environmental concerns; the EPA and the U.S. Army Corps of Engineers (USACE) are currently moving forward with new regulations without regard for the profound financial impact these rules will have on the taxpayers of Colorado, businesses and to homeowners.

For this reason, I have urged the House Appropriations Committee to include in the FY 2013 Interior Appropriations Bill language requiring the EPA to conduct and submit, for approval by Congress, a study before expanding or promulgating any new stormwater rule or regulation.

Douglas County, Colorado, estimates compliance with just a few of the proposed regulations would cost the county taxpayers and businesses in excess of $370 million. And these types of costs will not only be felt in Colorado, but in every state and county across the United States.

An unclear expansion of the definition of which waters are protected by the CWA, by implementing a one-size fits all approach, will have a negative impact on the successes Colorado has already achieved.

I thank you Mr. Chairman for the opportunity to speak on this issue today and would ask the Committee to urge the EPA to conduct a study and report to Congress prior to developing new stormwater permit regulations to determine the financial impacts to taxpayers, businesses, and homeowners.

Sincerely,

Mike Coffman
Member of Congress

BAKER BOTTS L.L.P

THE WARNER
1299 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20004-2400

TEL +1 202.639.7700
FAX +1 202.639.7890
www.bakerbotts.com

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July 21, 2010

Thomas C. Jackson
TEL +1 (202) 639-7710
FAX +1 (202) 585-1009
thomas.jackson@bakerbotts.com

BY ELECTRONIC SUBMISSION

Document Control Office (7407M)
Office of Pollution Prevention and Toxics (OPPT)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

RE: EPA Regulatory Docket Number EPA-HQ-OPPT-2005-0049

Dear Sir or Madam:

On behalf of the American Architectural Manufacturers Association, the Associated General Contractors, the Institute of Real Estate Management, the National Association of the Remodeling Industry, National Association of REALTORS®, the National Lumber & Building Material Dealers Association, the Painting & Decorating Contractors Association, Plumbing-Heating-Cooling Contractors Association, Real Estate Roundtable, the Vinyl Siding Institute, and the Window and Door Manufacturers Association, please find attached our comments on the U.S. Environmental Protection Agency's proposed amendments to the rule for the Renovation, Repair and Painting ("RRP") Program as it applies to target housing and child-occupied facilities (the "Rule"). EPA has proposed amendments to the Rule - published in the Federal Register (Volume 75, No. 87) on May 6, 2010 - to require dust wipe testing and clearance testing in specified circumstances. The proposed amendments suffer from several different flaws, each of which individually mandate that the proposed amendments be withdrawn.

First, EPA lacks the authority under the Toxic Substances Control Act ("TSCA") to impose dust wipe testing or clearance testing requirements on renovators. Rather, the Agency has statutory authority only to suggest guidelines for the conduct of RRP activities. The proposed amendments to the Rule would go beyond the boundaries of guidelines and impose work practice standards for RRP activities. Further, EPA has not established that all the RRP activities being regulated create lead-based paint hazards. While RRP activities may disturb lead-based paint, no evidence has been presented to support a finding that a hazard would automatically result from such activities. Similarly, EPA has not satisfied the statutory requirement of conducting a "study of certification" to determine which, if any, RRP activities create lead-based paint hazards. Consequently, EPA has failed to establish a necessary predicate for the regulation of RRP activities.

Second, EPA's proposed amendments to the Rule are inconsistent with TSCA because they eliminate the distinction between abatement and renovation. The proposed amendments would effectively transform renovators performing RRP activities into abatement

contractors. The dust wipe testing and clearance testing, as contained in the proposed amendments, would require renovators to remove all lead hazards from a work site regardless of whether the lead hazard was present before the RRP activities began. The dust wipe tests and clearance tests require the renovator to perform abatement-type work even after Congress has been careful to distinguish RRP activities from abatement activities. If the proposed amendments go into effect, renovators, while obligated not to create lead-based paint hazards, would be under an untenable duty to abate lead-based paint hazards that preexist the RRP activities.

Third, EPA has acted in an arbitrary and capricious manner in imposing dust wipe testing and clearance testing requirements through the proposed amendments to the Rule. Under previous versions of the Rule, dust wipe testing and clearance testing were not required because of cost and liability concerns. EPA explicitly considered the cost and liability factors, among others, when it declined to include dust wipe testing and clearance testing requirements in the Rule previously. EPA has now changed course without offering a reasoned explanation, such as new data or circumstances, to justify its decision. Further, the amendments only exacerbate issues relating to: (1) the costs for renovators to comply with the proposed amendments, and (2) the liability that will effectively be imposed on renovators that do not abate preexisting lead-based paint hazards. In addition, any benefits provided by the proposed amendments would be minimal because the existing cleaning verification requirements have been deemed effective by EPA. Finally, the unintended harm resulting from proposed amendments would outweigh any benefits it provides because people who would be priced out of hiring a licensed, professional renovator to perform RRP activities will likely perform such work themselves or hiring unlicensed contractors, thereby increasing the likelihood that a renovation project would result in the creation of lead-based paint hazards.

Fourth, EPA has violated the Regulatory Flexibility Act in proposing amendments to the Rule without convening a new Small Business Advocacy Review Panel. The Regulatory Flexibility Act requires that such a panel convene when a rule is promulgated that will have a significant economic impact on a substantial number of small entities. This obligation is also triggered when an existing rule is amended. By adding the dust wipe testing and clearance testing requirements to the Rule, EPA will profoundly impact numerous small entities. The failure to convene a Small Business Advocacy Review Panel to review the proposed amendments is a violation of clear, binding statutory authority.

The groups represented by this letter and attached comments support efforts to reduce the incidence of lead exposure, but are troubled that the proposed amendments are not tailored to meet that goal. The attached comments fully outline the concerns of these trade associations and their belief that the Rule, as it currently stands, effectively and efficiently protects the public from lead exposure. Of course, industry members are always open to additional ways in which to better protect the public. Unfortunately, the proposed amendments to the Rule do little in that regard yet would impose considerable costs.

If you have any questions, please contact me at (202) 639-7710.

Sincerely,

Thomas C. Jackson

Enclosure

COMMENTS REGARDING EPA'S PROPOSED AMENDMENT TO THE LEAD; RENOVATION, REPAIR AND PAINTING RULE[1]

In 1992 Congress passed the Residential Lead-Based Paint Reduction Act, commonly referred to as "Title X." Pub. L. 102-550, tit. X (codified in part at 15 U.S.C. §§ 2681-92). Among other things, that title added a new Subchapter IV to the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* ("TSCA"), and as part of that subchapter directed the U.S. Environmental Protection Agency ("EPA") to develop regulations to reduce exposure to lead by enacting requirements for individuals involved in maintenance, remodeling and construction activities in certain types of buildings, including "target housing." 15 U.S.C. § 2682. "Target housing" is defined, with some exceptions, as "any residential structure built prior to 1978 where a child under six resides or is likely to reside." *See* 42 U.S.C. § 4851b(27).

In April 2008, EPA published its regulation concerning the Lead Renovation, Repair and Painting program for renovation, repair and painting ("RRP") activities in target housing. 73 Fed. Reg. at 21692 (April 22, 2008) (the "Rule" or "LRRP Rule"). The purpose of the Rule is to "reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint." *Id.* Under the Rule, new requirements for renovation work practices were established. The renovation work practices include a requirement that renovators engage in what EPA refers to as "cleaning verification" to ensure that the work area has been cleaned in accordance with the requirements set forth in the Rule. 71 Fed. Reg. at 1613-14. The verification procedure includes both a visual inspection of the work area after the required cleaning steps have been conducted as well as the use of a "white glove" test. *Id.* at 1630. These work practice requirements apply to all commercial enterprises engaging in RRP activities but do not apply to homeowners who conduct RRP activities themselves. *Id.* at 1602.

For the second time in less than two years, EPA has proposed changes to the Rule. *See* 75 Fed. Reg. 24802 (May 6, 2010), 40 C.F.R. §§ 745.81 - 745.82; *see also* 75 Fed. Reg. 25038 (May 6, 2010). "Specifically, EPA is proposing to require dust wipe testing after many renovations covered by the Rule." *Id.* at 25039. EPA is also proposing requirements for clearance testing in some instances, as well as requirements related to training, certification and accreditation. *Id.* However, the proposed amendments to the Rule regarding dust wipe testing and clearance testing suffer from a number of serious legal deficiencies and should be reconsidered by the Agency.

I. EPA Lacks the Authority Under the Toxic Substances Control Act to Impose Dust Wipe Testing or Clearance Requirements on Renovators

There are several key respects in which the proposed amendments to the Rule, to the extent they include requirements for any form of dust wipe testing or clearance testing, would

[1] These comments are submitted on behalf of the following groups: American Architectural Manufacturers Association (AAMA), the Associated General Contractors (AGC), the Institute of Real Estate Management (IREM), the National Association of the Remodeling Industry (NARI), National Association of REALTORS® (NAR), the National Lumber & Building Material Dealers Association (NLBMDA), the Painting & Decorating Contractors Association (PDCA), Plumbing-Heating-Cooling Contractors Association (PHCC), Real Estate Roundtable (RER), the Vinyl Siding Institute, and the Window and Door Manufacturers Association (WDMA).

exceed the statutory authority Congress granted to EPA under Title X. For the reasons set forth below, EPA should withdraw its proposal to add these requirements in light of the limits on its authority.

A. EPA can only issue guidance concerning renovation work practices[2]

Based on the plain language of the statute, EPA lacks authority under TSCA to promulgate regulations requiring any form of clearance testing because such requirements are part of work practice standards, which can only be the subject of Agency guidelines. Section 402(a)(1) of TSCA only authorizes EPA to promulgate regulations "to ensure that individuals engaged in [lead-based paint] activities are properly *trained*; that training programs are *accredited*; and that contractors engaged in such activities are *certified*." 15 U.S.C. § 2682(a)(1) (emphasis added). Moreover, while the statute also grants EPA authority to create standards for "lead-based paint activities," such activities are defined, in the case of target housing, as "risk assessment, inspection, and abatement." 15 U.S.C. § 2682(b)(1). Accordingly, work involving renovation, repair and painting is not included under the "lead-based paint activities" definition.

In enacting Section 402(c), Congress was very careful to distinguish between lead-based paint activities and RRP activities and that section does not explicitly authorize EPA to promulgate regulations affecting the work practice standards for RRP activities, *e.g.*, requiring clearance testing. Instead, Congress authorized EPA to "promulgate *guidelines* for the conduct" of RRP activities and to require certification of RRP firms that are engaged in activities that create lead-based hazards. 15 U.S.C. § 2682(c)(1) and (3). The statute also requires EPA, after undertaking certain studies, to revise the regulations developed for abatement and other lead-based paint activities to apply to RRP activities. *Id.* § 2682(c)(3). Thus, Congress intended that EPA would apply appropriate certification requirements developed in connection with lead-based paint activities to RRP contractors but that work practice standards – including clearance testing requirements – would remain the subject of guidelines, not regulations.

Further, the plain meaning of the statute is supported by the fact that the provision requiring EPA to engage in a study prior to promulgating regulations for RRP activities (Section 402(c)(2)) is entitled "Study of certification" and the provision concerning subsequent promulgation of regulations (Section 402(c)(3)) is headed "Certification determination." *See I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) (section titles can serve as aids to the construction of statutory language where the language is ambiguous); *see also Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (the title of a section is an indication of its meaning). In contrast to the preceding provision concerning guidelines for work practice standards, the focus of Section 402(c)(2) and (3) is the certification of contractors. Therefore, the focus of rulemaking development under Section 402(c)(3) must be on certifications of contractors and any attempt by EPA to require contractors to comply with work practice standards such as any form of clearance testing is beyond EPA's statutory authority.

[2] Lead-safe work practices do provide health and safety benefits. However, EPA is without the authority to require such practices. Nevertheless, contractors that comprise the regulated community endeavor to use work practices that protect human health and the environment.

B. EPA has not established that all the activities being regulated create lead-based paint hazards

EPA's proposed dust wipe testing and clearance testing requirements also exceed the Agency's authority because EPA has not established that the activities it seeks to regulate create lead-based paint hazards. Any activity that does not create a lead-based paint hazard "does not require certification" under Section 402(c)(3) and cannot be regulated by EPA. *See* Comments by the National Ass'n of Home Builders regarding EPA's Proposed Rule: Lead Renovation, Repair and Painting Program, Published in the Federal Register, January 10, 2006 at 71 FR 1587, Section II(C) ("NAHB LRRP Rule Comments") (May 25, 2006). ("In those cases where EPA has not demonstrated that typical RRP activities create lead hazards, the Agency is prohibited from addressing them in this rule"). Such RRP activities may only be subject to EPA guidelines. *See* 15 U.S.C. § 2628(c)(1).

The Agency may not impose the type of clearance requirements it has proposed because it has failed to demonstrate that RRP activities create the type of hazard that is a predicate for regulation under Section 402(c). The statute does not authorize EPA to regulate RRP activities simply because they disturb lead-based paint, as RRP activities may do. Instead, Section 402(c)(3) requires EPA to promulgate regulations with respect to RRP activities only where such activities create a lead-based paint hazard. The statute does not provide specific authorization to EPA to regulate RRP activities that do not create a lead-based paint hazard. Consequently, from that silence EPA lacks authority to regulate RRP activities unless they create a lead-based paint hazard. *See, e.g., In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (where Congress knows how to say something but chooses not to, its silence is controlling). Therefore, because Section 402 is silent as to EPA's authority to regulate RRP activities that do not cause a lead-based paint hazard, such authority is lacking.

EPA does not address this aspect of the extent of its regulatory authority in the proposed amendments because it has purported to find that all RRP activities that disturb lead-based paint create a lead-based paint hazard. However, there is a lack of evidence to support such a conclusion. Generally, most RRP activities either eliminate or reduce the potential for future lead-based paint hazards. For example, the Mercatus Report stated that "evidence collected [in EPA's Study] following the passage of the statute has indicated that lead hazards created by renovation and remodeling work are minimal, and RRP work removes chipping and deteriorating paint – two of the leading causes of elevated blood-lead levels." *See* Comments of the Regulatory Studies Program, Mercatus Center, George Mason University at 30 (May 25, 2006) ("*Mercatus Report*").

Other studies have reached similar conclusions. NAHB's own study noted that "when considering lead dust loading on surfaces throughout a single property, results showed that overall all but one of the properties evaluated showed *lower levels of lead dust when R&R contractors completed the work than when they arrived.*" NAHB, *Lead-Safe Work Practices Survey Project Report* 2 (Nov. 2006) (the "*NAHB Report*") (emphasis added). Moreover, the Wisconsin Department of Health and Family Services ("WDHFS") noted that "our experience in Wisconsin is that *professional renovation is rarely the cause of lead poisoning in children.*" Wisconsin Department of Health and Family Services, *Comments: Lead; Renovation, Repair, and Painting Program; Proposed Rule* (emphasis added).

In light of these studies, an ample basis exists in the record for concluding that most RRP activities do not create lead-based paint hazards, but rather minimize and even eliminate such hazards. As discussed above, the statute limits EPA's regulatory authority to those activities that actually create a lead-based paint hazard, which means that RRP activities would generally be exempt from EPA's authority under Section 402(c)(3). To the extent that EPA is without authority to promulgate enforceable regulations with respect to such activities, it is likewise prohibited from requiring renovators engaged in RRP activities to conduct dust wipe testing or clearance testing.

C. EPA has not satisfied the requirement to conduct a study to determine which types of renovation activities create lead-based paint hazards because the studies the Agency conducted are flawed

EPA also is without authority to promulgate dust wipe testing or clearance testing requirements for RRP activities because the Agency has not satisfied the prerequisite of conducting a congressionally-mandated study as set forth under the relevant statute for imposing regulatory requirements on RRP activities. Prior to promulgating any regulations involving RRP activities, EPA was required to conduct a "Study of certification" to determine which of the "various types of renovation and remodeling activities . . . disturb lead and create a lead-based paint hazard on a regular or occasional basis." 15 U.S.C. § 2682(c)(2). Thus, EPA cannot promulgate any regulations affecting RRP activities until after it has satisfied the "Study of certification" requirements.

The Agency has undertaken a four-part study (the "Study") in an attempt to satisfy the study requirement, but the administrative record provides an ample basis for questioning the validity of the Study and its conclusions. One of the most comprehensive critiques of the Study comes from the Mercatus Center at George Mason University, which conducted a "careful and independent analys[is] employing contemporary economic scholarship to assess [the] rulemaking proposal[] from the perspective of the public interest." *Mercatus Report* at 1. According to the Mercatus Report, the conclusions made in EPA's Study did not match its content. *Id.* at 23. For example, based on a review of EPA's own data, the *Mercatus Report* concluded that:

- Phases I and II of the Study "failed to find a connection between elevated blood-lead levels and workers' exposure to considerable amounts of lead-contaminated dust;" and
- "[T]he Wisconsin [Phase III] study cannot claim that any RRP work increases the risk of elevated blood-lead levels in children."

Id. at 10, 21; *see also* NAHB LRRP Rule Comments, Section II(B)(4).

Several members of the peer review panel involved in evaluating the Study also raised concerns about various aspects of the methodologies employed. For example, EPA reported that "[i]n regard to the Wisconsin blood-lead registry, another issue of concern among the reviewers was how representative the registry is of the state population." *See* Phase IV Report at 1.3. However, the Study failed to adequately address these and other concerns. In other words, contrary to EPA's conclusions, the Agency's own Study failed to show that

unregulated RRP activity contributed to increased blood-lead levels in *either* RRP workers or in children residing in homes that were being remodeled. NAHB likewise pointed out in its prior comments to EPA that "the studies cited do not illustrate a definitive link between renovation and remodeling activities and lead poisoning in children." *See* NAHB LRRP Rule Comments, Section II(B).

EPA has based its decision to regulate RRP activities on the conclusions made in the Study, when the underlying data suggest that there is little, if any, need for such regulation. Because the conclusions of the Study are not supported by the underlying data, EPA has not satisfied the requirements of Section 402(c)(2) because it has not adequately determined the "extent to which persons engaged in various types of renovation and remodeling activities . . . are exposed to lead in the conduct of such activities or disturb lead and create a lead-based paint hazard" as required by Congress. 15 U.S.C. § 2682(c)(2). Therefore, EPA is not entitled to "utilize the results of the study" as a justification for promulgating dust wipe testing and clearance testing requirements for RRP activities. 15 U.S.C. § 2682(c)(3).

II. EPA's Proposed Requirements Are Inconsistent With the Statute Because They Eliminate the Distinction Between Abatement and Renovation

The imposition of dust wipe testing and clearance testing requirements as proposed by EPA is inconsistent with the intent of Congress because at a fundamental level it eliminates the distinction between abatement contractors on the one hand and renovators on the other. "Abatement is intrinsically very different from remodeling," and this reality is reflected in the statute, which sets forth separate regulatory schemes for "lead-based paint activities," including abatement, and renovation and remodeling. NAHB LRRP Rule Comments at 23 (May 25, 2006). Moreover, those regulatory schemes differ in key respects. For example, Section 402(a) requires that *all* abatement contractors be properly trained and certified and that *all* abatement activities conform to work practice standards promulgated by the Agency. In contrast, Congress gave EPA flexibility in determining whether contractors engaged in RRP activities should be subject to regulatory requirements.

The legislative history of Title X supports the conclusion that Congress believed RRP activities and lead-based paint activities were distinct and that each required a different level of government regulation. For example, the Senate Committee on Banking, Housing and Urban Affairs recognized that not all RRP activities would create lead-based paint hazards and that, unlike lead-based paint activities (risk assessment, inspection, abatement), not all RRP activities would require the use of certified workers. As the Committee stated:

> Although the committee is aware that some home remodeling and renovation projects which have not incorporated lead reduction measures have aggravated lead-based paint hazards, and caused poisoning of workers and children, *not all such projects are inherently dangerous*. The level of hazards is a function of the extent to which lead-based paint is disturbed and the amount of dust lead generated. *The committee recognizes that some federally funded renovation projects in housing containing lead-based paint*

> *will not require certified workers* because it will not involve significant dust generation or the disturbance of painted surfaces.

S. Rep. No. 102-332 at 121 (1992) (emphasis added).

In fact, many RRP activities are more closely related to a category of activities referred to as "Interim Controls" in the bill before the Committee (which included "repairs, maintenance, [and] painting") than they are to abatement and other lead-based paint activities. "Interim Controls would be measures which temporarily reduce human exposure or likely exposure to lead-based paint hazards. These measures would include specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident education programs." *Id.* at 115. In the bill it reported out, the Committee chose not to impose any training and certification requirements on individuals carrying out interim control measures, stating that:

> These activities typically involve *less* potential for generating dangerous levels of dust, and are not much different from the types of activities routinely carried out by housing residents and maintenance personnel.

S. Rep. No. 102-332 at 121 (1992) (emphasis added).

EPA itself has recognized that abatement activities and renovation differ in fundamental respects. In issuing the LRRP Rule, the Agency acknowledged that "[t]he purpose of an abatement project is to permanently eliminate lead-based paint and lead-based paint hazards." 71 Fed. Reg. at 1613. As a consequence, EPA concluded, it is "perfectly appropriate" to require an abatement contractor to undertake testing once the work is completed to ensure that the lead-based paint hazards have in fact been eliminated. *Id.* In contrast, EPA recognized that "renovations may be performed for many reasons, most of which have nothing to do with eliminating lead-based paint hazards." *Id.* at 1613-14. The Agency further recognized that "if clearance testing using dust wipes were required after every renovation job, it could have the effect of holding the renovation firm responsible for abating all lead dust hazards, including such hazards that may have existed in the area before the renovation commenced." *Id.* at 1614.

To the extent that EPA imposes clearance testing requirements, the Agency will effectively eliminate any distinction between renovation and abatement. *Id.* at 250050 ("EPA is proposing to require renovation firms to follow a clearance process similar to that performed after abatement projects . . ."). Indeed, the amended Rule would impose more requirements on renovators, who have to follow specified cleaning requirements, than contractors performing abatement projects. Even the dust wipe testing requirements in the amended Rule impermissibly blur the distinction between abatement and renovation. For instance, dust wipe testing will effectively make renovators responsible for any lead dust left in the residence after the job that is in excess of applicable standards unless the renovators incur the additional costs associated with baseline testing. Consequently, whether the task carried out is one of renovation or abatement, the company performing the work must meet the cleanliness standards regardless of conditions that existed prior to the commencement of the work.

Accordingly, notwithstanding the fundamental distinction between abatement and renovation, the imposition of dust wipe testing and clearance testing requirements imposes essentially the same burden on the renovator as the abatement contractor, *i.e.*, to leave the work area in a clean, relatively dust-free (and therefore lead dust-free) condition. In the case of abatement contractors, remedying pre-existing conditions and rendering the work area free of lead is precisely the point of the work. However, the purpose of a renovation project is to change the appearance of the home in some fashion without regard to the presence of lead, and it is therefore inappropriate to impose liability on renovators for failing to remedy pre-existing conditions. Thus, the imposition of dust wipe testing and clearance testing requirements would erode the distinction between abatement contractors and renovators in critical respects, which is contrary to the intent of Congress to maintain the distinction between the two types of contractors.

III. EPA's Proposed Imposition of Dust Wipe Testing and Clearance Requirements is Arbitrary and Capricious

Even if EPA had authority under the statute to impose clearance testing and other requirements on renovators, EPA's proposed amendments would still be legally deficient because they are arbitrary and capricious. As the U.S. Supreme Court has stated, an agency's decision will be vacated if it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *National Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2530 (2007). Moreover, EPA must articulate an explanation that includes "a rational connection between the facts found and the choice made." *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 952 (D.C. Cir. 2007). A court should uphold EPA's action only if the court can discern a "reasoned path" from the facts and considerations before the Agency to the decision it reached. *United Distribution Cos. v. F.E.R.C.*, 88 F.3d 1105, 1187 (D.C. Cir. 1996) (*per curiam*).

Accordingly, if EPA has offered an explanation for its decision that runs counter to the evidence before it, a court should find the Agency's action to be arbitrary and capricious. *American Coke & Coal Chemicals Inst. v. Environmental Protection Agency*, 452 F.3d 930, 941 (D.C. Cir. 2006). Here, EPA's explanation for its rulemaking decisions run counter to the evidence in the record that was before the Agency.

A. The Agency has simply changed its mind without citing any new data or circumstances to justify its new direction

When changing a final rule, an agency must provide a reasoned explanation for the change. *See C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1561 (D.C. Cir. 1991); *see also Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (stating that an agency may change its past practices, especially under changed circumstances, so long as it provides a reasoned explanation for its action). If an agency fails to explain its reassessment, then the courts will decline to find that the agency had an adequate basis for its decision. *Fox*, 931 F.2d at 1561. In amending the Rule to include dust wipe testing and clearance testing requirements, EPA has reversed course without citing any data or other information that has

come to light since April 2008 that casts doubt on its prior position. *See* 75 Fed. Reg. at 25057 (References). Rather, it appears that the Agency simply changed its mind even before it implemented the Rule as the result of the settlement of a lawsuit. *See* 75 Fed. Reg. at 25044. In the absence of a reasoned explanation for the change in the Rule regarding dust wipe testing and clearance testing, the Agency's decision is arbitrary and capricious.

B. The Agency notes the concerns which led it to reject dust wipe testing and clearance requirements for renovation activities but fails entirely to explain how its new proposal is justified in the face of those same concerns

EPA gave "significant weight to the cost . . . and liability concerns" in crafting the Rule. *See* 75 Fed. Reg. at 25046. In proposing to amend the Rule, EPA concedes that the imposition of dust wipe testing and clearance testing will make renovation and remodeling activities more expensive. *See* 75 Fed. Reg. at 25044 ("EPA also recognized that dust wipe testing and clearance as required after abatements can be expensive."). Further, the Agency acknowledges that the amendments will prompt renovation and remodeling contractors to take measures to protect themselves against future liability. *Id.* at 25045 (noting that EPA considered the "white glove" method an alternative to clearance in order to protect contractors against liability for pre-renovation dust). However, EPA has not adequately explained why it reached a different conclusion on dust wipe testing and clearance testing when the factors to be balanced remained unchanged. *See id.* at 25046. ("EPA has continued to balance these considerations in today's proposal, but has preliminarily concluded that, for certain jobs, the additional benefits of dust wipe testing, and in some cases clearance, warrant imposing these additional requirements."). Such a course of action is arbitrary and capricious.

C. The costs of the proposed amendments outweigh the minimal benefits of the proposed new requirements, particularly in light of EPA's conclusions regarding the effectiveness of the existing cleaning verification requirements

EPA's imposition of dust wipe testing and clearance testing requirements is also arbitrary and capricious because the costs of the proposed requirements will outweigh their benefits. Currently, renovators clean up and conduct a visual inspection of the work area after completing a project. EPA itself has noted that this type of cleanup typically reduces the percentage of lead in the affected areas by over 99%. *See* EPA, *Final Summary Report* 8 ("[S]imple broom and shop-vacuum cleanup resulted in substantial reduction in the total amount of lead available to occupants."); *see also Mercatus Report* 10-11; 75 Fed. Reg. at 25049 (stating that in the Dust Study "experiments, cleaning verification was needed to reduce average dust lead levels below the standards"); *id.* at 25051 ("the Dust Study suggests that it would be unlikely for a surface that had been cleaned and had gone through the cleaning verification process to fail another round of cleaning verification"). As NAHB documented in its report, because such cleanups are so effective most homes are less likely to have current or future lead-based hazards after the RRP activities have occurred than they were before the RRP activities took place. *NAHB Report* at 2 ("the post-work samples collected from all surfaces were lower than the pre-work dust samples in all of the activities evaluated"); *see also* 75 Fed. Reg. at 25049 ("Cleaning verification is useful because it combines fine cleaning properties with feedback to the certified renovator on the effectiveness of the post-renovation cleaning process.").

In contrast to the benefits of the existing regime, the only benefits proffered by EPA for its proposed changes are (1) providing more information to the owners and occupants of the affected buildings, and (2) changed behavior on the part of the contractors during the cleanup after renovation. *See* 75 Fed. Reg. at 25060. However, these assumed benefits are insufficient to justify the proposed amendments. First, improvement of the population's "understanding and awareness of dust-lead hazards" - while a worthy objective - should not be the primary reason behind the proposed change. The Agency could enlighten citizens regarding the dangers of lead dust in more cost-effective ways than requiring contractors to undertake dust wipe testing and clearance testing.

Indeed, information regarding these dangers is already available and the means of dissemination are mandated by Congress. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 provides a direct avenue for EPA to reach owners and occupants of target housing, and establishes a clear process for informing owners and occupants about the potential for lead-based paint exposure and health impacts. *See* Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. 102-550, § 1018. Section 1018 requires sellers and lessors of target housing to provide prospective buyers and tenants with a lead hazard information pamphlet. *Id. at* § 1018(a)(1)(A). In addition, the sale or rental contract must include a "lead warning statement," alerting the prospective buyer or tenant that, because of the age of the home, lead-based paint may be present. The statement describes the health risks associated with lead-based paint with emphasis on young children and pregnant women. *Id. at* §1018(a)(2)-(3). Any known lead-based paint hazards must be disclosed, and any documentation pertaining to these hazards must be presented to the buyer/tenant. *Id. at* § 1018(a)(1)(B). Furthermore, a prospective buyer or tenant also has at least a 10-day opportunity to have the property tested for lead before becoming obligated under the contract. *Id. at* §1018(a)(2)(C).

The penalties for noncompliance are steep and include federal monetary penalties as well as civil remedies for the buyer or tenant when the seller, lessor, or any agents involved in the transaction fail to comply with Section 1018 or the implementing regulations. Thus, Section 1018 is a powerful tool that provides EPA with direct access to the occupants of target housing even before they enter the home.

As EPA has recognized, Section 402 does not grant it authority to regulate home owners or occupants who choose to perform their own renovation activities.[3] Nor does Section 402 authorize EPA to disseminate information to owners and occupants. Thus, Section 402 and its implementing regulations[4] fail to provide EPA with any authority to provide information to residents or change residents' behavior under Section 402.

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[3] *See* Lead; Renovation, Repair, and Painting Program; Lead Hazard information Pamphlet; Notice of Availability; Final Rule, 73 Fed. Reg. 21692, 21708 (Apr. 22, 2008) ("EPA thus interprets the statutory directive to regulate remodeling and renovation activities found in TSCA section 402(c)(3) as applying to contractors and not a broader category of persons, such as homeowners."); *see also* Lead; Requirements for Lead-Based Paint Activities; Proposed Rule, 59 Fed. Reg. 45872, 45873-4 (Sept. 2, 1994).

[4] *E.g.*, 73 Fed. Reg. 21692 (Apr. 22, 2008).

Instead, Congress has provided two methods for information dissemination to owners and occupants, including Section 1018, which is discussed above. The other statutory mechanism for providing information to residents regarding lead-base paint hazards is found in TSCA Section 406. That provision requires EPA to produce an informational pamphlet describing lead-based paint hazards that may be present in a home built before 1978, the risks these hazards pose to occupants of the property, the role renovation may play in creating these risks, methods for evaluating and reducing hazards, and information on how to locate contractors that specialize in lead-based paint hazard evaluation and reduction. *See* TSCA, § 406(a). Then, Congress specifies the method for dissemination of this pamphlet – "each person who performs for compensation a renovation of target housing [must] provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation." TSCA, § 406(b). However, there is no mention of any other form of information dissemination within Section 406(b), and Section 402 is silent on the issue. Long-standing rules of statutory interpretation clearly state that where Congress "knows how to say something but chooses not to, its silence is controlling." *In re Hass,* 48 F.3d 1153, 1156 (11th Cir. 1995); *see also discussion infra*, p. X.

Thus, not only does EPA have a mechanism to directly reach owners and occupants of target housing in a cost-effective manner that provides information at a time when exposure to lead hazards may be prevented entirely, but Congress is clear on the role the renovator contractor is to play in informing residents about lead-based paint hazards. The Agency has no authority under Section 402 to require information dissemination to residents through a requirement imposed on the renovation contractor.

The other benefits city by EPA for dust wipe testing and clearance testing relates to the change in behavior of the contractor that EPA hopes to see as a result of the imposition of these requirements. In effect, the Agency is citing this changed behavior as one of the reasons for the proposed amendments without having any information as to how the proposed requirements would actually benefit the populations of concern. Given that RRP activities generally do not result in lead-based paint hazards and standard cleanup procedures result in the removal of almost all of the lead from the work area, the dust wipe testing and clearance testing procedures will result in minimal benefit.

At the same time, the costs associated with dust wipe testing and clearance testing will be significant. These costs include not only the expense of administering the dust wipe testing and clearance test itself, but also include the opportunity costs associated with delays in completing projects and a resulting inability to take on additional projects due to the clearance testing. In addition, as EPA itself has recognized, renovators may feel compelled to document pre-existing conditions due to liability concerns, which would further increase costs. *See* 71 Fed. Reg. at 1614. These costs associated with dust wipe testing and clearance testing outweigh the minimal benefits of clearance testing and call into question the rationales for imposing such requirements.

As noted above, visual inspections following a typical post-project cleanup are extremely effective and, according to EPA's own Study, typically reduce the lead concentration in a home by over 99%. While this method of inspection is effective, simple and inexpensive, dust wipe testing and clearance testing are more time-consuming and more expensive. It would

be arbitrary and capricious for EPA to require more expensive and complicated dust wipe testing and clearance testing that would provide little additional benefit as opposed to a simpler, more effective, and less expensive visual test, especially after EPA itself has admitted the many drawbacks associated with these proposed requirements.

D. The proposed rule will actually undermine EPA's goal of minimizing risk to young children and other exposed populations

The dust wipe testing and clearance testing requirement will actually undermine the very goal that EPA seeks to achieve, *i.e.*, overall reduction of lead-based paint hazards. As renovators incur the costs associated with dust wipe testing and clearance testing, they will pass some of those costs along to their customers in the form of higher prices for services. NAHB's survey demonstrates that most homeowners are unwilling to absorb significant costs for dust wipe testing and clearance testing. NAHB, *Report on Lead Paint Test Survey* (April 2007). As a result of the higher prices occasioned by dust wipe testing and clearance testing, some homeowners may elect to postpone renovations, meaning that areas with lead-based paint will remain in homes longer. In other cases homeowners – who will not be subject to EPA's regulatory requirements – will undertake such activities on their own, or will hire underground and/or unregulated contractors. In either case, the work may be done in a way that causes more lead dust and cleanups may not be as thorough.

As noted by NAHB, the Mercatus Center, and others, the unintended consequence of the imposition of dust wipe testing and clearance testing requirements on professional renovators will be that more children and other people will be placed at risk for lead poisoning due to deteriorating homes. *See* NAHB LRRP Rule Comments at Section II(C)(2); *see also Mercatus Report* at 30. As the U.S. Court of Appeals for the Seventh Circuit has stated, a court "'is not obliged to stand aside and rubberstamp [its] affirmance of administrative decisions that . . . frustrate the congressional policy underlying a statute.'" *Local 15 Int'l Brotherhood of Elec. Workers, AFL-CIO v. N.L.R.B.*, 429 F.3d 651, 656 (7th Cir. 2005). Thus, it would be arbitrary and capricious for EPA to impose requirements that will lead to an increased risk to the very population EPA is striving to protect.

IV. EPA's Refusal to Convene a New Small Business Advocacy Review Panel Violates the Regulatory Flexibility Act

In the preamble of the proposed LRRP Rule Amendment, EPA states that it has complied with its obligation under the Regulatory Flexibility Act ("RFA"), including its responsibility to convene a Small Business Advocacy Review ("SBAR") Panel. More specifically, EPA alleges that the SBAR Panel which was convened in 1999, and discussed in the preamble to the original LRRP Rule, satisfies any obligation the Agency might have to convene a SBAR Panel as a consequence of proposing the LRRP Rule Amendment. EPA is mistaken in this assumption.

EPA must convene a SBAR Panel any time "a rule is promulgated which will have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 609(a). EPA's obligation to convene a SBAR Panel is not limited to situations in which an entirely new rule is being proposed. Instead, this obligation is triggered by any rulemaking –

even the amendment of an existing rule – that would result in a significant economic impact on a substantial number of small entities. For example, EPA convened a SBAR Panel to review proposed changes to existing regulations related to the certification of pesticide applicators. *See* EPA, *Panel 33b: Certification of Pesticide Applicators (Revisions).*

By adding dust wipe testing and clearance testing requirements, the proposed LRRP Rule amendments would significantly alter the regulatory reach – and consequently the economic impact – of the LRRP Rule. EPA itself has recognized that the changes associated with the proposed amendments would result in a significant economic impact on a substantial number of small entities. *See* 75 Fed. Reg. at 25061. For example, according to EPA's economic analysis related to the proposed LRRP Rule amendments, the additional requirements would cost small entities between 0.4% and 2.6% of their annual revenue. *Id.* Therefore, it is apparent that the proposed amendments trigger EPA's obligation to undertake a RFA/SBREFA Screening Analysis and ultimately convene a new SBAR Panel.

EPA attempts to avoid this obligation under the RFA by stating that it "believes that the conclusions it made in 2008 regarding these recommendations are applicable to this proposal." *Id.* Despite these claims, the proposed amendments to the LRRP Rule represent a major departure from the original LRRP Rule and would result in a significant economic impact on a substantial number of small entities. As such, the proposed amendments trigger EPA's obligations to comply with the RFA, including an obligation to convene a SBAR Panel. To date EPA has failed to discharge this duty. As a result, EPA must delay the promulgation of the proposed amendments until after these obligations have been fully satisfied.

Douglas County Business Alliance
420 Jerry Street
Castle Rock, CO 80104

The Honorable Sam Graves
Chairman
House Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Graves:

On behalf of our over 2,500 members of the Douglas County Business Alliance, which is made up of the Castle Pines Chamber of Commerce, Castle Rock Chamber of Commerce, Castle Rock Economic Development, Denver South Economic Development Partnership, Highlands Ranch Chamber of Commerce, Lone Tree Chamber of Commerce, Northwest Douglas County EDC and Parker Chamber of Commerce, we submit the following statement for the record in today's hearing on *Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?*

NACo strongly supports the Clean Water Act and the goals of the EPA that are intended to protect our nation's water resources. NACo has concerns with the EPA's recent endeavor to promulgate new regulations during which the EPA appears to have not considered and incorporated public, State and Local government's comments; provide flexibility to incorporate geographically-specific and cost effective requirements; and conduct a study that includes a comprehensive cost benefit analysis.

What the EPA is currently advancing would have serious financial implications for local governments and their constituents at a time when this country is struggling to recover from one of the worst recessions in modern history.

In April 2011 the EPA/USACE issued draft guidance that was intended to "increase clarity and to reduce costs and delays in obtaining CWA permits." During the review of the draft guidance a large number of stakeholders, including organizations such as NACo, National League of Cities, and the National Conference of State Legislatures, found that the draft could substantially expand the definition of "Waters of the U.S.", included in the CWA. These interpretations have far-reaching implications for local governments by:

- increasing costs for public and private-sector projects, including maintenance activities;
- potentially affecting U.S. Counties' National Pollutant Discharge Elimination System (NPDES) programs;
- raising the likelihood of third party lawsuits; and
- potentially lengthening permit timelines, resulting in project delays.

Additionally, through public outreach, the EPA provided details on new requirements that the EPA intends to include in the updated Stormwater General Permit. These additions included an expansion of boundaries in permit areas under the National Pollutant Discharge Elimination System (NPDES) which could include the entire jurisdictional boundaries of cities and counties, a requirement for municipalities to treat stormwater volume as a pollutant, and a requirement that municipalities develop a program requiring existing site owners to address discharges from their properties (retrofits). This expansion would impose an unfunded mandate and dramatically increase the financial burden on local governments and businesses, including rural areas not currently subject to these regulations.

We urge the Committee to move forward with legislation putting a halt to the EPA's efforts until such time an impact study can be done and sound evidence can be produced to show there is in fact a problem and the solution proposed is thoroughly vetted, cost effective and flexible to provided geographically specific solutions. At a time when businesses are struggling and people are out of work, we should not be promulgating a one size fits all regulation that causes further harm to our businesses and those they employ. For this reason we hope Congress will move to pass bi-partisan legislation in the House in the form of HR 4965.

This is common-sense legislation requiring EPA to follow the current rule-making process and would prohibit them from moving forward until such impact studies are done.

Respectfully,

Frank Gray
Castle Rock Economic Development
Chairman, Douglas County Business Alliance

Tel 303 290 6611
Fax 303 290 9141
6880 S. Yosemite Court, Ste 200
Centennial, Colorado 80112

COLORADO CONTRACTORS
ASSOCIATION

The Honorable Sam Graves
Chairman
House Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Graves:

On behalf of the over 350 members of the Colorado Contractors Association ('CCA'), which is made up of civil infrastructure contractors (road, bridge, rail, airfield, water, sewer, and stormwater) and suppliers of equipment, materials and professional services, we submit the following statement for the record in today's hearing on *Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?*

CCA strongly supports the Clean Water Act and the goals of the EPA that are intended to protect our nation's water resources. CCA has concerns with the EPA's recent endeavor to promulgate new regulations during which the EPA appears to have not considered and incorporated public, State and Local government's comments; provide flexibility to incorporate geographically-specific and cost effective requirements; and conduct a study that includes a comprehensive cost benefit analysis.

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Tel 303 290 6611
Fax 303 290 9141
6880 S. Yosemite Court, Ste 200
Centennial, Colorado 80112

COLORADO CONTRACTORS ASSOCIATION

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We urge the Committee to move forward with legislation putting a halt to the EPA's efforts until such time an impact study can be done and sound evidence can be produced to show there is in fact a problem and the solution proposed is thoroughly vetted, cost effective and flexible to provided geographically specific solutions. At a time when businesses are struggling and people are out of work, we should not be promulgating a one size fits all regulation that causes further harm to our businesses and those they employ. For this reason we hope Congress will move to pass bi-partisan legislation in the House in the form of HR 4965.

This is common-sense legislation requiring EPA to follow the current rule-making process and would prohibit them from moving forward until such impact studies are done.

Respectfully,

Jim Moody
Colorado Contractors Association
Director of Owner-Agency Relations

June 27, 2012

The Honorable Sam Graves
Chairman
House Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nydia M. Velazquez
Ranking Member
House Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Graves and Ranking Member Velazquez:

On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing more than 22,000 merit shop construction and construction-related firms, I am writing in regard to the full committee hearing titled, "Regulatory Flexibility Act Compliance: Is the Environmental Protection Agency (EPA) Failing Small Businesses?"

ABC believes that all federal agencies, including EPA, must be held accountable for full compliance with existing rulemaking statutes and other obligatory requirements when promulgating regulations to ensure the policies are feasible and cost-effective for small businesses to implement. Unfortunately, delays and attempts to circumvent the regulatory process result in increased uncertainty and increase the likelihood of rules and policies that will negatively impact our country's largest contributors to job creation.

ABC members have expressed concern about several pending EPA rulemakings and sub-regulatory actions from a small business standpoint:

- ***Lead Renovation, Repair and Painting (RRP) Program for Commercial and Public Buildings***: Having already implemented regulations for residential construction, EPA now plans to regulate lead exposures in renovation, repair and painting practices in commercial buildings. Despite feedback from a broad coalition of industry stakeholders—including fundamental differences between residential and nonresidential environments—concerns persists that EPA will take an inflexible approach to this rulemaking, which impose unnecessary costs and threaten businesses and the jobs they create. In addition, it is unclear whether EPA will obtain sector-specific data to ensure sound analysis (despite being required to do so by the Toxic Substances Control Act) prior to issuing a proposed rule. The rulemaking is currently at the "pre-rule" stage, with stakeholders waiting for EPA to convene its requisite Small Business Advocacy Review (S-BAR) panel.

- ***Post-Construction Stormwater Runoff***: EPA plans to regulate stormwater runoff after the "active" phase of construction. Despite warnings from industry about the varied, localized nature of this issue, concerns remain that the EPA will take a rigid, one-size-fits-all approach to stormwater control, creating unnecessary costs in the process. In addition, it is unclear whether the EPA has the appropriate authority under the Clean Water Act to regulate post-construction stormwater discharges. While EPA has conducted its mandated S-BAR panel, the agency has yet to release the impact analysis from those meetings. Despite this, the EPA plans to issue a proposed rule in 2013.

- ***Clean Water Protection "Guidance"***: In May 2011, EPA, in coordination with the U.S. Army Corps of Engineers (USACE), issued a draft guidance document titled, "Identifying Waters Protected by the Clean Water Act" (CWA). This guidance would significantly expand the scope of the CWA beyond Congressional intent. The proposal is a prime example of de facto "regulation by guidance," which should have followed established administrative procedures for creating federal rulemakings, including analysis under the Regulatory Flexibility Act. Beyond the obvious procedural missteps, ABC is concerned the proposal will result in increased need for unnecessary permits, which will establish new bureaucratic hurdles to job creation and economic growth. The guidance is currently under review by the Office of Information and Regulatory Affairs (OIRA).

We appreciate your attention to this important matter and look forward to working with the subcommittee to ensure that EPA upholds its statutorily mandated commitments to small business.

Sincerely,

Kristen A. Swearingen
Senior Director, Legislative Affairs

June 26, 2012

The Honorable Sam Graves
Chairman, House Small Business Committee
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, D.C. 20515

Re: Regulatory Flexibility Act Compliance: Is EPA Failing Small Business?
House Small Business Committee Hearing, June 27, 2012

Dear Representative Graves:

On behalf of the National Association for Surface Finishing (NASF), we thank Representative Graves for convening this hearing, Regulatory Flexibility Act Compliance: Is EPA Failing Small Business, regarding assessing the impact of regulations on small business. NASF appreciates the opportunity to submit this information regarding the unnecessary regulatory burdens imposed by EPA on the surface finishing industry through the proposed chromium electroplating national emission standards for hazardous air pollutants (NESHAP), EPA Docket No. EPA-HQ- OAR-2010-0600. Provided below are the concerns of the NASF on how EPA ignored the significant impacts of this proposed rulemaking on a substantial number of small businesses.

Summary of the Surface Finishing Industry

The NASF has nearly 2,000 members that include metal finishing companies, metal finishing suppliers, and individual and professional members. The NASF represents the business, management, technical and educational programs as well as the regulatory and legislative advocacy interests of the surface finishing industry to promote the advancement of the North American surface finishing industry globally.

The surface finishing industry plays a vital role in the lives of consumers and in the nation's economic future. The industry's role in corrosion protection alone provides an estimated $200 billion annual economic benefit to the nation. Surface finishing ensures that the products people use every day last longer, work better, and look better.

Metal finishing operations are performed in two ways: 1) as a "captive" operation or department of a manufacturing company; and 2) on a job-shop basis where the work is performed under contract for the owner of the product or material that is to be finished. Over 80 percent of the job-shops in business employ fewer than 75 people, while nearly 40 percent employ fewer than 20 people. Most job-shop surface finishing firms are family-owned businesses, located in urban areas, with a large percentage of minority employees.

Small Business Impacts of Proposed Rule

As part of its residual risk and technology review of the chromium electroplating NESHAP, EPA issued a proposed rule on October 21, 2010. Pursuant to the Regulatory Flexibility Act (RFA) EPA did not convene a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel for this proposal because it did not propose any significant new regulatory requirements that would negatively impact small businesses. After receiving comments on this proposed rule (based primarily on a review of residual risk), EPA negotiated an extension of the rulemaking deadline with the Sierra Club.

Accordingly, EPA issued a supplemental proposed rule on February 8, 2012 that set new proposed emission limits that are 50 percent more stringent than the existing standard. In the supplemental proposal, EPA concluded that the residual risk was acceptable, but the new proposed emission limits could be achieved easily and cost effectively.

In preparation for the supplemental proposal, EPA made plans to convene a SBREFA panel to assess the potential impact of the rule on chromium electroplating operations, all of which are small businesses. Just prior to the negotiated deadline for the supplemental proposal, EPA withdrew its request for a SBREFA panel. The stated rationale for the withdrawal was that EPA had identified a low cost technology option for achieving the new proposed emission limits that would minimize the impact of the rule on small businesses. Coincidentally, EPA would not have had enough time to complete the SBREFA panel process before the negotiated deadline for the supplemental proposal.

Inexplicably, EPA reached its conclusion on the low cost technology option with no credible data. Chromium electroplating facilities comply with the existing NESHAP with the use of fume suppressants (to comply with existing surface tension level for chromium plating baths) or more expensive pollution control equipment (to comply with the existing emission limits). Facilities currently use a PFOS-based fume suppressant to comply with the existing regulatory standard. These PFOS-based fume suppressants are being phased out globally and will be banned within three years as part of this rulemaking. In the supplemental proposal, EPA concluded that facilities could use non-PFOS fume suppressants to replace the current PFOS-based fume suppressants and that these non-PFOS fume suppressants would reduce chromium emissions below the new proposed emission limits cost effectively.

EPA reached this conclusion despite the fact that it provided no evidence that the use of non-PFOS fume suppressants (or the use of any fume suppressant) could achieve the new proposed emission limits. In addition, EPA did not seek input from the small businesses impacted by this rule regarding this flawed conclusion. The only effective technology option to comply with the new proposed emissions limits is to install expensive pollution control equipment.

Had EPA convened a SBREFA panel on the supplemental proposal (as it had originally planned), it would have received substantial input from chromium electroplating facilities and suppliers of non-PFOS fume suppressants that the new proposed emission limits cannot be met with the simple addition of fume suppressants, as EPA contends. The NASF has provided EPA with information demonstrating that non-PFOS fume suppressants cannot be used to meet the proposed emission limits, but EPA has not retreated from its inaccurate conclusion. EPA has used this technically flawed analysis to short-circuit the SBREFA process intended to minimize the impact of the rule on small business. EPA, the regulated industry, and the general public would have benefitted greatly from a SBREFA panel assessment of the potential impacts of this rule on small businesses.

In addition to the issues discussed above, NASF remains concerned about this rulemaking process for numerous, additional reasons that are summarized below.

New Rule Is Not Needed Because Existing NESHAP Has Successfully Reduced Chromium Emissions by Over 99.7 Percent

It is not clear why EPA insists on imposing additional regulatory controls on the surface finishing industry in this new rulemaking, when few, if any, environmental benefits are expected from this rule. Since the implementation of the chromium electroplating NESHAP in 1995, the chromium electroplating industry has reduced chromium emissions by over 99.7 percent. By all accounts, it would appear that the existing chromium electroplating NESHAP has already been a huge environmental success. In addition, EPA has also concluded that the residual risk from chromium electroplating emissions is acceptable. Imposing unnecessary regulatory controls based on flawed analysis and no credible data appears to be inconsistent with current Administration policy to avoid unnecessary regulatory burdens on U.S. manufacturing.

The Administrative Process for this Rulemaking Is Flawed

EPA admittedly lacks real-world data and knows very little about the facilities in the industry and the trends associated with chromium electroplating. EPA has relied on limited data and

flawed models in this rulemaking. Contrary to the provisions of the Clean Air Act regarding RTRs, EPA contends that despite failing to identify any new control technology for chromium emissions and concluding that the risks associated with chromium electroplating are acceptable, it can proposed new emission limits for chromium electroplating because it erroneously believes that the new emission limits can be achieved relatively easily and cost effectively. The proposed rule would impose unnecessary burdens on a critical industry of small businesses and jeopardize economic growth and jobs creation with no environmental benefit and no risk reduction. The NASF data on facility closures (see below) demonstrate how vulnerable the chromium electroplating industry is relative to additional regulatory burdens.

EPA Has Overestimated Chromium Emissions

EPA has used a flawed model and data inputs to significantly over-estimated chromium emissions estimates. NASF provided EPA with survey results for both higher emissions and lower emissions facilities that show trends of emissions that are 80 percent lower than EPA's estimates based on the following factors:

- significant number of facilities are closed (approximately 30-35%),
- significant number of facilities no longer have hexavalent chromium processes (approximately 30-35%), and
- significant number of facilities report chromium emissions that are substantially lower than EPA's estimates.

EPA Has Concluded that Residual Risk Is Acceptable

EPA concluded that residual risk is acceptable, and this is based on EPA's overestimated chromium emissions. After chromium emissions estimates are corrected, the residual risk will be even lower, and few, if any, facilities would pose a cancer risk greater than one in a million. Furthermore, EPA's proposed new emission limits would not result in any meaningful emissions reductions or any risk reduction.

EPA Has Not Identified Any New Technology Options to Control Chromium Emissions

EPA has not identified any new technology to control chromium emissions. In fact, EPA has referenced data used to revise the NESHAP in 2004 as support for the proposed new emission limits in this rulemaking. As discussed briefly above, EPA has not provided any data in the record regarding emissions reductions from the use of non-PFOS fume suppressants, which is the technology option identified by EPA to reduce emissions. EPA does not accurately represent the technology option and the associated costs needed to meet the new proposed emission limits. Consequently, EPA does not have data to support the new proposed emission limits based on the technology option identified in the rule.

On behalf of the National Association for Surface Finishing (NASF), we appreciate the opportunity to submit this information as part of the record for this hearing. If you have any questions or would like additional information, please contact me at 202-257-3756 or jhannapel@thepolicygroup.com.

Respectfully submitted,

Jeffery S. Hannapel
The Policy Group
On Behalf of the National Association for Surface Finishing