

**AMERICAN SMALL BUSINESSES' PERSPECTIVES
ON ENVIRONMENTAL PROTECTION AGENCY
REGULATORY ACTIONS**

HEARING

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, WASTE
MANAGEMENT, AND REGULATORY OVERSIGHT
OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

APRIL 12, 2016

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AMERICAN SMALL BUSINESSES' PERSPECTIVES ON ENVIRONMENTAL PROTECTION AGENCY REGULATORY ACTIONS

TUESDAY, APRIL 12, 2016

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT,
AND REGULATORY OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:31 p.m. in room 406, Dirksen Senate Office Building, Hon. Mike Rounds (chairman of the subcommittee) presiding.

Present: Senators Rounds, Markey, Boozman, Inhofe, and Booker.

**OPENING STATEMENT OF HON. MIKE ROUNDS,
U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA**

Senator ROUNDS. Good afternoon, everyone. The Environment and Public Works Subcommittee on Superfund, Waste Management, and Regulatory Oversight is meeting today to conduct a hearing on American Small Businesses' Perspectives on Environmental Protection Agency Regulatory Actions.

The purpose of the hearing is to further this subcommittee's oversight of EPA's rulemaking process. We have already held hearings examining the science advisory process underpinning EPA's regulatory action, the sue-and-settle agreements that result in new EPA regulations, and the EPA's approach to economic analysis used to justify regulations.

This hearing will examine EPA's consideration of small businesses in its rulemaking process and the real-world impacts of EPA regulation from the perspective of regulatory experts and small business owners.

America's small businesses are the backbone of the U.S. economy. The 28 million small businesses in the United States provide 55 percent of all American jobs and make up 99.7 percent of U.S. employer firms.

The ability to build a small business from the ground up is a cornerstone of the American dream. Small businesses are able to flourish in our country. They provide jobs for millions of Americans and account for 54 percent of all United States sales. Unfortunately, despite their success, American small businesses are hindered by approximately 3,000 current and pending regulations that

will impact small businesses and cost \$1.75 trillion annually in compliance costs.

The Environmental Protection Agency imposes some of the most significant and far reaching regulatory burdens on small businesses. According to the Small Business Administration, EPA regulations cost small businesses 364 percent more to comply than large businesses. For example, EPA's greenhouse gas reporting rule is estimated to be 65 times more burdensome for small businesses than larger entities.

American small businesses are burdened with sweeping EPA regulations and provided few resources to aid them in complying with a myriad of confusing and costly regulations. In a recent study, 90 percent of respondents identified Government regulations as a challenge affecting their business.

Mindful of the disproportionate impacts Federal regulations could have on small businesses, Congress passed the Regulatory Flexibility Act, or RFA, in 1980, which requires Federal agencies to analyze how their regulations will impact small businesses and consider less burdensome alternatives. The RFA requires agencies to convene a small business advocacy review panel to receive input from small businesses' representatives before a proposed rule is issued.

However, the Government Accountability Office and others have found that the RFA does not define a number of key terms, and the courts have done little to clarify these terms.

Additionally, while courts have held agencies are not required under the RFA to analyze the effect of a regulation on small businesses if the regulation only indirectly impacts small businesses, agencies are still bound by executive orders to consider a regulation's impact on these businesses. Yet the EPA claims major environmental regulations, such as revisions to the National Ambient Air Quality Standards, or NAAQS, will have no significant impact on small businesses because NAAQS standards apply directly to States, not small businesses. However, these regulations will lead to significant economic harm on small businesses.

Further, the EPA has improperly certified that major regulations imposed by the Obama administration, such as the Waters of the U.S. Rule and the Clean Power Plan, will not have significant impacts on U.S. small businesses. However, the independent Small Business Administration's Office of Advocacy, the Government agency tasked with providing support and resources to small businesses, expressed concerns over each of these rules, even going so far as to urge the EPA to withdraw the expansive Waters of the U.S. Rule due to concerns regarding the costly impact the rule will have on small businesses.

The Office of Advocacy also pointed out particular challenges that would be faced by small businesses in complying with the EPA's proposed Federal compliance plan for the Clean Power Plan and how it would impact small businesses.

American small businesses provide jobs, products, and services for millions of Americans. We must recognize the unique characteristics and challenges faced by this vital segment of the U.S. economy so that businesses are able to thrive and grow rather than be

burdened by complex, overreaching EPA regulations that run contrary to the original intent of Congress.

I would like to thank our witnesses for being with us here today, and I look forward to hearing your testimony.

Now I would like to recognize my friend, Senator Markey, for a 5-minute opening statement.

Senator Markey.

**OPENING STATEMENT OF HON. EDWARD J. MARKEY,
U.S. SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator MARKEY. Thank you, Chairman Rounds. Thank you, Chairman Inhofe, for having this very important hearing today.

And I am very delighted that Dr. Emily Reichert of Greentown Labs in Somerville, Massachusetts, is with us today, and Frank Knapp, the President and CEO of the South Carolina Small Business Chamber of Commerce and Co-Chair of the American Sustainable Business Council, are able to join us today.

I had the opportunity to visit Greentown Labs with Dr. Reichert and EPA Administrator Gina McCarthy in the fall. Dr. Reichert and the work she is leading at Greentown Labs have helped make Massachusetts a clean energy innovation hub.

Frank Knapp has been a leader of the South Carolina Small Business Chamber of Commerce and an advocate for American small businesses and their employees across the Nation.

I look forward to hearing from both of them and the other witnesses.

Today's hearing will examine the impact on small businesses of EPA's efforts to protect public health and the Nation's water and air. Massachusetts is the home to over 620,000 small businesses that employ 1.4 million people, or over 46 percent of our work force. In Massachusetts, we understand that a healthy environment is key to a healthy economy. Where some might see Government overreach, our entrepreneurs see opportunity to develop new technology and to create new jobs.

We know that by cutting carbon pollution we can grow our economy and save American families money. It is a formula that works. We did it in Massachusetts through the Regional Greenhouse Gas Initiative.

Since the Regional Greenhouse Gas program went into effect in 2009, the program has added almost \$3 billion in economic value to participating States and saved consumers more than \$1.5 billion. This formula is at the heart of the Clean Power Plan.

The Clean Power Plan will create jobs and grow our economy. It is a signal to the marketplace to invest in clean energy. Today, more than 2.5 million Americans are employed in clean energy, and this February the Solar Foundation released a report showing that sunny Massachusetts is second in the Nation in total solar workers.

Massachusetts now has nearly 100,000 clean energy jobs in our State. It is now in the top 10 in terms of sectors for employment, up from non-existence for all intents and purposes 10 to 15 years ago. Protecting the climate and public health by investing in the clean energy sector is fueling small business entrepreneurs and innovators across the country.

The same is true when it comes to clean water. Sensible regulations protect our beaches, our waterways, our drinking water, and our economy. In Massachusetts, we love that Dirty Water—the Standells—but understand that tourism, recreation, agriculture, and other economic engines of growth in Massachusetts need clean water in order to flourish.

For over 40 years the Clean Water Act has played an integral role in the protection and clean up of America's most iconic and important waterways, and we must continue that effort. It helped clean up the Charles River and Boston Harbor, and today a cleaner Boston Harbor is helping revive waterfront development, create jobs, and grow our economy dramatically.

The Clean Water Rule is smart and sensible and has the support of business leaders. Last year, 300 small businesses, including several in Massachusetts, wrote a letter to President Obama in support of the new rule. What small businesses, entrepreneurs, innovators, and Government are doing in my home State of Massachusetts can serve as a model for the rest of our Nation, demonstrating that growing our economy and protecting our environment go hand in hand.

Because small businesses play such an important part in our economic vitality, Congress has directed agencies to incorporate the impact of their regulations on small businesses. EPA takes their responsibilities to incorporating small businesses' concerns very seriously. For example, their recently finalized Petroleum Refineries Rule was only applied to major refineries. Small refineries were excluded, one of the suggestions made by the Small Business Administration's Office of Advocacy.

I look forward to working with my colleagues to ensure that EPA and the Small Business Administration get the resources they need so that the views of small businesses continue to be incorporated into the rulemaking process.

Again, Mr. Chairman, thank you for holding this hearing, and I am looking forward to hearing from our witnesses.

Senator ROUNDS. Thank you, Senator Markey.

We are also pleased to have the chairman of the full committee here with us, Senator Inhofe.

Senator Inhofe, thank you, and welcome.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you. I have imposed upon Chairman Rounds and Senator Markey to allow me to make a couple of comments, even though this is a subcommittee hearing. And at the appropriate time I want to introduce one of our witnesses, as we do for all the witnesses that come along.

Just two quick stories. One is my poetic justice story. And by the way, you are looking up here at a panel of really diverse philosophies. I consider Senator Markey one of my closest personal friends, and I have even back when we were serving in the House together. Yet you won't find two Senators who are further apart philosophically than the two of us. So you will enjoy this story.

For 20 years I was in the real world, and I was being abused by the bureaucracy, and I can remember so often there I was down

there building and developing. Most of this was in the coast in Texas. And toward the end of it, I thought, who would be opposed? Why am I getting harassed by the bureaucracy? Here I am expanding the tax base, doing things that Americans are supposed to do; hire people, making fortunes, losing fortunes, and all that. So why is it that the Federal Government is the chief opposition to everything I am trying to do?

Well, the poetic justice part of it is I now chair the committee that has jurisdiction over the bureaucracy that tried to put me out of business for 20 years.

[Laughter.]

Senator INHOFE. The other thing I want to remind both of my good friends up here, Senator Rounds and Senator Markey, is that I was Mayor of Tulsa in 1980, and I was in the middle of drafting this bill at the time. I was pretty naïve and I thought, well, that takes care of all the problems of costing businesses and all that. It didn't quite work, but we tried.

That is my statement.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

Thank you, Subcommittee Chairman Rounds, for convening today's hearing, and thank you to our witnesses for being here to testify. I am especially pleased we will hear testimony today directly from small business owners with operations across the country from Oklahoma, to Ohio, to Massachusetts.

Our Nation's best ideas and economic success stories stem from small businesses. Yet it is small businesses that are most vulnerable to Federal regulatory overreach, where even a minor change in the eyes of a regulator can equate to a death sentence for a small operation. I know first-hand, from my days as a former developer, how red tape can bury a small operator from doing good work, as I once had to go to 26 different government bureaucracies to get a single project permit approved.

For these reasons, it is critical small businesses have a voice in Washington, both in Congress and in the overwhelming Federal bureaucracy. Today the subcommittee will take a closer look at how well those voices have been heard at the U.S. Environmental Protection Agency (EPA).

Mindful of the sensitivity small businesses have to Federal regulation, Congress has enacted several laws and Presidents have signed executive orders that require Federal agencies to carefully consider the impacts of a potential regulation on small businesses. Most notably, the Regulatory Flexibility Act of 1980 (RFA), and its amendments from the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, designed a process to make Federal regulators think about how small businesses would actually comply with a regulation—on the front end. This statutorily mandated process was so important, Congress created the Office of Advocacy within the U.S. Small Business Administration to monitor agency implementation of the RFA.

Decades later, we are amidst a regulatory regime under the Obama administration that has grown too big and short-changed this process. EPA has exploited ambiguities in these laws to issue its agenda driven policies, even at the expense of small businesses. Instead of robust review and meaningful input from small businesses prior to issuing a regulation, the Obama-EPA has treated the RFA has a mere "check-the-box" exercise.

This is precisely what happened before EPA proposed its waters of the U.S. (WOTUS) Rule to drastically expand waters regulated by EPA, which will make it extremely difficult for farmers to make routine changes to their own property and decrease farmers' property values. In this case, EPA and the Army Corps of Engineers certified the proposed rule would not have significant small business impacts—contrary to the advice of the Office of Advocacy. EPA's decision to simply ignore the Office of Advocacy's advice allowed the agency to circumvent RFA requirements despite ample evidence that the rule would lead to much higher costs for many small businesses.

There are plenty of other examples where the Obama-EPA and the Office of Advocacy have disagreed on the impacts a potential regulation could have on a small business. Ultimately, this regulatory approach is inefficient. Disregarding small businesses leads to poorly written rules and years of litigation, which only delays action that could produce meaningful public health and environmental benefits.

Accordingly, Congress must continue to conduct oversight over EPA's implementation of the RFA to ensure robust analysis and input from small businesses are used to issue leaner, smarter regulations that benefit all stakeholders and avoid costly rules with little to no benefit. American ingenuity and well-being depend on it.

Senator ROUNDS. Thank you, Mr. Chairman.

Senator MARKEY. May I just say to Chairman Inhofe, I was an original co-sponsor of that bill in 1980.

Senator INHOFE. That was one of our early successes. Maybe our only success.

[Laughter.]

Senator ROUNDS. I had just bought my first home in 1980.

[Laughter.]

Senator ROUNDS. Thank you.

Our witnesses joining us for today's hearing are Mr. Michael Canty, President and CEO, Alloy Bellows & Precision Welding, Inc.; Tom Buchanan, President, Oklahoma Farm Bureau Federation; Thomas M. Sullivan, of counsel, Nelson Mullins Riley & Scarborough; Mr. Frank Knapp, Jr., President and CEO of South Carolina Small Business Chamber of Commerce; and Dr. Emily Reichert, CEO, Greentown Labs.

Now we will turn to our first witness, Mr. Michael Canty, for 5 minutes.

Mr. Canty, you may begin your opening statement, and welcome.

**STATEMENT OF MICHAEL CANTY, PRESIDENT AND CEO,
ALLOY BELLOWS & PRECISION WELDING, INC.**

Mr. CANTY. Thank you.

Good afternoon. I want to thank Subcommittee Chairman Rounds and Ranking Member Senator Markey and all of the subcommittee members for allowing me the opportunity to share my perspectives on the impact of EPA regulatory actions on small business.

My name is Michael Canty. I have been in the business world for 40 years. I have owned my own current company for about 10 years. I have about 135 employees with two manufacturing locations, up from 25 employees about 10 years ago. We sell primarily to the power generation, oil and gas, aerospace, and semiconductor industries.

I am proud to be here representing not only Alloy Bellows, but the National Small Business Association, NSBA. The NSBA represents 65,000 small business owners across every sector of this country, and it is a member-driven and staunchly nonpartisan organization, and I currently serve as an Associate Trustee.

I also have significant public service serving on a council, village council, and as Mayor for 8 years on various public service boards and councils and commissions, including over 4 years now on the CSI, or Common Sense Initiative, from Ohio initiated by the Governor, John Kasich, to review all regulations being proposed by State agencies before they become law, and all regulations every 5 years to sunset them if they become obsolete.

In recent years the EPA has an important job. However, the EPA is one of the most prolific regulatory agencies that exist, in my view. It has implemented a seemingly endless stream of rules and regulations, including the Waters of the U.S. and the Clean Power Act, which have significant negative impacts on small business. Small businesses want to help, but it is becoming increasingly difficult to do so.

Alloy Bellows was forced to hire a few years ago a senior level compliance officer just to keep up with the regulatory issues and stay in compliance. We spend well in excess of \$200,000 every year just to do that.

An OSHA inspector came in a surprise visit to our organization, and her mentality to us kind of sums up many—certainly not all, but many of the Federal regulatory agencies. She fined us for a very, very minor infraction of an adjustable guard on a little-used manual grinder. It was up one-eighth of an inch too high, an issue that we fixed on the spot. We got a fine of thousands of dollars, and she told me flat out that finding issues and issuing fines was how they help fund their department.

I decided I couldn't be more shocked at whether it was her candor or angry at just the mindset of how she had to deal with things.

The cumulative effect on Federal regulations is pretty intense. I often hear from elected officials and Agency staffers, this is just one more form, and it only takes 22 minutes to fill out and submit. We must wonder if those same elected officials and staffers have ever worked at a growing manufacturing company, where resources are scarce, personnel are pressed with company needs, and nothing gets done either in isolation or in the 22 minutes they often say.

I want to thank Chairman Rounds for introducing the bipartisan RESTORE resolution. This resolution would have an enormous impact on my small business and all businesses. And along those same lines, the NSBA strongly supports the National Regulatory Budget Act of 2014, introduced by Senator Marco Rubio. It is aimed to ensure fairness and common sense in the Federal regulatory processes. Regulatory compliance costs are disproportionately higher on small businesses than their large counterparts. Some of those issues were read during the opening statement.

In Ohio, the Common Sense Initiative, now State law thanks to Governor Kasich, was passed as a second bill. It requires all proposed State agencies to run their proposed regulations through a cost-benefit review process and ensure that all affected stakeholders have input into the process. The numbers are impressive. The number of annually proposed regulations has dropped significantly as bad proposals get weeded out early and then through the process as well.

Some personal examples. Stormwater regulation. When I was a Mayor in the early 2000s, the Federal EPA passed the stormwater regulations requirements on every community to develop, monitor, and report annually on six key areas of water quality at every water area, every outflow in the community. The EPA mandates were vague, and they were overreaching. The result was excessive, permanent, and annual taxpayer cost paid by both businesses and residents alike.

NORS—the Federal and State EPA imposed in Ohio certain regulatory and extensive requirements to control potential and real sewage overflows into Lake Erie during 500-year storms. To deal with this, the State of Ohio set up through State law multijurisdictional sewer districts to control and manage the problem. My business is located in one of those multijurisdictional districts. The district just imposed—and this isn't the first time—without oversight and without a vote, stormwater control fees, a permanent annual \$35 million fee, a 19.5 percent increase in their annual budget. Our firm's share was \$2,000 annually, every year, forever.

NORS also implemented an 11 percent to 13 percent increase in sewer fees for each of the next 5 years and stated that that annual increase would continue for the next 25, a 1,900 percent-plus increase paid for by business and residents alike. Our firm, with 135 employees, is moving in 2017, and we are moving out of the NORS district.

Our electric costs alone because of the input on coal and the shutting down of those plants has increased 35 percent on our company, an energy intensive company, over the last 2 years.

Senator ROUNDS. Sir, if you could, bring it to a close, OK?

Mr. CANTY. I will sum up.

Senator ROUNDS. Thank you.

Mr. CANTY. Over the last 10 years our philosophy has been to make everything we sell. Ninety-five percent of everything we have sold is made in America, with American labor. That has to change. Next Sunday I leave for Poland and Berlin, and the first week of June for China to set up vendor relationships with companies due in large part to the ever increasing and ever costly increase cost of Federal regulations on small businesses like mine. That means fewer jobs, fewer investments, and fewer technologies in the U.S.

Again I want to thank Senator Rounds and Ranking Member Senator Markey for holding this hearing and allowing me to testify on behalf of NSBA. The need for relief is real and immediate. Thank you.

[The prepared statement of Mr. Canty follows:]

Testimony of Michael Canty

President & CEO

Alloy Bellows and Precision Welding, Inc.

On behalf of the National Small Business Association



**Senate Environment and Public Works Subcommittee on Superfund, Waste
Management and Regulatory Oversight Hearing:**

"American Small Businesses' Perspective on Environmental Protection Agency Regulatory Actions"

April 12, 2016

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Good afternoon. I want to thank the Senate Environment and Public Works Superfund, Waste Management, and Regulatory Oversight Subcommittee Chairman Rounds, Ranking Member Markey, and all of the subcommittee members for holding this important hearing and allowing me the opportunity to testify to share my perspectives on several of the Environmental Protection Agency's (EPA) regulatory actions.

My name is Michael Canty. I have been in the business world for almost 40 years, after completing graduate school in 1976. Most of my work career has been with small manufacturing companies – those businesses with fewer than 500 employees. I am currently the President & CEO of Alloy Bellows & Precision Welding Inc., located in Cleveland, Ohio. I currently have 135 employees and two facilities, up from about 25 employees just 10 years ago when I took over the company.

I am proud to be here representing not only my company, but also the National Small Business Association (NSBA)—the nation's first small-business advocacy organization, with more than 65,000 small businesses in every industry across the country. NSBA is a uniquely member-driven and staunchly nonpartisan organization—where I currently serve as an Associate Trustee.

I also have public service experience as a council member for two years, and mayor of the Village of Bentleyville for eight years, a small community in northeast Ohio. I serve on the Board and various committees of the Council of Smaller Enterprises (COSE) in Cleveland; I am an active member in the Greater Cleveland Partnership; and I serve as a Council Member for Governor Kasich's Common Sense Initiative (CSI) in Columbus, Ohio. CSI was set up to review all proposed agency regulations as to their costs and benefit effects on small businesses, verify the need of proposed regulations, insure that all affected stakeholders are involved in the drafting of regulations, and to improve the effectiveness of those regulations that are put into law.

As a result of my diverse background, my comments regarding regulations and the EPA are salted with experiences stemming from both the private and public sector. A former elected official myself, I recognize how difficult a job each of the elected officials on this subcommittee has in their work, regardless of party affiliation.

In recent years, the EPA has been one of the most prolific federal regulatory agencies in terms of issuing sweeping new rules. It has promulgated a seemingly endless stream of regulations and rules including, the Waters of the U.S. rule (WOTUS), as well as the Clean Power Plan, but also smaller, lesser-known but impactful ones as well. While certainly well-intentioned, these regulations have profound impacts on the small-business community, and companies such as Alloy Bellows.

The EPA has a difficult job and a very important one. Certainly, no one wants dirty air or water, and I imagine that most people want to leave the world a better place for the next generation. That includes the small businesses that make up 99.7 percent of U.S. employer

*Testimony of Michael Canty, Alloy Bellows and Precision Welding, Inc.
On Behalf of the National Small Business Association*

firms and provide 49.2 percent of private sector employment.¹ Small-business owners such as me want to protect the environment too, but the current state of the regulatory landscape is making it difficult for us to do that and continue to run our businesses.

In an effort to eliminate ALL environmental issues – both real and perceived – the number and cost of EPA regulations seems both overreaching, overly costly, and increasingly more difficult to comply with, especially by small businesses in the U.S. There seems to be a genuine disconnect between the EPA in Washington, D.C. and the small businesses that must actually comply with all the regulations across the country. It appears to me that the EPA simply does not understand the costs associated with some of these regulations as well as the limited resources that most small businesses have. As a result, manufacturing companies are increasingly pressured to source products and components overseas, shift jobs, expertise, and technologies overseas instead of making those components and products in the U.S. Very often, foreign countries do not have the same degree of environmental regulations.

In addition to the enormous volume, the rules and guidelines promulgated by the EPA leave a great deal to interpretation. This results in very inconsistent implementation and enforcement from community to community, and state to state. I have found this in both the public sector and the private sector. In some areas, the interpretations of current and new regulations are severe, costly, and overly enforced, driving even more jobs and business overseas. While in other communities, the interpretations of those same regulations are less severe and costly. This introduces tremendous uncertainty in the regulated community, and provides incentives for companies to relocate or simply outsource the production overseas.

In most cases, the EPA and other agency rules are proposed and implemented with good intentions. However, from my perspective, those regulators generally have little or no business experience and our ability to contribute to the regulatory process as a small business is limited. Elected officials with similar good intentions allow thousands of unnecessary regulations to continue, and thousands more to pass stemming from the complex and often murky legislative process. All this is oftentimes done without knowledge of the significant adverse impact those rules have on small business, the economy, the trade deficit, and American jobs.

Due to the tremendous regulatory requirements we were facing, in the last five years, Alloy Bellows hired a senior-level “Compliance Officer” to help our company keep informed and in compliance with federal, state, and local regulations. Between compensation costs, computers, software, supplies, training, and lost employee time, we estimate spending at least \$200,000 or more each year just to stay compliant with the regulations that we know of. Although given the literal volumes of environmental regulations, not to mention the other regulatory agencies, we are fairly confident there are many regulations of which we simply have no knowledge.

We spend much, much more in “defensive protection mode” trying to keep agency officials from the EPA, Occupational Safety and Health Administration (OSHA), and others at bay who

¹ U.S. Small Business Administration, *Frequently Asked Questions*, available at https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

*Testimony of Michael Canty, Alloy Bellows and Precision Welding, Inc.
On Behalf of the National Small Business Association*

seek infractions because they benefit from the fines they levy. As one OSHA inspector told me during a surprise inspection, "... this is how we help to fund our department."

Let me repeat that: an OSHA inspector once flat-out told me during a surprise inspection, "... this is how we help to fund our department." I couldn't decide if I was more shocked at his candidness or angry at the mindset.

Before I discuss a few specific examples of regulations that are impacting my small business, I want to first touch on the overwhelming volume of regulations which currently exists, or will in the near future.

CUMULATIVE EFFECTS OF FEDERAL REGULATIONS

I often hear from elected officials and agency staffers that this one regulation "only has one form", or that it "only takes 22 minutes" to fill out the required form and submit it. With all of their good intentions, I often wonder if those suggesting what the time commitments are have ever worked at a growing manufacturing company, where resources are scarce, personnel are pressed with company needs, and nothing gets done either in isolation or in 22 minutes.

But the real impact to manufacturing companies, and in fact all companies, is cumulative. It is the proverbial "death by a thousand cuts." Federal regulations require many forms, many different personnel, and almost always take far longer than 22 minutes to complete. The cumulative cost on American business – especially small business – is significant. As I mentioned earlier, we spend a few hundred thousand dollars a year, or more, in an effort to comply with federal regulations. We also spend significantly more on materials and component parts whose suppliers have also bourn the cost of federal regulations.

I want to thank the Subcommittee Chairman Rounds for introducing the bipartisan *Regulation Sensibility Through Oversight Restoration* (RESTORE) Resolution. This resolution, if adopted, in my own opinion, would have an enormous impact on my small business – and all small businesses. It would establish a Joint Select Committee to conduct a comprehensive review of rules enacted by federal agencies and analyze the feasibility and options for creating a rules review process in Congress, similar to the Common Sense Initiative set up in Ohio by Governor John Kasich.

From my perspective, the Joint Select Committee on Regulatory Reform as envisioned by the RESTORE Resolution is a strong step toward providing meaningful assistance to the small-business community. I believe the regulatory process desperately needs the review mechanism which the RESTORE Resolution would put in place.

And a review of all existing regulations needs to be added to the process. I am often required to comply with regulations that perhaps served a valuable purpose when they were initially promulgated, but are simply no longer needed and are outdated. With the current level of deference often given the regulatory agency by the courts, the Joint Select Committee on Regulatory Reform will create a valuable check on the power of regulatory agencies. From the

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perspective of a small-business owner, these regulations have the force of law, but they often come from agency staff with which I have no real recourse short of litigation.

Along those same lines, NSBA played a critical role in developing the idea of a National Regulatory Budget and is an ardent supporter of its aim to ensure fairness and commonsense in the federal regulatory process. As one of the first supporters of Sen. Marco Rubio's *National Regulatory Budget Act of 2014*, NSBA recognizes that a regulatory budget will help federal regulators to run their shops the way any small-business owner would—by prioritizing regulations that produce the most benefit for the lowest regulatory cost. Simply put: quality over quantity.

I will provide a few examples of where federal regulations have impacted my small business later on in this testimony. However, first I must express how frustrating it is for me as a small-business owner to sit before you today and not be able to tell you exactly which federal rule or rules make my business so difficult to run and compete with foreign companies. It is simply the cumulative effect of all the regulations. Even just an hour of time working on a regulatory requirement makes a difference, and takes time away from other things I can be doing to run and grow my business. I know this feeling is held by many other small-business owners. In a recent NSBA survey, 33 percent of members indicated that regulatory burdens were one of the top three challenges facing their company.²

Regulatory compliance costs are disproportionately higher for small businesses than their larger counterparts. Firms with less than 20 employees in this country pay \$10,585 per employee in compliance costs, 36 percent higher than medium and large firms.³ Importantly, of that \$10,585, more than \$4,000 was devoted to environmental regulations.⁴ The cost per employee of environmental regulations is incredibly, four times higher for smaller firms than for larger firms.⁵ It is estimated that between 2000 and 2008, between \$175 billion and \$280 billion were spent on environmental regulations.⁶ These statistics are from a few years ago and obviously do not include the Clean Power Plan and the Waters of the U.S. rule. Therefore, I would certainly expect that these figures have also risen significantly in recent years.

It is further disheartening to realize that currently, there does not seem to be any end to the new federal regulations – from the EPA or otherwise. Based on the most recent regulatory agenda, as indicated by the Fall 2015 Unified Agenda of Regulatory Actions, there are currently more than 2,000 regulations being promulgated, and 144 of those are economically significant,

²National Small Business Association, *2015 Mid-Year Economic Report*, 5 available at <http://www.nsba.biz/wp-content/uploads/2015/07/Mid-Year-Economic-Report-2015.pdf>.

³Nicole V. Crain et al., *The Impact of Regulatory Costs on Small Firms* 8 (2010), U.S. Small Business Administration Office of Advocacy, available at <https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20-%28Full%29.pdf>.

⁴*Id.* at 7.

⁵*Id.* at 9.

⁶*Id.* at 27.

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meaning they will cost the economy more than \$100 million each.⁷ It is my understanding that 40+ of those are EPA regulations in final stages, and another 60+ EPA regulations being proposed.⁸

This is an untenable situation but it is also a clear answer to the questions often raised by elected officials like “why is American growth so anemic at one-to-two percent the past seven years when the average growth historically is more like 3.5 percent?” and, “why have so many manufacturing jobs disappeared overseas?”

THE REGULATORY FLEXIBILITY ACT (RFA)

The Regulatory Flexibility Act (RFA) was enacted with the understanding that small businesses needed regulatory relief and that regulations promulgated for the largest companies in the world would impose disproportionate burdens on the country’s smallest employers.⁹ The RFA requires that agencies consider the impact of their regulatory proposals on small businesses, analyze equally effective alternatives, and make their analyses available for public comment.¹⁰

When promulgating rules, agencies are required to either certify that the regulation does not have significant impact on a substantial number of small entities or the proposed rule must also contain an initial regulatory flexibility analysis (IRFA). Upon completion of the final rule, the agency must also publish a final regulatory flexibility analysis (FRFA).¹¹

The U.S. Small Business Administration Office of Advocacy works diligently to advise regulatory agencies of their requirements under the RFA as well as serve as a voice for the small-business community within the federal government. The Office of Advocacy often schedules training with agency staff and files comments with regulatory agencies with regard to their obligations under the RFA.

Unfortunately those comment letters routinely carry the same two concerns to regulating agencies. Over the past three years, the Office of Advocacy has consistently reported that improper certification of no significant impact on small businesses and inadequate analysis of small business impacts are among the most common comments to agencies. This is troubling, because it means that agencies are continuously neglecting to fully consider the position of small businesses when promulgating regulations. This is certainly not a surprise to me, as a member of NSBA, I have been hearing from other small-business owners for years that it did not feel like regulations were written with us in mind. I have felt this way myself on a number of occasions.

⁷Unified Regulatory Agenda, Fall 2015 *available at* http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=0000&Image58.x=29&Image58.y=9&Image58=Submit.

⁸*Id.*

⁹U.S. Small Business Administration Office of Advocacy, *Report on the Regulatory Flexibility Act: FY 2015*, 7 *available at* https://www.sba.gov/sites/default/files/advocacy/FY_15_RFA_Report_newTC_pp1-72.pdf.

¹⁰*Id.* at 8.

¹¹*Id.*

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This is best illustrated by the example of the EPA and Army Corps of Engineers' Water's of the U.S. rule, which according to the agencies simply sought to clarify the jurisdiction of the water regulations. In that case, the agencies certified that the new definition would not have a significant impact on small businesses in this country.¹² Respectfully, I could not disagree with that more. The new definition seems set to greatly expand the EPA's jurisdiction and will require many small businesses to get permits in situations where they were not previously required. I simply do not understand how that would not constitute an impact on small businesses. What is even more frustrating is that the Office of Advocacy alerted the EPA to the oversight, requested they withdraw the rule and conduct a fact finding panel before proceeding.¹³ Instead, the EPA ignored the request and finalized the rule, without making any of the suggested changes.¹⁴

The RFA also mandates retrospective rule review by federal agencies, in addition to several executive orders. However, as a small-business owner, I have not at all felt the regulatory burdens being lifted by these measures. Regulations continue to stack on top of each other making it increasingly difficult for me to comply with all of them. The Office of Advocacy even included in its most recent report on the RFA that agencies need to continue to improve with regard to this requirement.¹⁵

THE OHIO COMMON SENSE INITIATIVE

Four years ago when Ohio Governor John Kasich was elected to his first term as Governor, he initiated and passed as his second bill, the Common Sense Initiative. The purpose of this initiative was to create a small nine member Small Business Advisory Council and five member staff, run by the Lt. Governor Mary Taylor, to set up a review process to assess the costs and benefits of all proposed regulations from all Ohio agencies. I have been a member of that nine-member Council for four years.

All proposed agency regulations must run through a review process to assess the costs and benefits of those regulations on small business, insure that all affected stakeholders have strong input into the process, and that the proposed regulations make "common sense". All agency rules, past and new, have a five year horizon, and must be reviewed through the same process every five years.

This program has been an enormous success.

- The number of annually proposed regulations has dropped significantly as agencies first review their own proposals and weed out the bad ones. Through mid-year 2015, 719 rules have been rescinded or amended.¹⁶

¹² *Id.* at 32.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Common Sense Initiative 2015 Mid-Year Report, 3 available at <http://www.governor.ohio.gov/Portals/0/pdf/CSI/SBAC/2015%20CSI%20Mid-Year%20Report.pdf>.

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- > Regulations that pass through the process come out much better, less costly, and have much broader acceptance because all the stakeholders were part of the process.
- > The impact on the business community in Ohio has been significantly positive. Businesses now regularly propose to have existing rules reviewed to weed out the outdated and ridiculous regulations. Business costs generally go down, and they become more competitive.
- > Elected officials from both parties see the benefits and support the program.

The federal government needs this type of stronger review process at each agency and as a review process for all proposed agency rules. As previously discussed, some programs “exist”, but are less effective than they could be, or should be. That is why there is a clear need for things like the RESTORE Resolution to fundamentally change the landscape of the regulatory environment.

Below are some specific examples to better illustrate the difficulties posed by EPA regulations for small businesses.

STORM WATER REGULATIONS

In the early 2000s, while I was mayor of Bentleyville, the federal EPA promulgated Storm Water Regulations requiring every community to develop, monitor, and report annually on six key areas of water quality at every water and “outflow” location in the community. The EPA, however, refused to give specific guidance on what developed programs would pass before they were developed. Instead, they required the communities to first interpret the regulations, develop the plan, and submit the plan. Only at that point, after all the community resources had been sunk into the plan would the EPA tell the community if the plan was acceptable.

Given this uncertainty, plans differed greatly from community to community. Some communities in hopes of avoiding a rejected plan implemented very costly programs for which the taxpayers (residents and businesses) were ultimately responsible. Some communities, especially smaller ones with limited budgets, were more restrained, but still experienced significant taxpayer costs. And these taxpayer costs are permanent – paid by both residences and businesses alike year after year.

With no specific EPA guidance, some of the community plans were excessive, and some were moderate. But no one knew which plan the EPA actually wanted, as I never received any follow up by the EPA, throughout the eight years that I was in office. Yet, our community is proposing two new tax levies this fall – likely in part to pay for regulatory costs imposed by federal agencies like the EPA.

These things matter to small businesses; costly regulations not directly leveled on small businesses still impact us. Small businesses pay for these regulations through their taxes.

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Furthermore, this lack of clarity adds to the cost of compliance and slows that compliance, making it more difficult for those communities trying to do the right thing.

NORTHEAST OHIO REGIONAL SEWER DISTRICT

The federal and state EPA required certain practices to control the overflow of sewage into Lake Erie. This is, of course, an admirable and necessary goal. To deal with the federal EPA rules, the State of Ohio implemented regulations through state laws in 1972 setting up multi-jurisdictional sewer districts to control and manage sewage. My business is located in the Northeast Ohio Regional Sewer District (NEORS). Now, decades later, NEORS with the blessings of the federal and state EPA, imposed “storm water control fees” on every parcel in the four county districts under its control, in order for them to control the overflow of raw sewage. This was a permanent, \$35 million fee, a 19.5 percent increase in their annual operating budget. These are real costs to small businesses. Our small firm received a \$2,000 invoice. Following that, the NEORS implemented an annual 11 percent – 13 percent increase in sewer fees for the next five years, and stated that the annual increase would continue for 25 years. The result is an even greater incentive to move my company out of Cleveland and the NEORS district, and/or to outsource more products and jobs overseas. The latter, of which, I have now been forced to do.

NEW EPA WATER AND STREAM CONTROL REGULATIONS

Under the Waters of the U.S. rule promulgated by the EPA and the Army Corps of Engineers, those agencies will effectively have oversight over every lake, stream, wet spot, and mud puddle in America. While those agencies have maintained that the rule was simply meant to clarify the existing jurisdiction, I can, as an owner of a small business, say that it has not clarified anything for me. If anything, it has muddied the waters even more. Going forward, I will likely be operating under the assumption that everywhere I operate will be covered, with added permits and costs of compliance for any spot of dirt that holds water for any period of time through the year. Even if politicians and lawyers tell me that this is not the case, when I think about expanding my operations, I will be forced to assume that these regulations will apply to me.

I doubt that I am alone in this respect. This will unfortunately stifle economic growth before it even happens. If we thought that building a new plant, branch office, or industrial building was expensive already due to EPA regulations, and it is, wait until the added cost and construction delays of these new regulations set in.

The result of all of this from my perspective is that rather than expand here, I have begun the process of importing products from overseas. This means a loss of domestic business and jobs to overseas companies. And with these shifts overseas, America loses the trades, the expertise and technical know-how.

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COST OF ENERGY

It is no secret that the EPA, at the insistence of the current administration, and many in Congress, have and will pursue federal regulation of power plants regardless of the impact on the coal industry. The “Clean Power Plan” and other regulations clearly lay out the intentions of the EPA, and from my perspective, the impact on American manufacturing is devastating.

Increased Electric Rates

Many places in the U.S., including Ohio, feel the effects of power plant regulations in a variety of ways. The retirement of many coal-fired power plants because of regulatory costs is already increasing electricity rates. The cost of energy for manufacturing companies, like mine, is going up – way up. In 2015, Alloy Bellows paid 25 percent more per kilowatt/hour than it did in 2013 – and as a manufacturing company, we are energy intensive and energy dependent. That is an enormous increase to our overhead costs. It directly impacts the bottom line of my company, and the competitiveness of my products compared to those from foreign imports.

Coal plants in Ohio produce about 40 percent of the electric energy we consume. However, these plants are currently closing at a rate so fast that it both drives up the cost of electric energy, and produces outages. The outages may be short, but the impact on manufacturing companies like mine includes the shortage period, plus the generally longer period to reboot machinery and computers. These are significant costs to manufacturing companies, affecting their ability to produce and driving their costs up, making them yet again less competitive.

To get around the growing costs and increased outages, companies such as Alloy Bellows are spending tens of thousands of dollars to change out lighting—we have already spent upwards of \$100,000 in lighting options and replaced old equipment with newer, more energy efficient models. While perhaps beneficial to the maker of that equipment, it is a significant added cost to small-business owners like me. It is costs like these that drive small business overseas to source components and products instead of dealing with the costs and hassles posed by the energy situation here.

Federal EPA Required Use of Ethanol

The federal EPA has required the use of up to 10 percent of ethanol in gasoline for years under the assumption, which is now in serious doubt, that it is better for air quality and the environment. The EPA requirement drives up the costs for small business, including for Alloy-Bellows – by driving up the cost of fuel for deliveries, pick-ups, and sales personnel and company cars; while also adding costs to the purchase of supplies and materials delivered by gas driven vehicles; as well as driving up the costs of meals that pay more for food.

I am sure that many of my competitors overseas do not need to endure these added costs from ethanol. We need to take a pause and understand the financial impact of the EPA water and air quality regulations on small businesses, all business, in the growth in the economy and American jobs.

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The discovery and development of natural gas production in the U.S. will undoubtedly replace much of coal use in the U.S. naturally – though it appears that both the current administration and the EPA are seeking to greatly hasten the process. This is dangerous; pushing for such an enormous shift in power generation, without the requisite infrastructure in place requires small businesses to bear the costs of that transition.

USE / DISPOSAL / RECORD KEEPING OF CHEMICALS IN MANUFACTURING

Manufacturing often requires the use of chemicals throughout the manufacturing process from preparation to clean up. No one argues that manufacturers need to insure that hazardous chemicals used in production be handled and disposed of properly. However, the number and complexity of the regulations is simply becoming too much to endure.

For example, Alloy Bellows recently ended its minimal use of the “vapor degreaser” Trichlor in expensive equipment to thoroughly clean difficult parts prior to welding. Our use of Trichlor was minimal due to the EPA concerns and strict reporting requirements. We disposed of used Trichlor properly, though it was expensive to do so. But the costs of compliance and the fears of the EPA reprisals, ultimately forced Alloy Bellows to end the use of Trichlor, adopt another cleaning agent that is not as good, and takes far more time to use, and still requires expensive disposal. Some of those parts were sourced overseas, while some of them required higher, less competitive prices.

Small companies must bear the added costs due to the EPA regulations, making them less competitive to foreign companies, move to less effective, more expensive processes, or simply source those products from outside the U.S.

CHANGES IN ALLOY BELLOWS PHILOSOPHY

I would like to conclude with a sad fact. Over the last 10 years, our philosophy at Alloy Bellows has been to in-source everything the company had sourced elsewhere under the prior ownership – both in the U. S. and from foreign sources. Alloy Bellows has invested millions of dollars in the past 10 years to buy equipment, develop new technologies, hire personnel, and be innovative in our processes. In short, we have become a state of the art, U.S. manufacturing company dedicated to making our products in the U.S. with American labor enabling us to develop proprietary equipment and processes no one else in the world has. Last fall, we were forced to change our business approach due to the rising costs and difficulties of dealing with the ever-increasing amount of federal regulations – including those we see from the EPA.

Next week, I head to both Poland and Germany to set up business relationships with what I expect to be vendors of product that we had previously made in our plant, and would have expected to continue to make, here in the U.S. Unfortunately, the regulatory costs from the EPA, OSHA, Department of Labor, National Labor Relations Board, and other agencies and taxes have just become too much to fight. In June, I will head to China for the same reason regarding another set of technologies and products.

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Alloy Bellows will still make products here in the U.S., but our past philosophy of near total reliance on making our products in our Ohio facility will come to an end. Some of the technology development, and the increase in jobs, will end for us, but so will the costs, hassles, and fears of dealing with thousands of federal regulations that unnecessarily drive up the costs of our products.

Again, I would like to thank Subcommittee Chair Rounds and Ranking Member Markey for holding this hearing and allowing me to testify on behalf of NSBA. Small businesses continue to struggle under the burden of all regulations. However, as I mentioned before, environmental regulations are particularly tough on small businesses, costing more than four times per employee than at larger firms. The need for relief is real and immediate. I hope the subcommittee bears this in mind while it continues to look at ways to lighten the regulatory burden of small businesses around the country.

**MICHAEL CANTY**

Alloy Bellows & Precision Welding, Inc.

President & CEO

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Michael is the Owner, President & CEO of Alloy Bellows & Precision Welding, a 75 year old manufacturing company in Cleveland that designs and produces custom engineered products for the power generation, aerospace, semiconductor, and oil & gas markets.

Michael has a BA in Political Science and an MBA in Marketing and Finance. He has over 35 years of business experience dealing with a wide variety of industries that include security hardware, construction equipment, plumbing fixtures, heavy duty truck parts, and industrial bellows assemblies – mostly with smaller enterprises having fewer than 500 employees. Michael's business background includes business start-ups and turn-around ventures, as well as strategic growth initiatives for several private companies.

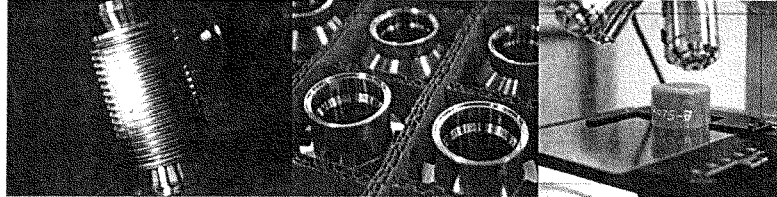
Michael has traveled extensively for both business and pleasure throughout Europe, South America, North America, and the Orient, and served on various private company boards over the years. A strong believer in continuous education, Michael taught Marketing and Business Management courses for Ashland College at the penitentiary in Mansfield, Ohio for 3+ years.

Michael has a strong interest in public service. He has served on various public service Boards and Commissions over the years, and raised monies for various charities. He has held elected office as a Precinct Committeeman, a Council member, and eight years as Mayor for his community. As Mayor, he dealt extensively with a wide variety of public issues and organizations at the local, state and federal level. Business development, job creation, the regulatory environment, and education have been key focuses for Michael.

Michael has served, and currently serves, in various board, commission, and committee capacities that include the Council of Smaller Enterprises (COSE), the Greater Cleveland Partnership (GCP), the National Small Business Association (NSBA), the Governor's Small Business Advisory Council, Hiram College, and Alliance for Working Together (AWT), etc.

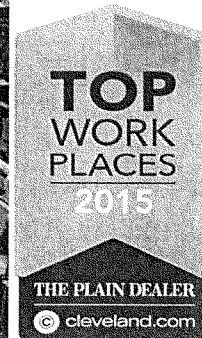
Michael has been a resident of NE Ohio since the early 1980s. He is married to Michele, a Cleveland native, and has a beautiful daughter named Alexis.

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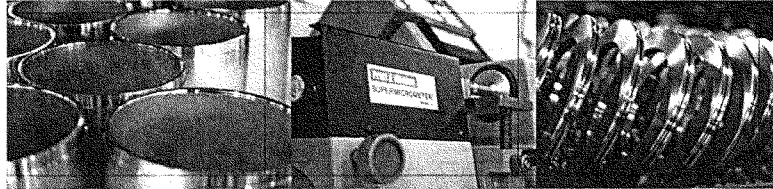


About Us

For more than 80 years, Alloy Bellows & Precision Welding has been supplying the world with metal bellows, bellows assemblies, thin-wall seam-welded tubing, and welding, soldering, brazing and nondestructive testing services. Our dedication to providing high quality products and services on-time and on-budget has allowed us to become a leading supplier to companies, both large and small. Our unique capabilities, flexible manufacturing environment and, most importantly, our Team Members have allowed us to meet our customers' most critical demands.



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Mission & Vision

Our mission is to meet or exceed our customers' needs by providing products and services of premier quality, cost-effectively and on-time.

Our Vision:

Our customers, and future customers, are our #1 priority: Alloy Bellows & Precision Welding's business is based on the belief that every customer and prospect counts! Therefore, every customer and prospect is either future business or lost business, depending upon the quality of our products and services, as well as the responsiveness of our staff. Our success is measured by increasing numbers of satisfied customers, escalating customer retention rates and increased market share. Our growth is testimony to our balanced competence in engineering, quality, production, and sales/marketing.

We are committed to product leadership:

Alloy Bellows will deliver the best product and services possible to the market on-time, all the time. Continuous, high-quality rapid development of new products, services and internal infrastructure is imperative to maintaining and improving our competitive edge. We are committed to exploring the latest innovations and proactively adjusting to meet the ever-changing demands of the markets we serve.

We recognize the importance of being a socially responsible corporation:

Alloy Bellows strictly abides by all laws and regulations in our day-to-day business operations. We rely on the integrity and principles of our employees and believe that upholding high ethical standards is vital to the future health of our organization.

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Senate Committee on Environmental and Public Works
 Subcommittee on Superfund, Waste Management, and Regulatory Oversight hearing entitled,
 "American Small Business Perspectives on Environmental Protection Agency Regulatory Actions"
 Tuesday, April 12, 2016
 Questions for the Record for witness Michael Canty

ANSWERS TO QUESTIONS FOR THE RECORD SUBMITTED TO MICHAEL CANTY

QUESTIONS FROM CHAIRMAN INHOFE:

1. In your written testimony, you state that in 2015 your manufacturing facility paid 25 percent more per kilowatt/hour than it did in 2013. According to a November 2015 NERA Economic Consulting study all of the lower 48 states will experience higher electricity prices with 40 states experiencing double-digit price increases under EPA's so-called Clean Power Plan, up to a 15% increase in Ohio, because of this single EPA regulation. How would this potential electricity price increase impact your business?
 - a) While it is highly likely the Clean Power Plan will be struck down in court, how does the uncertainty surrounding a potential electricity price increase impact your business? How does your business begin to plan for such a potential increase?

The testimony stating that Alloy Bellows paid 25 percent more for electricity in 2015 than it did in 2013 came directly from comparing our electricity bills from those two years. This increase also came after the company implemented a significant and expensive program to "redo" the lighting throughout the facilities. This upgrade to a more efficient lighting reduced our overall Kilowatt usage by over 16 percent, despite company growth. Even with this efficiency upgrade, we still saw the 25 percent increase.

Our company has been told that the cost for electric power will rapidly escalate in future years due to the shutting down of coal-powered electric plants, which we are told produce about 40 percent of the electricity in Ohio. The increase in electricity rates means that we will either need to pass the additional cost on to the consumer, or more likely, that I will have to operate on a smaller profit margin, subsequently slow my business' growth, putting my company at financial risk, and paying less in Federal Taxes.

- a) Uncertainty is always a concern for small businesses, regardless of form. The Clean Power Plan and the associated increase in the cost of electricity is certainly no exception.

Alloy Bellows will have to consider several variables: Do we plan on spending money for new equipment or use that money to pay for the increase in power costs? A 25 percent increase in electric power currently costs our small company about \$29,000 more per year. If you compound that every two years, like the past two years, the costs really add up. The additional costs amount to \$58,000 and \$116,000 in 2 and 4 years, respectively. We could buy a new CNC (Computer Numerical Controlled) machining center to increase production and jobs each year that that amount of money, or hire one new employee for each \$58,000. Now multiply these figures times the number of small companies just in Ohio and the impact on the economies of Ohio and the U.S. is staggering – and the cost to the Ohio and U.S. treasuries in lost tax revenues is likely pretty significant as well.

Planning for the increase in electricity prices with regard to the Clean Power Plan is also tied into planning for power availability. As I previously mentioned, many coal-fired power plants in Ohio are shutting down, which is decreasing the amount generating capacity across our grid. So we have to plan not just for an increase in prices, but whether or not sufficient power will even be available. We plan and make decisions for expected increases in a few different ways.

- ✓ First, as explained above, we upgraded our lights and other power consuming areas of the company to more efficient lights and equipment to reduce consumption. The upgrade represents significant costs and can only be done to a certain point.
- ✓ Next, we will evaluate the development of new products and / or processes based upon the cost of power, its effects on the price of the products, and on how close we are to maximizing the power capacity of incoming lines. If we are close to maximum available power coming in, we may forgo the new products to avoid paying significant sums to increase the power to the plant. We just performed this study at our new Mentor, Ohio facilities.
- ✓ We will consider whether or not we can import the product rather than produce it in the U.S. Will the product costs be less to import the product, thereby making our prices more competitive? Will importing those products avoid the significant costs of upgrading power lines to the plant? As, I alluded to in my testimony, this is the avenue I'm currently being forced to explore.
- ✓ The last possibility is that we may simply postpone a decision on new products altogether due to the cost burdens, or due to the uncertainty of how the price of power will behave. It forces us to tread water rather than expand.

2. I understand the power generation and oil and gas industry are two major sectors your small business services. As you may be aware, there are several costly and burdensome EPA regulations on these two sectors. Can you share how regulations that may increase costs and burdens on these sectors may indirectly impact your business?

Alloy Bellows does serve the power generation and the oil and gas sectors. In fact, these are the two largest sectors that we serve, and they represent about 75 percent or more of our business revenues. The current and future regulations on these markets have a significant impact on Alloy Bellows, though it is difficult to isolate the singular effect of one regulation or tax over the other.

- a) The increased power plant regulations have actually had a positive effect on revenues in the short run by forcing the development and implementation of gas fired generators for power plants that replace coal fired power plants. As a result, our products, which go into gas turbine engines, have experience an upward trend in revenues as this sector changes over. However, it is not clear how long this will last, and as described below, the changes present long-term problems for us.
- b) As the cost to produce in the U.S. has grown due to overly burdensome regulations and taxes, companies that were buying our products have moved much of their production overseas – currently we see moves to China, Turkey, Italy, Germany, and elsewhere. In fact, I just came

back from Germany for this reason, and leave for China the first week of June. This is problematic because, if those products are made overseas, it is much more likely that our current customers would rather just contract for the parts that we make overseas as well, rather than ship our products to their foreign production facilities. Foreign companies see this as an opportunity, and seek to replace U.S. products (like ours) that are subject to these higher cost regulations and taxes with their own products, often replicas of our products developed in the U.S. As a result, we lose out, and the country loses out.

- c) The initiative to tax and regulate the oil industry and prevent the development of oil wells on public lands, off shore drilling, and drilling in Alaska reduces the need for U.S. products, such as those provided by Alloy Bellows, to be used in oil and gas drilling efforts. We have seen that outside of the oil price downturn this past year, oil production on private lands was up. However, the regulatory efforts to shut down oil and gas permitting on public land and to drive the cost of oil production up, ultimately keep the use of U.S. products lower than it might have been.
- d) Because much of power generation is currently done by natural gas power plants, costly EPA regulations on the oil and gas industry are directly tied to power generation. Uncertainty regarding the price of inputs has slowed conversion and construction of natural gas plants. This creates both the fear and reality of blackouts in areas that cannot meet the power needs of industry. We experience several of those blackouts each year. In addition, regulated utility companies seek to "pass on" the added costs of shutting down older, less efficient plants, and the costs of building new to manufacturing companies like Alloy Bellows. This fight is taking place at the PUCO in Ohio as I write this. This further drives up the production costs for my business.
- e) As escalating EPA and other regulations drive up the costs of doing business, and add uncertainty in the market place regarding costs, hassles, and power availability, the market reacts by slowing down, and/or failing to grow at historical rates. The U.S. has grown at substantially lower growth rates than has historically been the case. Zero to 2 percent GDP for 7 years after a downturn (0.5% last fiscal quarter) is not characteristic of a robust economy. That level of growth cannot drive robust growth for manufacturing companies, especially small ones, such as mine.

Respectfully submitted,



Mr. Michael Canty
 President and CEO
 Alloy Bellows & Precision Welding, Inc.
 Cell 440-725-3195

Senator ROUNDS. Thank you, Mr. Canty.

At this time I would ask if Senator Inhofe would care to introduce Mr. Buchanan.

Senator INHOFE. OK.

Well, first of all, we are very happy to have Tom Buchanan here. He has been a good friend for a long period of time. He has a cow-calf operation in southwestern Oklahoma. He grows wheat and irrigated cotton. He is the Vice Chairman of the Oklahoma Water Resources Board and is President of the Oklahoma Farm Bureau, and most important, a close friend.

Senator ROUNDS. Thank you.

Mr. Buchanan, you may begin your opening statement.

**STATEMENT OF TOM BUCHANAN, PRESIDENT,
OKLAHOMA FARM BUREAU FEDERATION**

Mr. BUCHANAN. Thank you, Senator Inhofe, for that introduction. Chairman Inhofe, Subcommittee Chairman Rounds, and Minority Member Markey and members of the committee, I appreciate this opportunity to testify on behalf of American Farm Bureau and this great Nation's farmers and ranchers.

My name is Tom Buchanan. I am President of the Oklahoma Farm Bureau, and I serve on the Board of the American Farm Bureau Federation.

Chairman Rounds, it seems that 1980 is an important date for everyone on the committee, including myself. While your esteemed colleagues started their professional career in 1980, so did I; 1980 is when I produced my first cotton crop and grew my first set of calves. So I have been trying to farm ever since that point.

I have attached two documents which I would like to request be included in the committee's record for this hearing. I would also like to begin by expressing my gratitude to Chairman Inhofe for the Government Accountability Office's investigation into EPA's illegal lobbying and social media campaign.

From our perspective, EPA did use covert propaganda to mislead the public and violate the Anti-Lobbying Act and was more focused on promoting a flawed WOTUS Rule than keeping an open mind or hearing good faith concerns with their proposal. Farmers and ranchers deserve better when important matters of public policy are discussed and are at stake.

I am here today because of my organization's experience with a major new Clean Water Act rulemaking by EPA and the Corps. This is a rule of extraordinary practical importance for farmers, ranchers, and almost anyone who grows, builds, or makes anything in this great Nation.

After carefully studying the proposed rule, we at Farm Bureau concluded that the rule's vague and broad language would define waters of the United States to include countless land areas that are common in and around farm fields and ranches across the countryside. These are acres that don't look a bit like water. They look like land, and they are farmed and ranched today.

But by defining them as waters of the U.S., the rule would make it illegal to farm, build fences, cut trees, build a house, or do most anything else there without first asking permission of the Federal

Government and navigating a costly and complex permitting process.

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

EPA also engaged in an extraordinary social media campaign aimed at a different audience, the broader public audience. That campaign consisted almost entirely of non-substantial platitudes about the importance of clean water, which, of course, no one disputes the need for clean water. It used simplistic blogs, tweets, and YouTube videos to generate purported support for the rule among well intended people who have absolutely no idea what the rule would actually do or what its actual costs would be. EPA later claimed public support for the rule, even though the vast majority of those who actually read the rule, State and local governments, businesses and organizations representing virtually every segment of the U.S. economy, vehemently opposed it.

I would like to point out that the agencies also ignored another important regulatory safeguard for small businesses by improperly certifying the WOTUS Rule under the Regulatory Flexibility Act. The Office of Advocacy concluded that the effects of EPA's WOTUS Rule would have direct economic impacts on a substantial number of small businesses, and the agency should have convened a small business advocacy review panel under the Small Business Regulatory Enforcement Fairness Act before releasing the rule for comment.

Congress should hold the agencies accountable for ignoring the requirements of the RFA and for openly showing their contempt for small entities by characterizing their concerns about this proposal as silly and ludicrous.

Last, EPA should try to honestly and transparently account for the regulatory impact and cost of their actions, even when they expect opposition. I truly hope this committee's efforts will lead us in that direction.

Thank you for the time and this opportunity.

[The prepared statement of Mr. Buchanan follows:]



**Statement of the
American Farm Bureau Federation**

**TO THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
SUBCOMMITTEE SUPERFUND, WASTE MANAGEMENT AND
REGULATORY OVERSIGHT**

**“AMERICAN SMALL BUSINESSES’ PERSPECTIVES ON
ENVIRONMENTAL PROTECTION AGENCY REGULATORY ACTIONS”**

APRIL 12, 2016

**Presented By:
Tom Buchanan
President, Oklahoma Farm Bureau Federation
Member of the Board of Directors, American Farm Bureau Federation**

Chairman Inhofe, Subcommittee Chairman Rounds, Ranking Member Markey, and members of the Committee, I appreciate the opportunity to testify on behalf of the American Farm Bureau Federation and the nation's farmers and ranchers.

My name is Tom Buchanan. I am President of the Oklahoma Farm Bureau Federation and serve on the Board of the American Farm Bureau Federation. I produce cotton and run cows on my farm in Altus, Oklahoma. I have attached two documents which I would like to request be included in the Committee's record for this hearing. The first is detailed testimony given on June 10, 2015 by AFBF's General Counsel, Ellen Steen, to the Senate Committee on the Judiciary entitled "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity." The second document is a letter from the Small Business Administration's Office of Advocacy detailing how the U.S. Army Corps of Engineers and the Environmental Protection Agency failed to comply with the Regulatory Flexibility Act (RFA). Both documents shine much needed light on EPA's overall conduct and lack of accountability, transparency and rulemaking integrity.

In addition, I would like to express my gratitude to Chairman Inhofe for his request to the Government Accountability Office that they look into EPA's highly irregular conduct during the "waters of the U.S." (WOTUS) rulemaking. As a result, GAO issued a *legal opinion* detailing how the federal agencies engaged in illegal lobbying and used *covert propaganda* to push the WOTUS rule by blitzing the public with a misleading social media campaign. The legal opinion found that the EPA broke the law with its social media and grassroots lobbying campaign by advocating for its own waters of the U.S. rule. It does not surprise Farm Bureau that EPA used tactics that stepped well past the bounds of proper agency rulemaking. From our perspective, EPA was more focused on promoting the WOTUS rule than keeping an open mind or hearing good-faith concerns with their proposal. Farmers and ranchers deserve better when important matters of public policy are at stake.

I'm here today because of my organization's experience with a major new Clean Water Act rulemaking by EPA and the U.S. Army Corps of Engineers. This is a rule of extraordinary practical importance for farmers, ranchers and most anyone else who grows, builds, or makes anything in this nation. After carefully studying the proposed rule, we at Farm Bureau concluded that the rule's vague and broad language would define "waters of the United States" to include

countless land areas that are common in and around farm fields and ranches across the countryside. These are areas that don't look a bit like *water*. They look like *land, and they are farmed*, but by defining them as "waters of the U.S." the rule would make it illegal to farm, build a fence, cut trees, build a house, or do most anything else there without first asking permission of the federal government and navigating a costly and complex permitting regime.

From the day it first issued the proposed rule, EPA behaved like an advocate for a decision that was already made—willing to say most anything to get to the desired result. It waged a public relations campaign aimed directly at farmers and ranchers—providing false and misleading assurances, in speeches and blogs, that the rule will not increase permitting requirements for farmers or "get in the way" of farming. But those of us who have litigated agency rules, and agency interpretations of their rules, know that courts won't give any weight to speeches and blogs. Our experience is that EPA and the Corps will interpret their rules broadly, not narrowly. And in the enforcement proceedings that are sure to come—with an agency, a judge, and an ambiguous regulation—the agency's interpretation will be unassailable.

EPA also engaged in an extraordinary social media campaign aimed at a different audience—the broader public. That campaign consisted almost entirely of non-substantive platitudes about the importance of clean water—which no one disputes. It used simplistic blogs, tweets and YouTube videos to generate purported "support" for the rule among well-intended people who have absolutely no idea what the rule would actually do or what it will cost. EPA later claimed "public" support for the rule, even though the vast majority of those who actually read the rule—state and local governments, businesses, and organizations representing virtually every segment of the U.S. economy—vehemently opposed it.

Regardless of whether you supported, opposed, or never heard of the waters rule, I hope many of you would agree that this is not how rulemaking should be conducted.

I would like to point out that the agencies also ignored another important regulatory safeguard for small businesses by improperly certifying the WOTUS rule under the Regulatory Flexibility Act. The Office of Advocacy concluded that the effects of EPA's WOTUS rule would have direct economic impacts on a substantial number of small businesses and the agencies should

have convened a Small Business Advocacy Review (SBAR) panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA) before releasing the rule for comment.

Congress should hold the agencies accountable for ignoring the requirements of the RFA and for openly showing their contempt for small entities by characterizing their concerns about the proposal as “silly” and “ludicrous.”

Lastly, Farm Bureau believes agencies must comply with the regulatory safeguards enacted by Congress and keep an open mind during rulemaking. They should try to honestly and transparently account for the regulatory impact and cost of their actions, even when they expect opposition. I hope this Committee’s efforts will lead us in that direction.

Thank you.



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Testimony of
 Ellen Steen
 General Counsel and Secretary
 American Farm Bureau Federation
before the
 Senate Committee on the Judiciary

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

June 10, 2015

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you for calling this important hearing on the transparency and integrity of federal agency rulemaking and inviting me to testify on behalf the American Farm Bureau Federation (AFBF) and the nation’s farmers and ranchers.

My name is Ellen Steen, and I am the General Counsel and Secretary of AFBF. In my current position and in two decades of private law practice prior to joining AFBF, I have been involved in dozens of agency rulemakings, primarily focused on U.S. Environmental Protection Agency (EPA) rules under the Clean Water Act. I have litigated the validity and interpretation of EPA rules and policies, experiencing first-hand the deference that courts show agency regulations and agency interpretations of their regulations.

As I explain below, the new “waters of the U.S. rule” rulemaking broke new ground, turning an already imperfect process into essentially a public relations campaign. Like any campaign, the last year has been full of “spin” created by former campaign officials now leading agency communications teams, mutual accusations of misleading the public, public officials derisively dismissing concerns of the opposition, suggestions that opposition to the rule amounts to opposition to clean water, tit-for-tat responses and public rejection of opposing views—all in the middle of a rulemaking public comment period. If this characterization of the rulemaking process troubles the Committee, it should. I invite the Committee to peruse the attachments to this testimony to get a flavor of what has become of our federal rulemaking process.

Executive Summary

The notice-and-comment procedure for rulemaking is designed to ensure that agencies take honest account of the thoughts and concerns of the regulated public and to hold agencies to their stated rationales when regulations are challenged in court. When it works as it should, the notice-and-comment process guarantees just what Congress, with the Administrative Procedure Act (APA), set out to accomplish: a deliberative process of soliciting and considering public input, followed by an agency decision and response to the public’s input. It’s often not exciting—sometimes even dull—but that back-and-forth is essential to sound decision-making and to the integrity of the rulemaking process.

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EPA's handling of the Waters of the United States Rule—a regulation of extraordinary practical and financial importance to farmers, ranchers and most anyone else who grows, builds, or makes anything in this Nation—flouted the APA's notice-and-comment process in three key respects:

- *First*, throughout the rulemaking process, EPA publicly derided concerns expressed about the proposed rule (including the concerns of Farm Bureau and our farmer and rancher members). Legitimate concerns how the rule would affect agriculture, in particular, were subtly twisted and then dismissed as “silly” and “ludicrous” and “myths.” Public statements from the agency's highest officials made it clear that the agency was not genuinely open to considering objections to the rule.
- *Second*, EPA engaged in an extraordinary public relations campaign to solicit support for (but not informed comment on) the rule. The campaign consisted almost entirely of non-substantive platitudes about the rule's purported benefits, while omitting any meaningful information about the actual content of the rule—i.e. *what the rule would do, and what activities would be regulated as a result*. The campaign substituted blogs, tweets and YouTube videos for what should have been an open and honest exchange of information between the agency and the public.
- *Finally*, the agency allowed its own internal timeline, and perhaps the presidential election cycle, to dictate issuance of a proposed rule before the fundamental scientific study underlying the proposal was complete and available for public review—and then to dictate issuance of a final rule without providing a further opportunity for public comment on major changes made in that final rule. Regardless of the agency's motivations, the integrity of the rulemaking process demands that the public have an opportunity to review and comment on the basis for an agency's proposal and on any major changes *before* they appear in a final regulation.

This flawed process recently culminated in the issuance of a deeply flawed regulation, the true costs and regulatory impact of which have not been seriously considered and may not be known for years. But regardless of whether you supported, opposed or never heard of that rule, you should shudder to think that this is how controversial regulations will be developed in the age of social media. Agencies must strive to maintain an open mind throughout the rulemaking process—and to inform rather than indoctrinate and obfuscate—even when policy issues have become controversial and politicized.

The overbroad and vague rule that EPA has promulgated to define “waters of the United States” perfectly illustrates another serious problem with agency rulemaking. The federal courts' current approach to determining whether a rule is lawful involves deferring to the agency's interpretation of a statute and deferring again to the agency's interpretation of its own rules. As scholars and some of the Justices of the Supreme Court have pointed out, this two-stage system of deference actually encourages agencies to promulgate broad and vague rules, and then to expand their power by interpreting those rules broadly during the course of implementation and enforcement.

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With the “waters” rule, EPA has repeatedly and emphatically assured farmers and the public, in speeches and blogs, that the new rule will not increase permitting obligations for farmers or “get in the way” of farming. But those of us who have litigated agency rules, and agency interpretations of their rules, know that courts are unlikely to give much weight to speeches and blogs. Months and years from now, with an ambiguous regulation before a judge, the agency’s interpretation will be unassailable. The end result is that the regulated community is ambushed: the rules allow for a wide range of interpretations, the agency’s informal campaign during rulemaking provides a narrow and comforting interpretation, and the regulated first learn their actual obligations and liabilities when the enforcement actions begin. This is not how it was meant to be.

Introduction

As the Members of this Committee know better than most, the statutes enacted by Congress—no matter how carefully drafted—frequently leave room for interpretation. That isn’t necessarily a bad thing. It would be as unwise as it would be impracticable for Congress to attempt to foresee every possible application of each statute that it writes. Leaving room for interpretation introduces common sense flexibility as unanticipated circumstances arise. The law gets worked out as much in its implementation as it does in its drafting.

As the Supreme Court explained in the watershed case, *Chevron v. Natural Resources Defense Council*, by leaving interpretive “gaps” in statutes, Congress leaves it to expert agencies to promulgate regulations to *fill* those gaps. But there is reason to be cautious on that score. There is very little, after all, to distinguish a statute enacted by Congress from the statute’s implementing regulations, promulgated by a federal agency comprising of unelected bureaucrats. According to the Supreme Court, agency rules that fill gaps in statutes have the force and effect of law and, under *Chevron* deference, are given controlling weight by the courts. Put simply, rules that fill gaps in statutes have *legislative* effect.

For that reason, it is essential that the process for promulgating agency rules be open and transparent and ensure accountability. That is precisely the purpose of the APA. The APA was enacted in 1946 against a background of rapid expansion of administrative rulemaking as a check on federal agencies whose enthusiasm for rulemaking risked regulatory excesses not contemplated by Congress. The Act guards against such excesses in part by mandating a public notice-and-comment process.

The notice-and-comment process is at the heart of the APA and the goals it was designed to achieve. As a general matter, before an agency makes a rule, it must *first* notify the public of the proposal and invite comment on the rule’s perceived virtues and vices; *second*, consider the comments and arguments submitted by the public; and *finally*, make a final decision and explain that decision in a statement of the rule’s basis and purpose. This process should force agencies to take honest account of the knowledge, experience and concerns of the public (including the regulated public) and allow courts to later hold agencies to their stated rationales when regulations are challenged in court. When it works as it should, the notice-and-comment process ensures just what Congress set out to accomplish with the APA: ensuring meaningful public input and a public record to hold agencies accountable for their stated rationale and intent in the rulemaking process.

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Unfortunately, agencies have recently been testing—and we think exceeding—the limits of what the notice-and-comment procedure permits. AFBF’s recent experience with EPA’s “Waters of the United States Rule” offers a troubling example.

First, a little background. Under the 1972 Clean Water Act, it is illegal (without a permit or other specific statutory authorization) to discharge pollutants from a point source—such as nozzles on equipment used to spread fertilizer and pesticides—into the “navigable waters.” Congress defined “navigable waters” as “waters of the United States.” The term has been the subject of controversy, rulemaking by both EPA and the U.S. Army Corps of Engineers, and inconsistent judicial interpretation ever since. Not surprisingly, EPA’s most recent regulation defining its jurisdiction over “waters of the United States” was the subject of vigorous debate.

It is no surprise that agriculture and other industries that engage in activities on the land have very serious substantive concerns with the scope of EPA’s Waters of the U.S. rule—which defines as “waters of the U.S.” many features that simply look like *land*, not *water*, and that are ubiquitous across the countryside. It will not be a surprise that we strongly believe the rule is an arbitrary and capricious interpretation of the Clean Water Act, exceeds EPA’s constitutional authority, and is simply bad policy that will cause costly and unhelpful disruptions in the national economy. But we understand those concerns are beyond the scope of this Committee’s current inquiry. Here we will focus on the defects in the process by which EPA arrived at the rule, which we believe help to explain why EPA got the substance of the rule so wrong. EPA made mistakes because it finalized the rule according to an opaque and deeply flawed process that failed to hold EPA to account to state and local governments, the regulated public, and the basic economic and other analyses that are meant to inform agency rulemaking—in fact, it treated these as obstacles to be overcome rather than as sources of input and information that would improve the final rule.

There were three core problems with the rulemaking process that should be of special concern to the Committee and its Members, which I have identified in bullet points in the Executive Summary of this testimony. I’ll now say a bit more about each of these concerns.

Closed-Mindedness

EPA first published the proposed Waters of the United States rule on April 21, 2014, and the public comment period remained open until November 14, 2014. AFBF did not immediately oppose the rule. Rather than jump to conclusions, our staff carefully reviewed the lengthy proposal and came to the conclusion that the rule’s vague language would dramatically expand EPA’s jurisdiction, allowing it to regulate virtually all “waters”—including countless land areas across the countryside where rain channels and flows only immediately after rainfall, ditches running alongside and within farm fields, and isolated low spots in the middle of farm fields. We prepared information for our members to help them understand the rule and voice their concerns (since we are a grassroots advocacy organization). In the end, we and scores of other organizations representing agriculture and other industries’ interests—plus the vast majority of state, county and municipal governments—submitted detailed comments as part of the notice-and-comment process, expressing grave concerns about the impact of the rule on a wide range of commonplace and essential land use and land management activities.

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But long before we sent the official comments to the record, all indications were that EPA's mind had already been made up, and that our comments had no hope of being taken seriously. For example, in an article appearing in *Farm Futures* (perma.cc/KH98-6WVU), EPA Administrator Gina McCarthy was quoted—on July 9, 2014, in the middle of the public comment period—as calling the Farm Bureau's concerns “ludicrous” and “silly” and based on “myths.” Farmers and ranchers across the country told us they read her remarks and took them personally. How could we expect our comments to receive fair consideration when they were already being dismissed out-of-hand as silly? The answer—we could not.

Instead, as described below, EPA's conduct over the coming months demonstrated not only that its mind and ears were closed, but also that it was firmly entrenched and fiercely “messaging” a misleading picture of the proposed rule designed to placate opposition within the regulated community and build ill-informed support among the lay public.

Manipulation of the Public and the Process

EPA's conduct throughout the rulemaking gave the striking appearance of advocacy aimed at generating public support and “cooking the books” to overcome procedural hurdles like the economic and regulatory impact analyses.

With regard to public support, EPA engaged in an aggressive social media and promotional campaign designed to dampen opposition and manufacture support for the rule. Immediately upon releasing the proposed rule (before we at Farm Bureau or the general public even had an opportunity to read it), EPA announced purportedly wide-spread support for the rule from businesses and agriculture.¹ Fast on the heels of that came a public webcast sponsored by EPA's Watershed Academy, proclaiming that the rule “does NOT protect any new types of waters,” “does NOT broaden historical coverage of the Clean Water Act,” “does NOT expand regulation of ditches,” would “benefit” agriculture and was shaped by “input from the agricultural community.”²

EPA's campaign right out of the gate made it incumbent on Farm Bureau, the nation's largest general agricultural organization representing farmers and ranchers, to not only develop comments to the agency, but to launch our own campaign to inform our members and the public about the true impact of the rule. The result was our “Ditch the Rule” grassroots campaign, which explained to farmers and rural America through our website and social media how EPA's proposed rule would expand federal jurisdiction over stormwater drainage paths, ditches and small “wetland” areas—in the process increasing federal permit requirements for routine farming and ranching practices as well as other common private land uses, like building homes.

Not long after our campaign went live, a competing campaign called “Ditch the Myth” went public and continues today. Remarkably, however, that campaign was not launched by an environmental advocacy group—instead, it was launched by *EPA itself*. To our knowledge, this

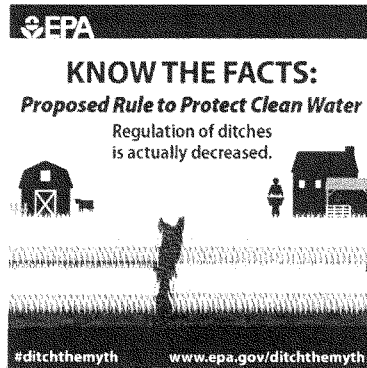
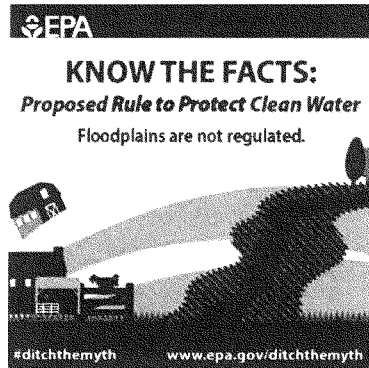
¹ EPA News Release, “Here's What They're Saying About the Clean Water Act Proposed Rule” (March 25, 2014) (attached).

² EPA Waters of the U.S. Proposed Rule Webcast (April 7, 2014) (attached).


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was an unprecedented move. The APA requires EPA to listen to comments and concerns on its proposed rule; it does not contemplate an agency engaging in a publicly funded campaign to influence the comments that the public makes and explicitly reject public criticisms of a proposed rule during the comment period.


Worse, the content of EPA's "Ditch the Myth" campaign was fundamentally misleading and directed at rejecting criticisms made by the very same industries that would be regulated by the rule. For example, EPA's "Know the Facts" slides assured the public that "normal farming activities like planting crops and moving cattle do not require permits." But that is extremely misleading, since "normal" farming under the Clean Water Act is in fact a term of art that has been extremely narrowly interpreted and has *never* been construed to include moving cattle (not to mention commonplace activities like applying fertilizer and crop protection products). The agency also asserted that "regulation of ditches is actually decreased." But that, too, is simply false—the rule would automatically regulate many ditches as "tributaries," whereas previously any ditch that does not carry water most of the time could only be regulated after a case-specific analysis by the agency. In the end, most claims that EPA made in its public campaign were, at best, artfully phrased to mislead the public:




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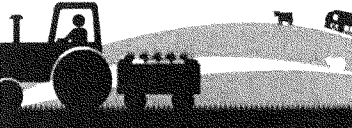
KNOW THE FACTS:
Proposed Rule to Protect Clean Water
 Normal farming activities like planting crops
 and moving cattle do not require permits.




#ditchthemyth www.epa.gov/ditchthemyth




KNOW THE FACTS:
Proposed Rule to Protect Clean Water
 Exclusions and exemptions
 for agriculture will not change.




#ditchthemyth www.epa.gov/ditchthemyth



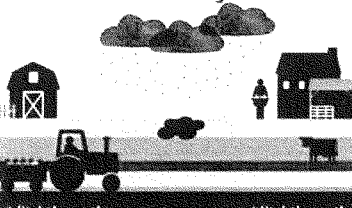
KNOW THE FACTS:
Proposed Rule to Protect Clean Water
 Current exemptions for farm ponds
 stay in place.



#ditchthemyth www.epa.gov/ditchthemyth



KNOW THE FACTS:
Proposed Rule to Protect Clean Water
 Puddles are not regulated.



#ditchthemyth www.epa.gov/ditchthemyth

Similarly, throughout the summer and early fall of 2014, EPA put out official blogs on its websites and “question and answer” documents for public consumption—again, in the middle of the public comment period—rejecting the Farm Bureau’s and other groups’ arguments that the rule: (1) dramatically expands the agency’s jurisdiction compared to current law (given that the Supreme Court has long since found the previous decades-old overbroad regulations to be unlawful); (2) perpetuates the costly vagueness of prior rules; and (3) would allow EPA and the U.S. Army Corps of Engineers to require permits or simply disallow innumerable commonplace activities on the land nationwide, including farming and ranching activities like building a fence, fertilizing and protecting crops, and grazing livestock. The question-and-answer document put forth a new round of carefully crafted and misleading statements that the rule would not increase federal jurisdiction (false), would not regulate land where water flows after rainfall (false), and

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would not require permits for the protection and fertilization of crops (false).³ Farm Bureau responded the following month with a detailed rebuttal,⁴ and the public battle waged on. Strikingly, this battle was not over the policy merits of expanding jurisdiction or of increasing federal permitting of farming and other land uses—which would be a worthwhile public discussion—but simply over whether or not the rule *would* expand jurisdiction and increase federal regulation of land use. EPA has insisted it will not, but those statements are absent from the official public notices that judges would typically look to in construing an agency rule.

Beyond its “Ditch the Myth” campaign, EPA engaged in an aggressive “Thunderclap” social media campaign, designed to drum up superficial support for the rule outside the regulated community. Thunderclap is a company that provides a “crowdspeaking” platform, which, in its own words, “allows a single message to be mass-shared, flash mob-style, so it rises above the noise” and helps “create action and change like never before.” See perma.cc/EBD4-KLR5. EPA’s Thunderclap campaign coupled a picture of a child drinking water over a meaninglessly one-dimensional statement: “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and my community.” Thunderclap then directed people to a link so they could support the rule through social media and further the campaign. EPA’s Thunderclap campaign purportedly reached 1.8 million people.⁵

Through Thunderclap and the coordinated efforts of environmental groups and political action groups (in particular, Organizing for America (OFA)), EPA was able to boost superficial support for the rule by hundreds of thousands of well-intended people who never read or even looked at the proposed rule. In the preamble to its final rule, EPA boasts that the agency received “over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule.” Of course, this omits that over 900,000 of the so-called “comments” fit on less than four single-paced pages. It also omits that the rule was overwhelmingly opposed in detailed, substantive comments by the majority of state governments, county and municipal governments, and associations and companies from virtually every sector of the U.S. economy.⁶ Of course, agency rulemaking does not and should not turn on public polling—but for EPA to claim to be responsive to public comments—in this context—rings hollow.

³ See “Questions and Answers – Waters of the U.S. Proposal.” EPA and U.S. Army Corps of Engineers (undated but released in September 2014) (attached).

⁴ See “Trick or Truth? What EPA and the Corps of Engineers Are *Not* Saying About Their ‘Waters of the U.S.’ Proposal.” (Oct. 30, 2014) (attached).

⁵ “I Choose Clean Water” Thunderclap, by U.S. Environmental Protection Agency (attached).

⁶ Although agencies traditionally have discounted comments submitted as part of a mass campaign, EPA appears to have adopted a different approach—counting and tallying up individual non-substantive comments like petition signatures, postcards and copied emails. For example, rather than counting one electronic petition bearing 218,542 names as one comment, EPA appears to have counted it as 218,542 comments. Similarly, a petition organized by OFA, the former campaign for President Obama (which still uses the President’s picture on its communications), generated 69,369 signatures, each of which was counted as a separate comment. In contrast, a single, detailed substantive comment letter signed by attorneys general from 11 states and governors from 6 states opposing the rule appears to have been counted as one comment.

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EPA also seems to have gamed the economic and other required analyses designed to ensure an informed final rule. EPA's economic analysis, for example, cited a 3% increase in the scope of its jurisdiction, which was revised for the final rule to 4%. EPA widely cited this 3% figure in its public communications, as evidence of the modest impact of the rule. The final economic analysis itself (at page vi), however, states that it *does not* purport to estimate the scope of the increase in CWA jurisdiction under the rule—and indeed EPA has made no effort to estimate the degree of expansion:

To estimate how the costs and benefits of CWA programs may change as a result of a change in the number of positive jurisdictional determinations under this rule, the EPA reviewed a sample of negative jurisdictional determinations (JDs) (i.e., determinations of no jurisdiction) completed by the Corps in fiscal years 2013 and 2014 to assess how the JD would change if the final rule had been in place. The EPA looked at a random sample of 188 jurisdictional determination files, which represents 782 individual waters in 32 states. *It is important to emphasize that the economic analysis focuses exclusively on the costs and benefits from CWA programs that would result from the associated change in negative JDs, rather than an analysis of how the **scope of jurisdiction** changes - nationwide data do not exist on the extent of all waters covered by the CWA.* The agencies generally only make jurisdictional determinations on a case-specific basis at the request of landowners. (emphasis added)

Thus, according to the agencies' economic analysis, they actually do not know, and have not attempted to estimate, how much the scope of CWA jurisdiction will increase under the rule.

Likewise, EPA certified that the proposed rule would not have a significant economic impact on small businesses for purposes of Section 609(b) of the Regulatory Flexibility Act, asserting that the rule would be *narrower* in scope than previous regulations. Yet those prior rules have long since been found overbroad and unlawful, and which therefore do not reflect current practice, as pointed out in an objection by the SBA Office of Advocacy.⁷

In promoting the environmental benefits of the rule to the lay public, however, the agencies use a much larger figure. In this context, EPA boasts that the rule will protect 60% of the nation's flowing streams, and millions of acres of wetland, that otherwise lack clear protection.⁸

⁷ SBA Office of Advocacy letter to The Honorable Gina McCarthy (Oct. 1, 2014).

⁸ "But right now 60 percent of the streams and millions of acres of wetlands across the country aren't clearly protected from pollution and destruction. In fact, one in three Americans—117 million of us—get our drinking water from streams that are vulnerable.... EPA and the U.S. Army Corps of Engineers has proposed to strengthen protection for the clean water that is vital to all Americans." EPA Thunderclap campaign ending Sept. 29, 2014 (copy attached). "The Supreme Court decisions in 2001 and 2006 left 60 percent of the nation's streams and millions of acres of wetlands without clear federal protection, according to EPA, causing confusion for landowners and government officials." <http://abcnews.go.com/Politics/wireStory/epa-rules-protect-drinking-water-regulate-small-streams-31332848>

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So how big is this expansion of EPA's regulatory reach? 3-4%, 0% or 60%? Most seasoned Clean Water Act practitioners would tell you the answer is somewhere closer to 60%—maybe more. Yet this is nowhere reflected in the economic and regulatory impact analysis underlying the rule.

Circumvention of Notice and Comment

Much of the communication by EPA to AFBF, other stakeholder groups and the public during this rulemaking occurred outside the Federal Register and the formal public comment process. Yet even within the formal notice-and-comment process, EPA gave short shrift to the substantive give-and-take that Congress envisioned when it enacted the APA. Under settled APA notice and comment requirements, “[a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency [relies in its rulemaking].” *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008). Agencies are not permitted to promulgate rules based on “data that, to a critical degree, is known only to the agency.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 376, 393 (D.C. Cir. 1973). Instead, the “critical factual material” used by the agency must *itself* be “tested through exposure to public comment.” *American Radio Relay League*, 524 F.3d at 236.

That did not happen in the Waters of the U.S. rulemaking. Throughout the comment period, the EPA's linchpin scientific report was undergoing review by the Science Advisory Board. It wasn't until October 2014 that the Advisory Board submitted its formal review to the agency. And that review suggested major changes to the report, which as a result was not finalized until well *after* the close of the comment period. Organizations like the Farm Bureau should have had an opportunity to comment on the final science report, which we believe is deeply flawed. EPA could easily have reopened the comment period for a short time for the express purpose of allowing comment on the amended science report. Consistent with its efforts to marginalize critical comments, however, EPA issued a final rule and report without ever having allowing the public to comment on the amended version of the science report that underlies the final rule.

Furthermore, the substantial changes that EPA made between its proposed and final rule means that many of the key provisions of the final rule, including definitions of key concepts like “tributary,” “neighboring,” and “significant nexus,” have never been tested by notice and comment. While we understand EPA's desire to limit rulemaking to one round of notice and comment, there is no doubt that when an agency makes substantial changes from the proposed rule the rulemaking process would benefit from seeking comments on those changes. A practice of reopening the comment period to address major changes before a rule becomes final would improve agency transparency and accountability and result in better rules that are less open to attack in litigation. And the lack of such a practice could encourage agencies to save the “real” rule for final publication and thereby avoid public comment on key but controversial provisions of the rule.

Conclusion

The net result of all of this should, in our view, be of deep concern to the Members of this Committee. As a result of its unprecedented public relations campaign and the cutting short of the comment process, EPA effectively pulled the wool over the lay public's eyes. Among EPA's public explanations for the rule was its promise that the rule would bring greater clarity and predictability. In fact, the rule accomplished the exact opposite, leaving agency bureaucrats with unbridled discretion to determine the reach of the Clean Water Act. The result will be widespread uncertainty and enforcement risk for the hundreds of thousands of family farmers and ranchers whose interests the Farm Bureau represents.

But beyond its practical impact on the regulated public, this uncertainty does even further violence to the integrity of the notice-and-comment rulemaking process. As you know, the general rule is that courts will defer to an agency's interpretation of its own ambiguous regulations. The Supreme Court has warned in recent cases that this so-called *Auer* deference encourages agencies to be vague in framing regulations, which then allows them the discretion to make case-by-case "interpretations" of the regulation later. The result is that subsequent interpretations of vague regulations—many of which will be made, in this case, in the context of enforcement actions—form the true substance of the regulation, but are never tested through the notice and comment procedure. See *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part). In other words, *Auer* deference allows an agency, "under the guise of interpreting a regulation, to create de facto a new regulation" without going through formal APA rulemaking. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011). That is just what the Waters of the U.S. rule accomplishes—EPA has promulgated a vast and vague regulation, the *real* substance of which will be determined by unaccountable agency staff, without notice-and-comment rulemaking. Such opaque and unaccountable governance should be of deep concern to every member of this Committee, and to the public at large.

We at the American Farm Bureau Federation appreciate the Committee's willingness to listen to our concerns. Thank you.



Advocacy: the voice of small business in government

October 1, 2014

The Honorable Gina McCarthy
 Administrator
 U.S. Environmental Protection Agency
 1200 Pennsylvania Avenue, N.W.
 Washington, D.C. 20460

Maj. Gen. John Peabody
 Deputy Commanding General
 Civil and Emergency Operations
 U.S. Army Corps of Engineers
 Attn: CECW-CO-R 441 G Street, NW
 Washington, D.C. 20314-1000

Re: Definition of "Waters of the United States" Under the Clean Water Act¹

Dear Administrator McCarthy and Major General Peabody:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments regarding the proposed rule to the U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA, and together, "the agencies"). Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.

The Office of Advocacy and the Regulatory Flexibility Act

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so our views do not necessarily reflect those of SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² requires small entities to be considered in the federal rulemaking process. The RFA requires federal agencies to consider the impact of their proposed rules on small businesses. When a rule is expected to have a significant economic impact on a substantial number of small entities, agencies must evaluate the impact, consider less

¹ Definition of Waters of the United States Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014).

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

burdensome alternatives, and in the case of EPA, convene a Small Business Advocacy Review panel.³ The RFA directs Advocacy to monitor agency compliance with the RFA. To this end, Advocacy may file written comments reflecting small business concerns about the impact of a rulemaking.⁴ Because of small business concerns with the proposed rule, Advocacy held a roundtable on July 21, 2014 and has heard from numerous small entities in many industries.

Background

The Clean Water Act (CWA) was enacted in 1972 to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁵ The CWA accomplishes this by eliminating the “discharge of pollutants into the navigable waters.”⁶ The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”⁷ Existing regulations currently define “waters of the United States” as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.⁸

The CWA requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a “water of the United States.”⁹ The EPA generally administers these permits, but EPA and the Corps jointly administer and enforce certain permit programs under the Act.¹⁰

The extent of the Act’s jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions. Actions of the Court have expanded and contracted the definition, especially regarding wetlands and smaller bodies of water.

- In 1985, the Supreme Court determined that adjacent wetlands may be included in the regulatory definition of “waters of the United States.”¹¹
- In 2001, the Court held that migratory birds’ use of isolated “nonnavigable” intrastate ponds was not sufficient cause to extend federal jurisdiction under the CWA.¹²
- In 2006, the Supreme Court considered whether wetlands near ditches or man-made drains that eventually empty into traditional navigable waters were

³ 5 U.S.C. § 603, 605.

⁴ The Small Business Jobs Act of 2010 (Pub. L. 111-240 § 1601) also requires agencies to give every appropriate consideration to Advocacy’s written comments on a proposed rule. This response must be included in an explanation or discussion accompanying the final rule’s publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.

⁵ 33 U.S.C. § 1251(a) (1972).

⁶ *Id.* at § 1251(a)(1).

⁷ *Id.* at § 1362(7).

⁸ 33 C.F.R. § 328.3(a); 40 C.F.R. §230.3(s).

⁹ 33 U.S.C. §§ 1311(a), 1342, 1344.

¹⁰ *Id.* at § 1344.

¹¹ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985).

¹² *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001).

considered “waters of the United States.”¹³ Justice Scalia, writing for the plurality, determined that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ [. . .] are ‘adjacent to’ such waters and covered by the Act.”¹⁴ Justice Kennedy concurred in the judgment, but concluded that the Corps must establish the existence of a “significant nexus” when it asserted jurisdiction over wetlands adjacent to non-navigable tributaries.¹⁵

The courts have left much uncertainty regarding what constitutes a “water of the United States.” Such uncertainty has made it difficult for small entities to know which waters are subject to jurisdiction and CWA permitting.

To address this uncertainty, the EPA and Corps proposed this rule which would revise the regulatory definition of “waters of the United States” and would apply to all sections of the Clean Water Act. The proposed rule defines “waters of the United States” within the framework of the CWA as the following seven categories:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.¹⁶

The proposed rule defines several terms for the first time: “neighboring,” “riparian area,” “floodplain,” “tributary,” and “significant nexus”; and it clarifies the terms, “adjacent” and “wetlands.”¹⁷ The rule leaves the regulatory definitions of “traditional navigable waters,” “interstate waters,” “the territorial seas,” and “impoundments” unchanged.¹⁸

Regulatory Flexibility Act Requirements

The RFA states that “[w]henver an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or

¹³ *Rapanos v. United States*, 547 U.S. 715, 729 (2006).

¹⁴ *Id.* at 742.

¹⁵ *Id.* at 779 (Kennedy, J., concurring).

¹⁶ 79 *Fed. Reg.* at 22,198.

¹⁷ See *Id.* at 22,263, for the complete definitions of “adjacent,” “neighboring,” “riparian area,” “floodplain,” “tributary,” “wetlands,” and “significant nexus.”

¹⁸ *Id.*

publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis [IRFA]. Such analysis shall describe the impact of the proposed rule on small entities.”¹⁹

Under Section 609(b) of the RFA, EPA is required to conduct small business advocacy review panels, often referred to as SBREFA panels, when it is unable to certify that a rule will not have a significant economic impact on a substantial number of small businesses. SBREFA panels consist of representatives of the rulemaking agency, the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy. SBREFA panels give small entity representatives (SERs) a chance to understand an upcoming proposed rule and provide meaningful input to help the agency comply with the RFA. SERs help the panel understand the ramifications of the proposed rule and significant alternatives to it.

Section 605(b) of the RFA allows an agency to certify that a rule will not have a significant economic impact on a substantial number of small entities in lieu of preparing an IRFA.²⁰ When certifying, the agency must provide a factual basis for the certification.²¹ In the current case, the agencies have certified that revising the definition of “waters of the United States” will not have a significant economic impact on a substantial number of small businesses.

The Proposed Rule Has Been Certified in Error

Advocacy believes that the agencies have improperly certified this rule. Advocacy, and the small businesses we have spoken to, believe that

- The agencies used an incorrect baseline for determining their obligations under the RFA;
- The rule imposes costs directly on small businesses; and
- The rule will have a significant economic impact on small businesses.

A. The Agencies Use the Incorrect Baseline for its Regulatory Flexibility Act Certification

Advocacy believes that the agencies used the wrong baseline for their RFA certification. In certifying the rule, the agencies state that, “This proposed rule is narrower than that under the existing regulations...fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations.”²² On this

¹⁹ 5 U.S.C. §603.

²⁰ 5 U.S.C. §605.

²¹ *Id.*

²² *Id.*

basis the agencies conclude that, “This action will not affect small entities to a greater degree than the existing regulations.”²³

The “existing regulations” that the agencies refer to in this reasoning is the 1986 rule defining the scope of waters of the United States. Compared to the 1986 definition, the proposed changes represent a narrowing of coverage. However, in the economic analysis accompanying the rule, the agencies assess the regulation vis-à-vis current practice and determine that the rule increases the CWA’s jurisdiction by approximately 3 percent.²⁴ The agencies’ certification and economic analysis contradict each other.

Advocacy believes that the proper baseline from which to assess the rule’s impact is current practice. Guidance from the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA’s Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.²⁵ It states that “The baseline should be the best assessment of the way the world would look absent the proposed action.”²⁶ The 1986 regulation has been abrogated by several Supreme Court cases and is no longer in use.²⁷ The Corps and EPA also issued a guidance document in 2008 which sought to bring jurisdictional determinations in line with these Supreme Court cases.²⁸ The 1986 regulation does not represent the current method for determining jurisdiction and has not served that purpose for more than thirteen years. Using an obsolete baseline improperly diminishes the effects of this rule. Advocacy agrees with the agencies’ economic analysis that uses current practice as the appropriate baseline for evaluating the rule.

B. The Rule Imposes Costs Directly on Small Businesses

The second basis for the certification appears to be the agencies’ position that the impact on small businesses will be indirect, hence not requiring an initial regulatory flexibility analysis or a SBAR panel.²⁹ EPA cites *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*³⁰ and *American Trucking Associations, Inc., v. EPA*³¹ in support of their certification.³² Advocacy believes that the agencies’ reliance on *Mid-Tex* and *American Trucking* is misplaced because the proposed rule will have direct effects on small businesses.

²³ *Id.*

²⁴ *Id.*

²⁵ Office of Management and Budget, *Circular A-4*, http://www.whitehouse.gov/omb/circulars_a004_a-4/#e (September 17, 2003).

²⁶ *Id.*

²⁷ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001); *Rapanos v. United States*, 547 U.S. 715, 729 (2006).

²⁸ Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008,

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

²⁹ 79 *Fed. Reg.* at 22,220.

³⁰ *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, 773 F.2d 327, 342 (D.C. Cir. 1985).

³¹ *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

³² 79 *Fed. Reg.* at 22,220.

In *Mid-Tex*,³³ the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. Although the generating utilities were large businesses, their customers included small entities, to whom they may or may not have been able to pass on these costs through any rate changes.³⁴ The issue raised in this case was whether the agency had improperly certified the rule because it failed to consider the impact on the small business customers. The court concluded that an agency is required to file an IRFA only in cases where a regulation directly affects small businesses;³⁵ if it does not, an agency may properly certify.

In *Mid-Tex*, the proposed regulation's applicability to small businesses is akin to the FERC regulation's applicability to the generating utilities themselves, not their customers, as EPA seems to believe. Generating utilities were an intervening actor between the regulatory agency and the small business customers; the utilities had a substantial amount of discretion as to whether they would pass on their construction costs to their small entity customers and, if so, how much of those costs they would pass on.

Such is not the case with this rule. First, there is no intervening regulated actor. In *Mid-Tex*, the generating utilities were the entities regulated and bound by FERC guidelines, and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. Therefore they will be subject to the application of the proposed definition and the impacts arising from its application.

Second, the rule defines the scope of jurisdiction of the Clean Water Act without any discretion left to any entity or intermediary. The rule does not, for example, set a goal for which types or how many waters must be included in jurisdiction, leaving the Corps or states to determine the exact definition of waters of the United States in particular instances. This rule establishes the definition and all small entities are bound by it.

In *American Trucking*,³⁶ the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. The basis of the EPA's certification was that the NAAQS regulated small entities indirectly through state implementation plans. The rules gave states broad discretion to determine how to achieve compliance with the NAAQS.³⁷ The rules *required* EPA to approve any state plan that met the standards: it could not reject a plan based upon its view of the wisdom of a state's choices.³⁸ Under these circumstances, the court concluded that EPA had properly

³³ 773 F.2d at 342.

³⁴ *Id.* The generating utilities were not required to pass on the rate increases and in some cases were limited by state law in how much of the rate increase could be passed on to customers.

³⁵ *Id.*

³⁶ 175 F.3d 1027 (D.C. Cir. 1999).

³⁷ *Id.*

³⁸ *Id.* at 1044.

certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.³⁹

EPA's proposed rule is distinguishable from the regulations at issue in *American Trucking*. The states were intervening actors with broad discretion regarding how to implement the federal standards. The EPA rules only told the states what the goal was; the states were left to develop the plans that would implement those goals and thereby impose impacts on small businesses.⁴⁰ In the current case, the agencies are not defining a goal nor are they authorizing any third party to determine the means and methods for reaching the goal. To the contrary, the agencies are defining the term governing the applicability of their own CWA programs. A change in the scope of the definition of "waters of the United States" necessarily leads to an increase in the scope and impact of the CWA since the programs thereunder only apply to waters that fall within this definition. The agencies, not a third party, determine whether a given body of water is within the jurisdiction of the requirements of the Clean Water Act and therefore subject to it.

Small businesses have also provided specific examples of how this rule will directly impact them. For example, during a May hearing of the U.S. House of Representatives Committee on Small Business, Jack Field of the Lazy JF Cattle Co. testified that the rule would essentially eliminate an exemption for normal farming practices that he relies upon to do things such as building a fence to control his grazing cattle.⁴¹ The proposed rule would eliminate the exemption for farmers whose actions do not comply with Natural Resources Conservation Services standards.⁴²

Small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a "single and complete" project that results in less than a ½ acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.⁴³ Currently, each crossing of a road over a water of the U.S. is treated as a "single and complete" project. The proposed rule creates large areas in which NWP 12 could no longer be used at all. Under this proposed rule waters in the same riparian area or floodplain all become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area or floodplain are treated as one interconnected water of the U.S. it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual

³⁹ Id. at 1045.

⁴⁰ Id. at 1044.

⁴¹ Testimony of Jack Field, Owner Lazy JF Cattle Co. at U.S. House of Representatives Committee on Small Business Hearing entitled "Will EPA's Waters of the United States Rule Drown Small Businesses?", May 29, 2014 at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=373099>.

⁴² 79 Fed. Reg. at 22,194; Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, 79 Fed. Reg. 22,276.

⁴³ Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

permits. This is a direct cost imposed solely as a result of the changes to the definition of the term “waters of the United States” proposed in this rule.

These examples, as well as comments that Advocacy has received from small entities in other industries, demonstrate that the impact of the proposed rule will be direct. Therefore, the agencies are required to measure the impacts of the rule and to determine whether those impacts are significant for a substantial number of small entities.

C. The Rule Will Have a Significant Economic Impact on Small Businesses

The economic analysis clearly indicates that this rule is likely to have a significant economic effect on small businesses. In the analysis, the agencies examine the anticipated changes to permitting under CWA Section 404 (development projects that discharge dredge or fill materials into waters of the U.S.). They find that in current practice 98 percent of streams and 98.5 percent of wetlands meet the definition of waters of the U.S.;⁴⁴ under the revised definition these figures rise to 100 percent.⁴⁵ They find zero percent of “other waters” (the seventh category in the revised definition) to be covered in current practice, but the revised definition would cover 17 percent of this category.⁴⁶ The agencies evidence an understanding that this increase in jurisdiction will lead to greater costs stating, “A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program: a greater share of development projects would intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits.”⁴⁷

The agencies estimate that CWA 404 permit costs would increase between \$19.8 million and \$52.0 million dollars annually, and they estimate that section 404 mitigation costs would rise between \$59.7 million and \$113.5 million annually.⁴⁸ These amounts do not reflect additional possible cost increases associated with other Clean Water Act programs, such as Section 402 permitting or Section 311 oil spill prevention plans.⁴⁹ The agencies further state that the economic analysis done with respect to the 404 program increase is likely not representative of the changes that may occur with respect to 402 and 311 permitting,⁵⁰ leaving small businesses without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs.

The economic analysis also singles out a particular class of businesses potentially affected by the revised definition, yet fails to evaluate any of these potential effects. EPA acknowledges that “a large portion of traditional 402 permit holders are located nearby large water sources to support their operations.”⁵¹ The agencies do not identify how many

⁴⁴ Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 11 (March 2014).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 13. Advocacy disagrees with the agencies’ assertion that this cost is indirect (see above).

⁴⁸ *Id.* at 16.

⁴⁹ *Id.* at 12.

⁵⁰ *Id.*

⁵¹ *Id.*

of these businesses may be small nor do they discuss the expected impact of this rule on them. Yet this proposed rule would directly affect those small businesses that may be located next to large water sources and which fall within the 3 percent of waters that will be newly included in the definition "waters of the U.S."

Concerns raised by small businesses as well as the agencies' own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition. The EPA and the Corps have obligations under OMB guidance, and the RFA to measure and communicate this increase. Their certification of no small business impact is inappropriate in light of this information. Because of this probable small business impact, the RFA requires the agencies to complete an IRFA and a SBAR panel.

Conclusion

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.

If we can be of any further assistance, please contact Kia Dennis, Assistant Chief Counsel, at (202) 205-6936.

Thank you for your attention to this matter.

Sincerely,
/s/ Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/ Kia Dennis
Assistant Chief Counsel

/s/ Stephanie Fekete
Legal Fellow

Tom Buchanan Oklahoma Farm Bureau President



Jackson County farmer-rancher Tom Buchanan was elected president of Oklahoma Farm Bureau Nov. 16, 2013, at the organization's 72nd annual meeting in Norman.

Buchanan runs a cow-calf operation and grows wheat and irrigated cotton on his farm near Altus. He also raises cattle in a family partnership with his brother and sister. Buchanan serves as the general manager of the Lugert-Altus Irrigation District and represents irrigation water use interests as vice chairman of the Oklahoma Water Resources Board.

Buchanan has been a Farm Bureau member since he was 16 years old and has been active on the Jackson County board for more than 20 years, representing the county on numerous state Farm Bureau committees. He also served on the Oklahoma Farm Bureau Board of Directors for six years representing District 2.

Buchanan is a 1974 graduate of Altus High School. He graduated from the University of Oklahoma in 1979 with a Bachelor of Arts degree.

Buchanan has two grown children: Nathan works as a petroleum engineer, and Catie is a registered dietician.

Senate Committee on Environment and Public Works

Subcommittee on Superfund, Waste Management, and Regulatory Oversight

hearing entitled, "American Small Businesses Perspectives on Environmental Protection Agency Regulatory Actions."

Tuesday, April 12, 2016

Responses to the Senator Vitter's Questions for the Record for witness Tom Buchanan

Mr. Buchanan, the EPA Administrator recently claimed that agency rules have not had any notable economic impact - other than a positive one - on American industry and jobs. Given what we know will happen in terms of economic impacts if the WOTUS rule is implemented, could you provide feedback on the EPA Administrator's position?

A farm is like any other business. It does best when investments are made to increase the productivity of the operations. I don't think many economists would disagree that when resources or capital are diverted in ways that don't provide a return, it makes operations less efficient and more expensive. A short economic story highlights the fault in EPA Administrator McCarthy's assessment of her agency's impact on the economy.

In 1850, the French economist, Frederic Bastiat¹ described how government rules and regulations harm productivity and jobs. He used a parable to emphasize how individuals and governments fail to consider the long term and unseen negative economic impacts of their actions.

In Bastiat's parable, a man's son breaks a pane of glass, having the direct effect of forcing the man to pay to replace the broken window. Some individuals argue that the boy has actually done the "community" a positive service. Why would some consider the broken pane of glass a positive service? Because the man with the broken window must now pay someone to repair and replace the window, which seems like a positive impact; because it is assumed that the repairman

¹ Frederic Bastiat, 1850 "That Which is Seen, and That Which is Not Seen"

will presumably spend the extra money he made on this window replacement job on something else, jump-starting the local economy.

I assume this would agree with the Administrator's line of thinking.

But this argument doesn't take into account the economic tradeoffs or cost/benefit analysis that comes into play for the economy as a whole. By breaking the window, the man's son has reduced his father's disposable income. Rather than purchasing some other good or service of his choice, the father is forced to spend his income replacing something that existed before. Thus, the broken window might help the window repairman, but at the same time, it robs other industries and reduces the amount being spent on other goods and services. In other words, replacing something that has already been purchased is a maintenance cost, rather than a purchase of truly new goods, and maintenance doesn't stimulate production.

As with the broken window, restrictive and costly EPA regulations cause individuals to expend resources and capital they would otherwise spend on other things. This is problematic, for most people, including farmers, who face limited resources. It also funnels capital and resources out of industries that produce goods people actually want - into destructive regulatory compliance - leading to even more costs. I would also point out that insofar as climate change regulatory costs are concerned, they will not even produce the kind of results the agency claims are necessary. In her answer, and faulty conclusions, Administrator McCarthy was only taking into consideration the man with the broken window and the window repairman. She failed to consider and understand the long term implications on the economy by only looking only at the parties directly involved in the short term, rather than looking at all parties (directly and indirectly) over both the short and long term.

Mr. Buchanan, you referenced the SBA Office of Advocacy's finding that the WOTUS rule would in fact have direct economic impacts on small entities. As chairman of the Committee on Small Business and Entrepreneurship, this is an issue that I care deeply about. Can you speak in some additional detail on what you think those direct impacts would be for your member and farmers and ranchers nationwide?

Unfortunately, EPA and the Corps did not follow the SBREFA requirements for the Waters Rule. Instead of conducting any analysis, the two agencies simply certified that the Waters Rule would not have any regulatory impact on small entities. As the SBA Office of Advocacy's letter correctly states, the proposed rule would actually have a significant and direct regulatory impact on small entities including small farms and ranches. EPA's expanded definition would require small entities to:

- update and expand their Spill Prevention, Control, and Countermeasure plans under section 311;
- revise their discharge permits and plans under section 402;
- become subject to more stringent requirements under the section 402 National Pollutant Discharge Elimination System program and;
- obtain section 404 "dredge and fill" permits for many ordinary activities that have not previously required federal permits. Getting these permits involves not only significant cost and delay before work can commence, the small entity may also be obligated to complete "mitigation" work that is itself highly burdensome.

Farmers and ranchers often have retention ponds and impoundments to manage and to store water for irrigation, fire control/dust suppression, among other reasons, in addition to many varieties of ditches. These waters would become "waters of the U.S." under the proposed definition. Completing construction or maintenance work in or near these areas will likely trigger section 404 and section 402 permitting requirements. Linear projects such as building or maintaining roads will be heavily impacted by the section 404 permitting requirement. Under the proposed rule, activities on these access roads and related ditches will trigger section 404 permitting as well as expanded environmental review requirements under the National Environmental Policy Act and the Endangered Species Act. These new requirements will wreak havoc on the ability of small firms to plan and budget. Furthermore, having agricultural land suddenly classified as federal waters could seriously affect the ability to secure working capital.

EPA's analysis explicitly omits costs to some programs that may be affected due to lack of data. EPA asserts that other programs are likely to be "cost-neutral or minimal" without providing an analysis to support this conclusion. Specifically, EPA states that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans) and section 402 (National Pollutant Discharge Elimination System (NPDES) permitting). These are bold claims that should be substantiated with a thorough analysis.

Senator ROUNDS. Thank you for your testimony, Mr. Buchanan. Our next witness is Mr. Thomas Sullivan. Mr. Sullivan, you may begin.

**STATEMENT OF THOMAS M. SULLIVAN, OF COUNSEL,
NELSON MULLINS RILEY & SCARBOROUGH LLP**

Mr. SULLIVAN. Thank you, Mr. Chairman, members of the subcommittee. I am pleased to present my views on how EPA rules impact small business. The bulk of my testimony will actually cover how small businesses impact EPA rules, or at least how the Reg Flex Act is designed to ensure that small business has a voice in the process.

Believe it or not, my first job in Washington was with the Environmental Protection Agency. I served under both Administrator Bill Reilly and Administrator Carol Browner. I then joined the National Federation of Independent Business, NFIB. One of my proudest professional experiences was working on NFIB's campaign working with this committee to prevent small businesses from being sued under the Superfund law just because they sent household garbage to their local landfill. It was the story of Barbara Williams of Gettysburg, Pennsylvania, who I was honored to be with when President George W. Bush signed the Small Business Superfund bill in January 2002.

Later that month I was unanimously confirmed to head the Office of Advocacy that we have already discussed this afternoon at the SBA. The Office of Advocacy is responsible for overseeing the Regulatory Flexibility Act. I served there as Chief Counsel for Advocacy until 2008. During my tenure, that office issued approximately 300 public comment letters to 68 agencies, averaging about 38 letters to agencies per year.

I have remained deeply interested in how small businesses are impacted by regulation and how small business involvement in the decisionmaking can benefit regulatory policy.

The rationale for passage of the Regulatory Flexibility Act still exists today. That rationale is based on the critical role small businesses play in our economy and an understanding of how small firms are disproportionately impacted by regulation. Recent data show that small firms create almost two-thirds of the net new jobs in this country, and we will hear later in the panel how small businesses lead America's innovation economy. Studies from the Office of Advocacy show that small firms produce 16 times the number of patents per employee than their larger business competitors.

At the same time, research shows that over \$2 trillion cost of Federal regulation hits small businesses the hardest. Small businesses with fewer than 50 employees shoulder \$11,724 per employee per year to keep up with regulatory mandates. That cost is more than twice the cost of healthcare at a per-employee basis. Plus, the cost for the small firms is 29 percent higher per employee than for firms with 100 or more employees.

Those are the reasons that led to the enactment of the Regulatory Flexibility Act in 1980.

There has been extensive research about the success and failures of the Regulatory Flexibility Act, and I would actually just like to

get into some of the good news and bad news about how it is being implemented.

The good news is that EPA actually does work with the Office of Advocacy and hosts SBREFA panels to explore how the Agency can sensitize its approach to small business. It is encouraging to know that EPA holds pre-panel sessions before the SBREFA panels actually start in order to think through issues that they may not have anticipated in developing a rulemaking.

The bad news is that there are still times when EPA's deadlines, whether they are judicial, statutory, or political, push the careerists to approach the Regulatory Flexibility Act as a set of bureaucratic procedural hurdles. The most obvious example of EPA purposely avoiding the Regulatory Flexibility Act, in my opinion, was its recent promulgations of the Waters of the U.S. Rule that Mr. Buchanan just outlined.

That troubling situation with EPA's promulgation of the Waters of the U.S. Rule leads people like me to try and figure out, how can it be improved. EPA's decision on whether to conduct a full examination of small business impacts is really a critical point in the rulemaking process. That certification part of the Reg Flex Act is truly the fork in the road when it comes to whether EPA should listen to small business or not. I believe that Congress, the EPA, and the Office of Advocacy should consider ways in which EPA certification would benefit from an objective third party's judgment when the Office of Advocacy has an objection.

When agencies quarrel over their impact on the environment, the Council on Environmental Quality acts as an arbiter. Some thought should be given on whether a similar model could work for disagreements between the Office of Advocacy and EPA under the Regulatory Flexibility Act.

In my opinion, EPA makes its best decisions or, as Senator Markey said, sensible regulations when it decides to embrace the Regulatory Flexibility Act and treat its interaction with small business as a constructive dialogue where the Agency can meet its objectives while also minimizing burden on small business. It can work. I have seen it work. And I thank the committee for taking the time to make sure it can work.

[The prepared statement of Mr. Sullivan follows:]

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**Testimony of
Thomas M. Sullivan**

**United States Senate
Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight**

April 12, 2016

**American Small Businesses' Perspectives on
Environmental Protection Agency Regulatory Actions**



Mr. Chairman and Members of the Subcommittee, I am pleased to present my views on how U.S. Environmental Protection Agency (EPA) rules impact small business. The bulk of my testimony will actually cover how small businesses impact EPA rules. Or, at least, how the Regulatory Flexibility Act is designed to ensure that small business has a voice in the process.¹

I am an attorney with the law firm of Nelson Mullins Riley & Scarborough, LLP. I represent several businesses and run the Coalition for Responsible Business Finance – a group of small businesses that are trying to educate Congress and the federal government on how non-traditional lending provides tremendous value for small businesses and the economy. The businesses I represent are concerned with how regulation impacts their bottom-lines, whether they will be treated fairly by regulators, and whether they will have a legitimate seat at the regulatory policy table. However, I am not presenting this testimony directly on my clients' behalf. Rather, my advice to the Subcommittee today is drawn from my two decades of work on small business regulatory issues and my overall desire to bolster the voice of small business in the regulatory process.

My first job in Washington was with the EPA. I served under both Administrator Bill Reilly and Administrator Carol Browner. After learning about regulatory policy development from within government, I joined the Washington office of the National Federation of Independent Business (NFIB). I am most proud of NFIB's campaign, working with this Committee, to prevent small businesses from being sued under the Superfund law just because they sent household garbage to their local landfill. That was the story of Barbara Williams of Gettysburg, Pennsylvania who I

¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980), amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. sec. 601-612), also amended by Sec. 1100 G of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2112 (July 21, 2010).

was honored to be with when President George W. Bush signed the small business superfund bill on January 11, 2002.²

Later that month, I was unanimously confirmed to head the Office of Advocacy at the U.S. Small Business Administration (SBA). The Office of Advocacy is responsible for overseeing the Regulatory Flexibility Act.³ I served as Chief Counsel for Advocacy until October 2008. During my tenure, the Office of Advocacy issued approximately 300 public comment letters to 60 agencies (averaging 38 per year).

I have remained deeply interested in how small businesses are impacted by regulation and how small business involvement in regulatory decision-making can benefit regulatory policy. I serve as an advisor for NFIB's Small Business Legal Center and for the SBE Council's Center for Regulatory Solutions and I am trying to create the Small Business Regulation Committee for the American Bar Association's Section on Administrative Law and Regulatory Practice. I also serve on the Board of Directors for the Public Forum Institute which is involved in the Policy Dialogue on Entrepreneurship, the Global Entrepreneurship Week initiative, and the Global Entrepreneurship Congress. The most recent congress was held last month in Medellin, Colombia and I was honored to participate.

History of the Regulatory Flexibility Act

One of the top five recommendations from the 1980 White House Conference on Small Business was for a law requiring regulatory impact analysis and a regular review of regulations. That recommendation became a reality when President Jimmy Carter signed the Regulatory Flexibility Act into law on September 19, 1980.

² *Small Business Liability Relief and Brownfields Revitalization Act*, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

³ See <http://www.sba.gov/advocacy>.

The rationale for passage of the Regulatory Flexibility Act in 1980 still exists today. That rationale is based on the critical role small businesses play in our economy and an understanding of how small firms are disproportionately impacted by regulation (research-based proof that “one-size-does-not-fit-all”). Recent data show that small firms create almost 2/3 of the net new jobs in this country and that small businesses lead America’s innovation economy, producing 16 times more patents per employee than their larger business competitors.⁴ At the same time, research shows that the \$2.028 trillion cost of federal government regulations hits small businesses the hardest.⁵ Small businesses with fewer than 50 employees shoulder \$11,724 per employee per year to keep up with regulatory mandates.⁶ That is more than twice the cost of healthcare.⁷ Plus, the costs for small firms are 29 percent higher per employee than for firms with 100 or more employees. The disproportionate regulatory impact is even more pronounced for environmental regulations where small firms bear over 3 times the costs per employee than their larger business competitors.⁸

Those reasons led to the enactment of the Regulatory Flexibility Act in 1980. The Act directs all agencies that use notice and comment rulemaking to publicly disclose the impact of their regulatory actions on small entities and to consider less burdensome alternatives if a proposal is likely to impose a significant economic impact. The law authorizes SBA’s Chief Counsel for Advocacy to appear as amicus curiae in Regulatory Flexibility Act challenges to rulemakings and it requires SBA’s Office of Advocacy to report annually on agencies’ compliance with the Regulatory Flexibility Act.

⁴ *Frequently Asked Questions*, SBA Office of Advocacy (updated March 2014).

⁵ W. Mark Crain and Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (September 10, 2014).

⁶ *Id.*, at page 2.

⁷ ASPE Research Brief, U.S. Department of Health and Human Services, *Health Insurance Marketplaces 2016: Average Premiums After Advance Premium Tax Credits in the 38 States Using the Healthcare.gov Eligibility Platform*, at table 2 (estimating costs of \$408 per month) (January 21, 2016).

⁸ Crain & Crain at page 2 (annual costs per employee for firms with under 50 employees is \$3,574 and costs per employee for firms with 100 or more employees is \$1,014).

From the time of enactment up to 1995, agency attention to the Regulatory Flexibility Act was disappointing and committees in the U.S. House of Representatives held hearings and drafted amendments to strengthen the Regulatory Flexibility Act.⁹ The Small Business Regulatory Enforcement Fairness Act (SBREFA) passed Congress and was signed into law by President Clinton in March of 1996.¹⁰ Those amendments to the Regulatory Flexibility Act established formal procedures for the EPA and for the Occupational Safety and Health Administration (OSHA) to receive input from small entities prior to the agencies proposing rules.¹¹

Early in my tenure as Chief Counsel, there was a realization that government could still do a better job incorporating small business considerations into rulemaking. We felt that in order to change the attitudes of regulators, direction had to come from the top. That led to President George W. Bush signing Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, in August of 2002.¹² The Executive Order directed SBA's Office of Advocacy to train regulatory agencies on how to comply with the Regulatory Flexibility Act and further instructed agencies to consider the Office of Advocacy's comments on proposed rules. More recently, the Small Business Jobs Act codified the Executive Order's requirements for agencies to respond to the Office of Advocacy's comments in final rules.¹³

The latest amendments to the Regulatory Flexibility Act were authored by Senators Olympia Snowe and Mark Pryor and were adopted as part of the Dodd-Frank financial regulatory reform law. That amendment requires the Consumer Financial Protection Bureau (CFPB) to conduct a

⁹ See, e.g., *Strengthening the Regulatory Flexibility Act: Hearing on H.R. 9 before H. Comm. On Small Business*, 104th Cong., Serial No. 104-5 (Jan. 23, 1995); *Job Creation and Wage Enhancement Act of 1995: Hearing on H.R. 9 Before the Subcomm. On Comm. And Admin. Law of the H. Comm. On the Judiciary*, 104th Cong. Serial No. 104-3 (Feb. 3 & 6, 1995).

¹⁰ *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857 (1996).

¹¹ See, 5 U.S.C. sec. 609.

¹² Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53461 (August 16, 2002).

¹³ *Small Business Jobs Act of 2010*, Pub. L. No. 111-240, sec. 1601 (September 7, 2010).

small business panel process (“SBREFA panels”) when issuing rules, the same requirement that EPA and OSHA have followed since SBREFA passed in 1996.¹⁴

What is required by the Regulatory Flexibility Act

The basic spirit of the Regulatory Flexibility Act is for government agencies to analyze the effects of their regulatory actions on small entities and for those agencies to consider alternatives that would allow agencies to achieve their regulatory objectives without unduly burdening small entities.

The Regulatory Flexibility Act covers all agencies that issue rules subject to the Administrative Procedure Act (APA). The Regulatory Flexibility Act requires agencies to publish an initial regulatory flexibility analysis (IRFA) unless the promulgating agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.¹⁵ The IRFA is supposed to be a transparent small business impact analysis that includes a discussion of alternatives designed to accomplish the stated objectives of the rule while minimizing impact on small entities. In the case of EPA, OSHA, and the CFPB, the SBREFA panels aid the agencies’ analysis and discussion of alternatives. Each SBREFA panel produces a report that includes a small business economic analysis and a detailed exchange of information between the promulgating agency and small entities

The availability of an IRFA allows for a more informed notice and comment process that can guide an agency’s formulation of its final rule. Under the Regulatory Flexibility Act, an agency’s final rule must contain a final regulatory flexibility analysis (FRFA) if it published an IRFA with its proposal. The FRFA is basically a public response to issues raised in the IRFA.

¹⁴ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, sec. 1100G (July 21, 2010).

¹⁵ See, 5 U.S.C. sec. 605(b).

Regulatory Flexibility Act in practice.

SBA's Office of Advocacy monitors implementation of the Regulatory Flexibility Act and a full accounting of how agencies are complying with the Act is published annually.¹⁶ Every annual report contains a section on the Office of Advocacy's interaction with the EPA, which should be no surprise because of how much of the federal regulatory burden emanates from EPA. The National Association of Manufacturers study on regulatory burden reported that small manufacturers with 50 employees or less pay an estimated \$34,671 per employee to comply with federal regulation.¹⁷ Environmental regulatory costs account for \$20,361 of the total (more than half of the total costs are from environmental regulation).

Good news/bad news

The good news is that EPA regularly works with SBA's Office of Advocacy and hosts SBREFA panels to explore how the agency can sensitize its regulatory approach to small business. It is encouraging that EPA is willing to hold "pre-panel" sessions with small business stakeholders in order to think through issues they may not have anticipated in developing a rulemaking. I was involved with a pre-panel for EPA's approach to reduce lead-based paint hazards from renovation and repair of commercial buildings. I represented small businesses in the remodeling industry and I was impressed by EPA's willingness to consider the remodelers' views, learn from their experiences in complying with residential lead-paint rules, and then hit the "pause button" to do the research necessary before proceeding down a full-blown regulatory path. I am told that EPA's "pre-panel" approach has benefitted the small business community and career officials at EPA who are genuinely listening and learning about issues without the internal agency pressure of having to necessarily promulgate a final regulation by a date certain.

¹⁶ See, Office of Advocacy annual reports on the Regulatory Flexibility Act, available at <https://www.sba.gov/advocacy>.

¹⁷ Crain & Crain at page 2.

The bad news is that there are still times when EPA's deadlines, whether they are judicial, statutory, or political, push the careerists to approach the Regulatory Flexibility Act as a set of bureaucratic procedural hurdles. The most obvious example of EPA purposely avoiding the Regulatory Flexibility Act was its recent promulgation of the "Waters of the U.S." rule. The EPA and the U.S. Army Corps of Engineers (the "Corps") certified that the proposed rule would not have a significant economic impact on a substantial number of small businesses. EPA argued that their proposal would not expand jurisdiction, but would narrow the jurisdiction of the Clean Water Act.¹⁸ To EPA's credit, the agency had worked with SBA's Office of Advocacy for several years and had engaged directly with small business stakeholders. According to testimony by Charles Maresca, who heads the Office of Advocacy's legal team, the Corps met with small entities well before issuing the proposed rule on April 21, 2014.¹⁹

Unfortunately, EPA did not seem to listen to those small business interests and instead concocted an argument that its rule would not impose additional costs on small businesses. Mr. Maresca pointed out that EPA's own economic analysis estimated a range of permit cost increases from \$19.8 - \$52 million dollars annually and that wetlands mitigation costs would rise between \$59.7 - \$113.5 million annually. That background suggests to me that EPA made a deliberate decision to avoid the transparent and constructive dialogue with small entities required by SBREFA when pushing forward with the Waters of the U.S. rulemaking.

How can the Regulatory Flexibility Act work better?

The Regulatory Flexibility Act requires EPA to analyze the direct impact a rule will have on small entities. Unfortunately, limiting the analysis to direct impacts does not accurately portray how small entities are affected by new EPA rules. For instance, when greenhouse gas

¹⁸ *Definition of Waters of the United States Under the Clean Water Act*, 79, Fed. Reg. 22188 (April 21, 2014).

¹⁹ Testimony of Charles Maresca, Director of Interagency Affairs, Office of Advocacy, U.S. Small Business Administration, *An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses*, United States Senate Committee on Small Business and Entrepreneurship (May 19, 2015).

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regulations impose a direct cost on an electric utility, EPA should make public how its proposal will likely affect the cost of electricity for small businesses and include that analysis as part of its work to meet the goals of the Regulatory Flexibility Act. The process works when there is a transparent and candid exchange of views between small business stakeholders and regulators. That exchange works best when small business stakeholders have as much information as possible and I believe that not including analysis of reasonably foreseeable indirect impacts harms the process.

The SBREFA amendments to the Regulatory Flexibility Act in 1996 established the SBREFA panels and have helped force a dialogue between EPA and small business stakeholders. Unfortunately, the process lacks transparency because EPA does not release the SBREFA panel report that must be completed in 60 days, until EPA issues its proposed rule. The time between a completed SBREFA panel report and EPA's proposed rule can be several months or several years. Keeping the valuable small business input secret and hiding the candid exchange of information between EPA and business stakeholders is a disservice to the development of regulatory policy that depends on a robust public exchange of information, even before the formal notice and comment period. I am not promoting the release of confidential interagency information that is a necessary part of the rulemaking process. However, once a SBREFA panel report is finished it is no longer a deliberative process document that deserves to be kept confidential. Regulators should continue to think about ways to improve their proposed regulations, all the way up to publishing their proposed rules. Hiding part of an agency's exchange with the regulated community stifles EPA's ability to gain informed insight up to the date of a proposed rule's publication. OSHA is subject to the same SBREFA panel requirements as EPA and OSHA releases their SBREFA panel reports as soon as they are completed. I think that if EPA changes its policy to mimic OSHA's, they will benefit from a more transparent SBREFA process.

Finally, I am troubled by what happened with EPA's Waters of the U.S. rule and how its avoidance of the Regulatory Flexibility Act (certification that the rule would not significantly

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impact a substantial number of small entities in April 2014) could not be challenged until the rulemaking was finalized a year later. EPA's decision on whether it should conduct a full examination of small business impacts and alternatives is a critical point in the rulemaking process. The "certification" part of the Regulatory Flexibility Act is truly the fork in the road when it comes to whether EPA should listen to small businesses and tailor its regulatory approach to accommodate small firms. I believe that Congress, the EPA, and the Office of Advocacy should consider ways in which EPA's certification would benefit from an objective third party's judgment when the Office of Advocacy has an objection. When agencies quarrel over their impact on the environment, the Council on Environmental Quality (CEQ) acts as an arbiter.²⁰ Some thought should be given on whether a similar model could work for disagreements between the Office of Advocacy and regulatory agencies covered by the Regulatory Flexibility Act.

Conclusion:

EPA makes its best decisions when it decides to embrace the Regulatory Flexibility Act and treat its interaction with small business as a constructive dialogue where the agency can meet its statutory objectives while also minimizing burden on small businesses. It can work. I have seen it work. And, I thank the Committee for taking the time to make sure it can work better.

²⁰ EPA's description of how a federal agency may refer to CEQ interagency disagreements concerning proposed federal actions that might cause unsatisfactory environmental effects is viewable at: <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

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Senate Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Re: Questions for the Record; Hearing on American Small Businesses' Perspective on Environmental Protection Agency Regulatory Actions; April 12, 2016

Chairman Inhofe and Senator Boxer,

Thank you for the opportunity to present my views before the Environment and Public Works Committee during the hearing on April 12, 2016. Please accept these responses to your follow-up questions.

Chairman Inhofe:

1. Last year, EPA convened a small business review panel for the model federal implementation plan (FIP) for the Clean Power Plan. How common is it for EPA to convene a small business review panel for a FIP? Do you think EPA should be encouraged to convene a panel for future FIPs?

I am aware of 3 small business review panels convened by EPA for FIPs.¹ According to a recent law review article, EPA has imposed over 50 FIPs.² I believe EPA should be encouraged to convene small business review panels for future FIPs. Small business review panels allow for EPA to directly engage with the small business community and constructively find ways that the agency can reduce pollution while minimizing regulatory burden on small entities.

2. While courts have held agencies are not required to consider indirect or secondary impacts of a rule for purposes of the Regulatory Flexibility Act, don't you think a rulemaking would benefit from small business input early in the rule development process?

¹ 1998 Federal Implementation Plans for Regional Reductions of Nitrogen Oxides (August 21, 1998); Federal Implementation Plan for the Clean Air Interstate Rule and Response to North Carolina's Petition Pursuant to Section 126 of the Clean Air Act (June 27, 2005); Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014 (July 28, 2015).

² Daniel P. Selmi, *Federal Implementation Plans and the Path to Clean Power*, Loyola Law School, Georgetown International Environmental Law Review (GIELR), Forthcoming, Loyola Law School, Los Angeles Legal Studies Research Paper No. 2016-13 (May 18, 2016).

Yes, I believe rulemakings would benefit from small business input early in the rule development process. Additionally, I believe that agencies should consider the ripple effects (secondary impacts) their rules have on small businesses in an open and transparent manner. For example, when EPA takes regulatory action on the composition of fuels, the agency should consider how its rules affect the price of gasoline. As you point out, the Regulatory Flexibility Act does not require that type of open and transparent analysis. Instead, the EPA only has to analyze how its fuel blending rules impact the petroleum industry and does not have to publicly show how its rules impact small businesses in the transportation sector that end up paying higher prices for gasoline. The Regulatory Flexibility Act should be changed to require agencies to consider the reasonable secondary impacts of their rules, a proposal that has been supported by both Chief Counsels for Advocacy at the U.S. Small Business Administration during this Administration.³

3. Mr. Sullivan, the Regulatory Flexibility Act was designed to ensure regulations were tailored to achieve their goals while imposing the least burdens on small businesses. However, we have heard from many small businesses that EPA has instead imposed "one-size-fits-all" approach to regulation, regardless of the disproportionate impacts on small businesses. For example, [enter into record] the Colorado Association of Commerce & Industry, which represents more than 500 small businesses, wrote EPA on its 2015 ozone national ambient air quality standards (NAAQS) cautioning EPA, "one size does not fit all." Do you think a "one-size-fits-all" regulatory approach works for small businesses? Do you have any recommendations for how to encourage EPA to truly tailor regulations to achieve its goals while minimizing impacts on small businesses?

I do not think that regulatory approaches that seek to impose rigid mandates without consideration of how smaller businesses are going to have to comply with those regulations are good policy. For instance, air emission requirements for large food processing facilities may not work for a small bakery. The Small Business Regulatory Flexibility Act (SBREFA) is designed to help EPA avoid those situations and, instead, craft their regulations in a way that accommodate small business.

I applaud this Committee's attention to how EPA considers the views of small businesses in accordance with SBREFA. Congress's insistence that regulatory agencies comply with the text and spirit of SBREFA and genuinely consider small business input prior to issuing new regulations makes a big difference. I also encourage you to coordinate with the Small Business & Entrepreneurship Committee and the Homeland Security and Governmental Affairs Committee to craft legislation that can prioritize small business consideration in agency rulemakings. Such an effort could include proposals that create an open and transparent process for agencies to consider the ripple effect (secondary impact) of their regulations on small businesses, early resolution of disputes between SBA's Office of Advocacy and agencies on regulatory proposals,

³ See, legislative priorities for Chief Counsel Winslow Sargeant: https://www.sba.gov/sites/default/files/files/leg_priorities112th.pdf; See also, legislative priorities for Chief Counsel Darryl DePriest: <https://www.sba.gov/advocacy/advocacy-2016-legislative-principles> .

and incentives for agencies to streamline, eliminate, or update existing requirements in a way that produce cost savings for small businesses.

4. Your written testimony discusses good news and bad news about EPA's compliance with the Regulatory Flexibility Act – which category would you put EPA's so-called Clean Power Plan in?

The good news is that EPA decided to convene a small business review panel for part of their Clean Power Plan. The bad news is that EPA waited until late in the regulatory development process to convene its small business review panel. The further bad news is that EPA did not approach the review panel process in a way that would ensure the adequate consideration of small entity input.⁴

Senator Vitter:

5. Mr. Sullivan, you stated in your testimony that there are “times when EPA's deadlines, whether they are judicial, statutory, or political, push the careerists to approach the Regulatory Flexibility Act as a set of bureaucratic procedural hurdles.” The most recent example of this occurred when EPA submitted its draft rule to regulate methane emissions from new oil and natural gas infrastructure to the White House OMB before the small entity representative on the SBFEFA panel had submitted their comments on the rule. When I pressed the EPA Administrator about that at a recent hearing in this Committee, her response was essentially that that oftentimes happens but that the interagency review process ensures that EPA hears and adjusts for all of the input from the SERs.

a. Isn't it true that EPA and other agencies oftentimes miss deadlines in submitting proposals to OMB for a whole multitude of reasons?

In my tenure as Chief Counsel for Advocacy, I recall that agencies did miss deadlines for their submittals to OMB. I am not up-to-date on current agency practices in this regard. As you stated in your question, my testimony referenced the use of deadlines as an excuse by agency personnel to avoid genuine consideration of small business flexibilities.

Excuses to avoid small entity input are harmful to the SBREFA process and, more importantly, harmful to small businesses and the economy. Small businesses account for 63 percent of job creation, innovate at 16 times the rate of larger businesses, and present tremendous economic opportunity for women, minorities, and America's veterans.⁵ The importance of small business

⁴ See, SBA's Office of Advocacy letter to EPA Administrator Gina McCarthy on the lack of preparation for the Small Business Advocacy Review Panel on the FIP for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014 (May 8, 2015).

⁵ Small businesses account for roughly 63 percent of job creation in America, innovate at 16 times the rate of larger business competitors, and present tremendous economic opportunity for women, minorities and America's veterans. See, SBA's Office of Advocacy, *Frequently Asked Questions* (March 2014), available at: https://www.sba.gov/sites/default/files/advocacy/FAQ_March_2014_0.pdf.

stands in sharp contrast to how they are treated by federal regulators. Small businesses with fewer than 50 employees shoulder 29 percent more regulatory costs per employee than their larger business competitors.⁶ This disproportionate regulatory impact is even greater for small businesses trying to keep up with EPA regulations where small firms bear over 3 times the costs per employee than large businesses.⁷

In my view, one way to avoid missed deadlines is for EPA to commit to small business advocacy review panels immediately upon announcing plans for upcoming rules and not waiting until mid-way through the regulatory development process to initiate the SBREFA process. This may prevent rushing or avoiding small business input later in the regulatory development process.

b. Wouldn't it make sense for SBREFA to be amended to ensure that EPA doesn't submit a draft rule to OMB until it has actually concluded the SBREFA process?

The exchange of information between EPA and SBA's Office of Advocacy and OMB is a critical part of every rulemaking. I am hesitant to set rigid parameters around that information flow. However, I am concerned with EPA's refusal to publish its Small Business Advocacy Review Panel report until EPA issues a proposed rule. I believe that practice flies in the face of transparency. By law, Small Business Advocacy Review Panel reports are "completed" in 60 days. However, EPA waits to release its finalized panel report until the agency issues its proposed rule. This practice prevents the public from reviewing important policy considerations and, for that reason, is bad public policy. If EPA does not reconsider this practice, I believe Congress should amend SBREFA to require publication of the small business advocacy review panel reports when they are completed.

Thank you for considering my views on the topic of how EPA can do a better job of minimizing regulatory burden on small business while meeting its environmental protection objectives. Please do not hesitate to contact me at tom.sullivan@nelsonmullins.com if you need clarification of my answers or if I may be of assistance to the Committee's important work.

Kind regards,



Thomas M. Sullivan
Of Counsel

⁶ See, W. Mark Crain and Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (September 10, 2014).

⁷ *Id.*

Senator ROUNDS. Thank you, Mr. Sullivan.
We will now hear from our next witness, Mr. Frank Knapp, Jr.
Mr. Knapp, you may begin.

**STATEMENT OF FRANK KNAPP, JR., PRESIDENT AND CEO,
SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE**

Mr. KNAPP. Thank you, Chairman Rounds, Ranking Member Markey, and Chairman Inhofe. My name is Frank Knapp. I am the President of the South Carolina Small Business Chamber of Commerce, also the Board Co-Chair of the American Sustainable Business Council, with a network representing 200,000 businesses.

Today's hearing topic is important for small business and the vitality of our economy. Good regulations tend to stimulate innovation and entrepreneurship in addition to limiting or preventing destructive forms of economic activity. Bad regulations, whether because they are not designed properly or simply not needed, would be a burden on small businesses and thus harm our economy. Everyone here would prefer the former and not the latter.

However, even good regulations will have some negative impact on certain small businesses. The issue is do the positive economic, social, environmental, or health outcomes outweigh the negatives.

For example, well constructed regulations that encourage alternative energy to reduce carbon dioxide emissions impede the use of fossil fuels, which reduces capital spending and jobs in the fossil fuel industries. However, alternative energy is much more responsive to technology driven innovation, and dollar for dollar invested, alternative energy stimulates much more employment than fossil fuels.

The issue today is, does the Environmental Protection Agency and the Federal Government's process of promulgating regulations adequately consider any negative on small businesses when developing a final regulation? Twelve years ago we addressed this issue in South Carolina. Back then, my organization worked with our State Chamber of Commerce and our State's NFIB to pass our Small Business Regulatory Act modeled after the Federal law.

A few years ago, the then-chairman to the Regulatory Review Committee told me that in 7 years his committee had reviewed about 300 proposed regulations and identified only 10 that raised their concern. His committee worked with the State agencies promulgating these new regulations to satisfactorily amend the regulations to address unnecessary burdens on impacted small businesses.

The Regulatory Flexibility Act works in our State because we provide the all-volunteer committee the resources they need to do an effective job on newly proposed regulations, and there is the important point. If you want the regulatory process to be fair to all parties, and you set up a mechanism to do that, it has to be adequately resourced.

Back on June 27th of 2012, I testified before the U.S. House Small Business Committee on this same subject. Mr. Keith Holman of the U.S. Chamber of Commerce was also testifying. I referred to Mr. Holman's filed written testimony in my testimony, and here is what I said back then: "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.”

That testimony was almost 4 years ago. Yet here we are still talking about the EPA regulations and small businesses, as well as proposals to erode the operational capacity of regulatory agencies, instead of providing the proper resources for them to do the job Congress tasked them to do, to protect small businesses.

This month, ASBC, the American Sustainable Business Council, led a coalition of 25 business organizations, including the South Carolina Small Business Chamber, in filing an amicus brief with the D.C. Circuit Court of Appeals in support of the Clean Power Plan. The brief argues that unrestrained climate change will burden national, State, and local economies with increased costs and business disruptions from droughts, flooding, reduced agriculture productivity, extreme weather, rising seas, and other disturbances. In addition, the report points out that the Clean Power Plan would boost economic growth by generating new market-based solutions and new jobs in renewable energy.

Small business also supports the intent of the Waters of the U.S. Polling commissioned by ASBC found that 92 percent of small business owners support regulations to protect our water and air and that 80 percent supported the Waters of the U.S. Rule.

Small businesses know that the risks of clean water disruptions are very real. In 2013 massive manure spills into clean water sources occurred in Wisconsin, threatening the dairy industry. In 2014 it was the Elk River chemical spill in West Virginia which cost the State’s economy \$19 million a day.

When clean water resources are shut down, the economic burden falls on small businesses.

In conclusion, the regulation promulgating process can produce good rules while protecting small businesses from unnecessary burdens if we provide the resources for agencies to expeditiously carry out the requirements Congress has already put in place. But the Federal Government’s responsibility to impacted small businesses shouldn’t stop there. Some small businesses will find compliance with Federal regulations difficult. The answer is not to throw the baby out with the bath water and invalidate existing rules. Instead, we believe the solution lies in expanding the capacity of the Federal Government to provide regulatory compliance assistance to small business.

Thank you for the opportunity to speak before you today. I welcome any questions the committee may have.

[The prepared statement of Mr. Knapp follows:]

Statement by Frank Knapp, Jr.

before the Environment and Public Works Committee
Subcommittee on Waste, Superfund and Oversight Management

“American Small Business’s Perspectives on Environmental Protection Agency
Regulatory Actions”

April 12, 2016

Thank you, Chairman Rounds, Ranking Member Markey and members of the subcommittee. My name is Frank Knapp, Jr., I’m the President and CEO of the South Carolina Small Business Chamber of Commerce, a statewide, 5,000+ member advocacy organization working to make state government more small business friendly. I am also the board co-chair of the American Sustainable Business Council which through its network represents 200,000 businesses. ASBC advocates for policy change at the federal and state level that supports a more sustainable economy.

Today’s hearing topic is important for small business and the vitality of our economy. Good regulations tend to stimulate innovation and entrepreneurship in addition to limiting or preventing destructive forms of economic activity. Bad regulations, whether because they are not designed properly or are simply not needed, will be a burden on small businesses and thus harm our economy. Everyone here would prefer the former and not the latter.

However, even good regulations will have some negative impact on certain small businesses. The issue is—do the positive economic, social, environmental or health outcomes outweigh the negatives.

For example, well-constructed regulations that encourage alternative energy to reduce carbon dioxide emissions impede the use of fossil fuels, which reduces capital spending and jobs in the fossil fuel industries. However, alternative energy is much more responsive to technology-driven innovation, and so it provides much better opportunity for sustainable economic growth. In addition, it stimulates much more employment than fossil fuels. Each megawatt of electricity generated by wind and solar employs more people, pays higher salaries, and generates more capital investment than a megawatt of electricity generated from coal. In this case, such regulations not only achieve their environmental objectives but also greatly benefit our overall economy compared to the absence of these regulations.

The issue today is—does the Environmental Protection Agency and the federal government’s process of promulgating regulations adequately consider any negative impact on small businesses when developing a final regulation?

Twelve years ago we addressed this issue in South Carolina. Back then my organization worked with our state Chamber of Commerce and the state's NFIB to pass our Small Business Regulatory Flexibility Act modeled after the federal law. A few years ago 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 to satisfactorily amend the regulations to address unnecessary burdens on impacted small businesses. The Regulatory Flexibility Act works in our state because we provide the all-volunteer committee the resources they need to do an effective job on newly proposed regulations.

And there is the important point. If you want the regulatory process to be fair to all parties and you set up a mechanism to do that, it has to be adequately resourced.

Back on June 27th of 2012, I testified before the U.S. House Small Business Committee on this same subject. Mr. Keith Holman of the U.S. Chamber of Commerce also was testifying. I referred to Mr. Holman's filed written testimony in my testimony. Here is what I said back then.

"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."

That testimony was almost 4 years ago. Yet here we are still talking about the EPA's process of formulating regulations and questioning whether they are fair to small businesses. And here we are today with proposals not to adequately provide the resources to the EPA and other regulatory agencies to carry out the process Congress has enacted to protect small businesses but instead to erode the operational capacity of these regulatory agencies to do their jobs, as many so-called "regulatory reform" bills appear designed to do.

Of particular interest to the members of this subcommittee are the EPA's most recent rules—the Clean Power Plan and the Waters of the US. Are these good rules that have adequately taken into consideration the overall impact on small businesses so that not only will the desired objectives be achieved but done so in a way that minimize any negative impact on small businesses while creating benefits for the overall economy?

Regarding the Clean Power Plan, the ASBC and the South Carolina Small Business Chamber applaud the effort to reduce carbon emissions to restrain climate change and its significant negative economic impacts. Also, we understand that standards like the Clean Air Act lead to innovation and the creation of much-needed American jobs.

The Bureau of Labor Statistics shows that for every \$1 million of investment in a construction project 11 new jobs are created. For a coal-fired power plant requiring \$200 million worth of pollution control equipment, this equates to 2,200 jobs. Multiply this by dozens of projects around the country and an investment in air quality becomes a meaningful step towards economic growth and job creation even though it might lead to some loss of jobs in the coal industry itself.

Companies that make up the diverse pollution control industry's supply chain, consisting of businesses involved in engineering, design, construction, maintenance, transportation, and manufacturing of air pollution control systems and technologies stand ready to supply their services.

This month ASBC led a coalition of 25 business organizations, including the South Carolina Small Business Chamber, in filing an amicus brief with the D.C. Circuit Court of Appeals in support of the Clean Power Plan. The brief argues that unrestrained climate change will burden national, state and local economies with increased costs and business disruptions from droughts, flooding, reduced agriculture productivity, extreme weather, rising seas, and other disturbances. In addition, it points out that the Clean Power Plan will boost economic growth by generating new market-based solutions and new jobs in renewable energy.

Small business also supports the intent of the Waters of the US.

Polling commissioned by ASBC found that 92 percent of small business owners support regulations to protect our water and air, and that 80 percent supported the Waters of the US rule. Support for the clarification of federal rules under the Waters of the US crosses political lines, with 78 percent of self-identified Republicans and 91 percent of self-described Democrats supporting the rule.

Small businesses know that the risks of clean water disruptions are very real. In 2013, over a million gallons of manure were spilled into clean water sources. A spill in a Dane County, Wisconsin saw 300,000 gallons of contaminated manure spill into Six Mile Creek. Since then, the facility has had two other spills of another 100,000 gallons of manure. These spills threaten Wisconsin's dairy industry, which includes 10,290 dairy farms and accounts for nearly half of Wisconsin's agricultural sector, according to the Wisconsin Milk Marketing Board.

The 2014 Elk River chemical spill in West Virginia cost the state's economy \$19 million a day, according to a study from Marshall University. Wake Forest University estimated that cleanup of the 2014 Dan River coal ash spill in North Carolina cost upwards of \$300 million.

Besides the obvious environmental damage, water pollution brings huge economic burdens to small businesses, many of which may have to shut down temporarily if water sources are polluted.

In conclusion, the regulation promulgating process can produce good rules while protecting small businesses from unnecessary burdens if we provide the resources for agencies to expeditiously carry out the requirements Congress has already put in place. But the federal government's responsibility to impacted small businesses shouldn't stop here. Some small businesses will find compliance with federal regulations difficult. The answer is not to throw the baby out with the bathwater and invalidate existing rules. Instead we believe the solution lies in expanding the capacity of the federal government to provide regulatory compliance assistance to small businesses.

Thank you for the opportunity to speak before you today and I welcome any questions the committee may have.



The Advocate of South Carolina Small Business
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May 20, 2016

**Response to Chairman Inhofe's Questions from April 12, 2016,
Subcommittee on Superfund, Waste Management, and Regulatory
Oversight Hearing entitled, "American Small Business Perspectives on
Environmental Protection Agency Regulatory Actions"**

**Respectfully submitted by Frank Knapp Jr., President and CEO, South
Carolina Small Business Chamber of Commerce and Co-Chair,
American Sustainable Business Council**

Questions

1. This question references my closing statement about "expanding the capacity of the Federal Government to provide regulatory compliance assistance to small businesses." However, the specific sub-questions refer to the EPA compliance with the RFA.

Since these are two separate issues, let me first provide more detailed observations regarding regulatory compliance assistance. Here is an excerpt from my testimony to the Senate Committee on Small Business and Entrepreneurship on April 27, 2016, on this subject.

"Once a rule has been promulgated and hopefully the burden on small businesses has been reduced as much as possible, the job of the federal government is not done. Small businesses need to be educated about the new rule and, when necessary, provided regulatory compliance assistance. Congress has also set up a process for this, not only within every regulatory agency, but also through the SBA Office of the National Ombudsman. Where the Office of Advocacy works on the front end of the development of significant regulations, the Office of the National Ombudsman is charged with helping small businesses on all regulation compliance on the back end. It serves as the conduit for small businesses to have their grievances about compliance problems or other issues with federal agencies heard directly by the agencies in question in an effort for successful resolution. In this way the Office of the National Ombudsman and the agencies can

detect patterns of compliance problems so that the agency can revisit the rule. This important component of the rulemaking process is woefully underfunded and thus underutilized. If Congress really wants to help small businesses deal with needed federal regulations, invest more in this small business outreach, support and feedback loop.”

1.a. Now, in regard to the question of “what specific actions should the EPA take to improve compliance with the RFA”, based on the information available as to WOTUS it is my understanding that EPA personnel in Washington and around the nation participated in over 400 meetings with numerous impacted industries, individual businesses, local government, NGOs, and other associations before promulgating a proposed WOTUS rule in April of 2014. The agency did take into consideration the comments and made adjustments to the proposed rule as a result. Beginning in 2011 the EPA also worked closely with the Office of Advocacy while developing this rule. Then following the promulgation of the proposed rule, the EPA held more hearing with small entities. So it appears that at least in regard to WOTUS the EPA did meet with small businesses in their geographic areas and worked with Advocacy. We believe that it is very important to the RFA process that all federal agencies reach out to the nation’s impacted small businesses for meetings and not only hold meetings in Washington. The latter guarantees that only trade association lobbyists will attend, not the actual small businesses. Therefore, if the EPA follows the same inclusive procedures on other rulemaking efforts and makes a correct decision on whether to hold a SBREFA panel. I do not have any further specific recommendations for how the EPA can improve compliance with the RFA.

1.b. This question implies that I agree with the position that the EPA has been insufficient in compliance with the RFA. I do not have evidence that this is the case in general or specifically regarding WOTUS. The EPA believed that it complied with the RFA when it certified that the new WOTUS rule would not have a significant negative impact on a substantial number of small businesses and therefore it did not conduct a Small Business Regulatory Enforcement Fairness Act, or SBREFA, panel. The Office of Advocacy disagrees. The matter is now in the Courts where it should be for a final decision.

1.c. I am not aware of “any specific EPA budget request for increased resources to comply with the RFA.” However, given the extensive process involved in compliance with the RFA for major rules, budgetary concerns must be an issue even if the Agency is reluctant to bring this issue before Congress. The outreach process the EPA conducted for WOTUS as described above is a very costly endeavor. Given that the Agency has a finite budget for RFA compliance, business decisions must be made as to how much the Agency can afford to spend in the process. Unfortunately, this could mean that financial issues might compromise RFA compliance not only for the EPA but for any federal agency. The complaints that I have heard from other business organizations regarding WOTUS would imply that those organizations desired more time to be spent on the regulatory promulgation process. If that is desired for every regulation, that means more funding is necessary even if the Agency is reluctant to request it. Below is part of my testimony to the Senate Committee on Small Business and Entrepreneurship on April 27, 2016, on this issue.

“Everyone, including the critics of the rulemaking process, wants more outreach and better analysis of regulatory impact in promulgating a rule. So let’s invest in that. We have essentially starved the regulatory agencies and Advocacy while at the same time wanting both to do more. And then when the machine gets clogged up and controversial we want to fix the wrong problem and make more problems. The RFA process we have today simply needs more resources so it can run more effectively and efficiently. If you want agencies to cross every T and dot every I in the RFA process, give them the resources to do it so they can both perform their everyday tasks and conduct the quality rulemaking analysis and outreach we all want.”

2. This question raises the hypothetical scenario of an EPA regulation resulting “in a net loss in jobs” while only resulting in “minimal or symbolic environmental benefits”. Hypothetically speaking, this certainly doesn’t sound like a justifiable regulation. Unfortunately, today we only measure the economic impact of a regulation in terms of cost. To have a true picture of the economic impact of a regulation we need to look at all the economic benefits also. Below is part of my testimony to the Senate Committee on Small Business and Entrepreneurship on April 27, 2016, on this issue.

“We have created a public impression that all regulations are evil and if we would just get rid of them the economy will thrive. That’s the message the public hears but everyone here knows that regulations are needed for the benefits they yield.

“So why do we never see the benefits of regulations in any agency analysis? For example the EPA and the Corps estimate that permitting costs under the WOTUS rule will increase over \$19 million annually and mitigation costs will rise over \$59 million. These are direct costs and some believe that indirect costs should also be reported. But there is no analysis showing how these direct costs are also direct benefits to the local economy because most of this money will be go to local small businesses for goods and services. The money doesn’t just disappear. It flows through the local economy directly and indirectly.

“Even the U.S Chamber in its testimony to a Senate committee last week said that agencies are to analyze costs and benefits in the rulemaking process. The NFIB made a similar statement in its testimony last year.

“However, the positive side of the ledger is always blank when the potential impacts of regulations are analyzed. The economic, health and social benefits of rules put in terms of dollars is not considered by the Office of Advocacy and the regulatory agencies. Whether this is by statute or custom, this must change if we are to get a truly accurate data to make rulemaking decisions and give the public complete information about the value of regulations.”

3. The issue of regulatory uncertainty is very important. We certainly support a thorough examination of a proposed rule’s impact on small businesses before any rule is finalized. However, even the most thorough vetting of a proposed rule won’t eliminate regulatory uncertainty, which comes from both the length of time it takes to promulgate a regulation and court challenges. The length of time to develop a rule while obtaining all the input

needed from small businesses might best be addressed with more resources for the Federal agency to speed up the process. Unfortunately, I don't have a solution for the current lengthy court challenges to regulations. However, as I stated in my testimony to the Senate Committee on Small Business and Entrepreneurship on April 27, 2016, on this issue, it is clear that most regulatory reforms being proposed will only add to regulatory uncertainty.

"The result is not going to benefit small businesses which need fair, well-crafted regulations produced in a timely fashion. Instead the results will better be described as "deregulatory chaos".

- *Federal agencies will take even longer than the current years or even decades to promulgate regulations,*
- *There will be even more avenues for opponents of regulations to delay regulations through litigation,*
- *Businesses will face even more uncertainty due to the longer time needed to promulgate regulations and increased litigation."*

4. Without specific examples of the EPA rushing "the rulemaking process" to "meet a particular deadline" with the result being a "poorly written rule that is vulnerable to legal challenges", I can only address the theoretical problem in this way. Any time-deadlines for a rule is a Congressional issue. If a deadline is imposed on an agency and that agency is not given the resources to thoroughly engage with the impacted businesses in the promulgation process, then the end product might not be as good as it could have been. The solution to this hypothetical scenario is to either lengthen or remove the deadlines or provide the agency more resources to meet the deadlines. However, it is my experience that most major rules take years or decades to be promulgated. The rulemaking process for the recent Silica rule issued this year began in 2003. Yet, it too will be subject to a court challenge. So it doesn't follow that taking longer to promulgate a rule will lessen the chance for a court challenge. The latter is determined more by how hard the opponents of a rule, even one carefully crafted to reduce the negative impact on small businesses, want to fight to delay the rule's implementation—a strategy perfected by the largest businesses not small businesses.

5. I am not familiar with EPA's procedure for releasing final SBREFA panel reports. As a general practice, the public should have access to government reports as quickly as possible.

6. As a general principle, the more transparent any government process is the better. All agencies should strive to make their rulemaking process as transparent as possible. It is understandable that in regard to inter-agency conflict negotiations that those processes might be resolved more expeditiously if they are kept out of the public realm. However, in these situations once a final agreement is reached the result should be available to the public immediately.

Senator ROUNDS. Thank you, Mr. Knapp.

And now, to introduce our next witness, I would ask Ranking Member Markey to do the honors.

Senator MARKEY. Thank you, Mr. Chairman, very much.

We are very honored to have Dr. Reichert here with us today. Her office, her operation is in Somerville, Massachusetts. It is like equidistant from Tufts, Harvard, MIT, Boston University, all of these 250,000 students all within like a 3- or 4-mile radius of where she has set up this incredible Greentown Laboratories; and she now has dozens of startup companies all trying to capture this incredible green energy revolution, job creating, a millionaire making clean energy revolution, and it is our honor to have you here, Doctor.

Senator ROUNDS. Welcome, Doctor, and you may begin.

STATEMENT OF EMILY REICHERT, CEO, GREENTOWN LABS

Ms. REICHERT. All right. Thank you, Chairman Rounds, Ranking Member Markey, and Senator Inhofe, for giving me the opportunity to testify on the impacts of EPA's regulations on American small businesses. My name, as Senator Markey just said, is Dr. Emily Reichert, CEO of Greentown Labs. We are the largest clean technology incubator in the country, located in Somerville, Massachusetts, with 40,000 square feet of space used to enable entrepreneurs to solve the world's biggest energy and environmental challenges.

The mission of Greentown Labs is to enable a vibrant community of entrepreneurs to work on their visions and to provide access to space, resources, and funding that allows their early stage companies to thrive.

We offer roughly 25,000 square feet of prototyping lab along with co-located office space, a shared machine shop and electronics shop, immersion in a growing community of clean technology entrepreneurs, onsite events and programs designed to help small businesses rapidly grow their networks and their companies.

Greentown Labs was started in 2011 by four startup companies who needed inexpensive space to build prototypes. Back in 2011 our operating budget was just \$99,000 a year, covering rent and shared supplies for four companies without any Government assistance of any kind. It was a grassroots initiative.

Five years later, in 2015, Greentown Labs was home to over 40 companies, operating as a for-profit small business with a business of \$2.1 million and six full-time employees.

Overall, in 2015, 83 percent of our budget was privately funded in the form of members paying rent and large corporate entities sponsoring our programming and activities because they want access to the innovation coming out of Greentown Labs. Only 17 percent of our operating budget was from public sources, 2 percent of which was from Federal grants, a \$50,000 grant from the Small Business Administration for one of our programs.

In total, we have now supported 103 small businesses since our founding in 2011. In a recent survey of our alumni has shown that 86 percent of them continue to grow today, the majority of these in Massachusetts, but others have relocated to Texas, Colorado,

California, and Wisconsin and continue to grow their businesses in these States.

Greentown Labs tries hard to quantify the impact our companies have on our community. Today, 50 member companies call Greentown Labs home. Greentown Labs companies employ more than 400 people and provide nearly 300 indirect jobs as well. These companies and our alumni have raised more than \$180 million in both public and private funding, and in Massachusetts. This is all happening in one of the most heavily regulated States in the country.

Since being elected, Governor Charlie Baker has undertaken a review of State regulations. We now know that we have over 1,600 regulations that companies have to deal with to do business in the State. Many of these are the State's interpretation of Federal standards. But like in many other States, in Massachusetts Federal rules act as the floor, particularly when it comes to environmental regulations.

Over the last 9 years, Massachusetts has enacted a number of laws that increase our State's investment in renewable energy, clean technology deployment, and business regulations regarding these matters. It has also led to over 1 gigawatt of installed renewable energy capacity in Massachusetts as of 2015.

Over the same timeframe, Massachusetts has also grown to be one of the leading States in innovation, home to thousands of start-up companies, small businesses. According to the Massachusetts Clean Energy Center, a quasi-State government agency who issues an annual report on the clean energy industry and is now considered the gold standard whose methodology is used in 10 other States, job growth in the State's clean energy sector continues to grow by double digits every year since 2010, 11.9 percent in 2015 alone, which represents 10,500 new jobs.

For the purpose of this hearing, though, I want to share some specific examples of how companies at Greentown Labs incubator are creating new innovative products that benefit from some of the regulations passed and under consideration by the EPA.

In April 2012 the EPA put into effect regulations under the Clean Water Act to limit water pollution from aircraft and airport runway de-icing operations. In response to this, a young company in our incubator is developing a new electric-based plane wing de-icing method that will not only help airlines comply with this regulation, but will also help airlines save time and money on the runway and potentially remove all glycol, a toxic substance, from the de-icing of planes.

I mentioned another company in my written testimony that has benefited from the Clean Air Act. They help landfill owners to better monitor and utilize methane gas, allowing the owner to make money while reducing emissions of methane, a greenhouse gas with a much greater impact, 25 times more, than carbon dioxide.

Across the country, new companies like Greentown, the two Greentown startups I have mentioned are popping up every day. We see them in places from L.A. to New York City, to Oregon, to Texas, Chicago, Detroit, even Hawaii.

I know that many of the people on this panel with me believe that environmental regulations cause an unnecessary burden to

small businesses, but I, in my experience, have not seen that. Instead, I have observed EPA regulations to be a catalyst for new business ideas and new innovative products. And as this committee continues to review the impacts of EPA regulations on small businesses, I hope you will keep the experience of Massachusetts and Greentown Labs in mind.

Creating regulations that can help promote a cleaner and more efficient environment can also lead to job growth and create innumerable opportunities for new businesses.

Thank you again for inviting me here today and for the opportunity to speak on such an important issue.

[The prepared statement of Ms. Reichert follows:]



Senate Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management and Regulatory Oversight

Testimony on oversight related to Environmental Protection Agency
regulations' impact on American small businesses

Submitted by: Emily Reichert, Ph.D, MBA
CEO, Greentown Labs Inc.

April 12, 2016

Thank you Chairman Rounds, Ranking Member Edward Markey and members of the subcommittee for giving me the opportunity to testify on the impacts of the Environmental Protection Agency regulations' on American small businesses. My name is Dr. Emily Reichert and I am CEO of Greentown Labs, the largest cleantech incubator in the United States, currently home to 50 young companies.

I would first like to provide you with some background on Greentown Labs. We are located in Somerville, MA with 40,000 square feet of space used to enable entrepreneurs to solve big energy problems. The mission of Greentown Labs is to enable a vibrant community of entrepreneurs to work on their visions and to provide access to the space, resources, and funding that allows their early-stage companies to thrive.

We offer roughly 25,000 sq. ft of prototyping lab space along with co-located office space, a shared machine shop and electronics shop, immersion in a growing community of energy and clean technology entrepreneurs, and on-site events and programs designed to enable startups to rapidly grow

their networks and their companies. Images of our space are provided in our Appendix.

Greentown Labs was started in 2011 by 4 startups that needed space to get dirty and build things - something that was not possible in normal co-working spaces that are very useful for typing on a computer but not ideal for designing a solar powered cooling station. These 4 companies joined forces in a small space in east Cambridge, MA and quickly attracted a few more startups and some larger, more established companies that were intrigued by the ideas that were literally becoming products. Greentown's operating budget in 2011 was \$99,000 without any government assistance of any kind.

Flash forward almost 5 years and in 2015, Greentown Labs operated as a for-profit company with an operating budget of \$2.1 million, with a staff of 9 including 6 full time employees.

- Of that - \$1.3 million was revenue in the form of rent from our member companies
- \$293,000 was from sponsorships from private corporations
- And \$300,000 from the MassCEC and MassDevelopment in the form of state grants

And in 2015, Greentown received its first federal funding in the form of a \$50,000 grant from the SBA for one of its programs.

Overall, in 2015, Greentown Labs' operating budget was made up of 17% grants, 2% of which was from federal grants. Which leaves 83% of our budget made up by privately funded companies in the form of our members paying rent and large corporate entities sponsoring our activities, because they want access to the innovation coming out of our labs.

Today Greentown is home to 50 companies, we've had 3 locations, and we have supported 103 companies over that time. A recent survey of our alumni has shown that 86% of them continue to grow today, and the majority of these do so in Massachusetts.

And why is that important? Recently, Greentown Labs has undertaken some research to quantify the impact our companies have on our community.

Greentown Labs Impact #'s

- 50 current startup member companies
- Jobs Created in 2015 through Greentown Labs member companies: 400+
- Member companies total funding (money raised by companies) since 2011: \$180M+
- Member companies total revenue since 2011: \$15M+
- Direct economic output in 2015: \$182.5M+
- Direct gross state product value added to MA economy in 2015: \$83.8M+¹

The companies who are accepted to Greentown Labs are all at a later stage of development. Most of them have raised a small amount of money, and often have gone through an accelerator or business plan competition where they have learned some basics of business. Many people use the terms "Accelerator" "Incubator" and "scale-up facility" interchangeably but they represent very different things for startups. So I have provided a chart that we use at Greentown Labs defining these terms as we see them and outlining the very common route for our startups to come to Greentown Labs for your reference.

While we have not recorded how many applicants we have turned away since 2011, I can tell you that since 2014, Greentown Labs has received 100 applications and accepted 40 of those, often due to space constraints. We have also continued to operate with a wait list since January of 2015. I mention this because it shows to me that people are developing solutions to energy and environmental problems everyday that are leading to the creation of small businesses.

And in Massachusetts, they are doing so in one of the most heavily regulated states in the country. Since elected, Governor Baker has undertaken a review of state regulations in Massachusetts and we now know that we have over 1600 regulations that our companies have to deal with in one form or another.

¹⁺ = reported impacts found via IMPLAN version 3.4.1 software

Many of these are the Commonwealth's interpretation of federal standards, but like so many other states, in Massachusetts the federal regulations act as a floor and Massachusetts has decided to build on many of those regulations, particularly environmental regulations.

Over the last 9 years, Massachusetts has enacted a number of laws that increase our state's regulation and investment in renewable energy, clean technology deployment and business regulations regarding these matters. It has also led to over 1GW of installed renewable energy capacity in Massachusetts as of 2015.

Over the same timeframe, Massachusetts has also grown to be one of the leading states in innovation, home to not only thousands of startups, but also:

- The largest accelerator in the country, MassChallenge
- One of the largest, if not the largest, concentrations of clean tech startups in the country
- Greentown Labs, the largest clean tech incubator in the country

According to the Massachusetts Clean Energy Center (MassCEC), who issues an industry report on clean energy that is now considered a standard and whose methodology is used in 10 other states, job growth in the clean energy sector continues to grow.

Despite being in one of the most heavily regulated states in the country, in 2015, Massachusetts experienced the largest single year of growth in the clean energy industry since reporting began in 2010 at 11.9%, which represents 10,500 new jobs.

Overall the clean energy sector has added <40,000 jobs since 2010, with a total in 2015 of 98,895 jobs at 6,439 clean energy establishments - a growth rate of 64% over that time. Clean energy jobs now represent 3.3% of the

overall Massachusetts workforce. And these jobs are found in every region and county of Massachusetts.

Clean energy firms have also added 1500+ new employers statewide since 2010 with a steady annual growth of 7-12%. And of those businesses, the majority are small, 86.9% have fewer than 50 employees and 56.7% have 10 or fewer employees. Which is exactly where the vast majority of companies who call Greentown Labs home fall.

And for the purpose of this hearing, I wanted to share some examples of how the companies who have made their way to Greentown are actually taking advantage of some of the regulations passed by the EPA.

In April 2012, the EPA promulgated regulations under the Clean Water Act to limit water pollution from aircraft and airport runway de-icing operations - *77 Federal register 29168-29205, "Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category; Final rule,"*

In response to this, a young company from MIT developed a new electric based plane wing de-icing method that will not only help airlines comply with this regulation, but will also help airlines save time and money on the runway and potentially remove all glycol, a dangerous toxin, from the de-icing of planes.

To give you an idea of the costs this can save airlines, the glycol solution and application which has to be heated to de-ice the plane costs about \$4,000 per de-icing for small jets and \$10,000 per de-icing for commercial airliners. The annual costs for the aerospace industry amounts to around \$6 billion in the United States. Our startup company can help reduce these costs by 50% or \$3 billion.

And from an environmental standpoint, the glycol solutions employed in de-icing are extremely undesirable. This is due to the harmful effect of glycol effluent in large quantities, as well as the pernicious additives which are also present in the solution, some of which are proven carcinogens and harmful to sea life. Worse yet, 5.5 pounds of water and 15 kwh of electricity are required for the production of each pound of glycol de-icing solution, an

unnecessary waste of money, resources and time on the runway for companies and passengers.

We have other company's currently at Greentown Labs that have benefitted from increased air quality restrictions from the Clean Air Act. One specific company has developed hardware and software utilizing a wireless sensor network to optimize the extraction of methane from landfills through better landfill gas monitoring. The technology is designed for energy producing landfills, by harvesting methane gas from landfills, and has shown to increase efficiency by 25% in at least one location. The software and hardware provides an advancement over the existing technology that requires on-site monitoring and adjustments to optimally extract the methane utilizing wireless sensor networks. The reduction in methane results in less pollution and increased revenue from landfill gas-to-energy plants, all while the risk of noncompliance is mitigated.

While this company has benefitted from the enactment of regulations of the Clean Air Act, the interpretation of regulations by states and their enforcement can be tricky to navigate for small businesses who want to operate in multiple states - particularly for innovative companies whose technologies were not in existence at the time of the writing of the regulations. For instance, our methane monitoring company can give real time methane data readings on multiple valves vs. standard measurements which might include a monthly reading by a human on 1 release valve. The regulations somewhat clearly oversee the latter with no idea how to handle the former, even though dynamic data monitoring provides significantly better information for regulators and landfill owners.

Providing clarity for some regulations could help spur even more innovative companies who take advantage of the opportunities that regulations create - not only do they help protect our environment and clean our common spaces, but they create opportunities for new companies to spring up.

And not just in Massachusetts. Through the Incubateenergy Network, Greentown Labs has developed partnerships with more than 25 other cleantech incubators and accelerators across the country. We have signed agreements to share services with 4 other incubators in: Oregon, New York, Los Angeles, and Wisconsin and have more planned that create shared resources and connections for our companies in those locations. Collectively,

this group represents hundreds of cleantech companies who are likely benefitting from the passage of environmental regulations, just like the two companies I mentioned above.

Based on the experiences of Greentown Labs, and our partners around the country, it is clear that regulations to improve our environment are not stifling the growth of small businesses. In fact in our experience, environmental regulations are creating new opportunities for innovators from every walk of life to create new companies and new products and help regulators achieve their goals of a cleaner and safer environment. Certainly there are opportunities in regulation to be more adapting to new innovations, but the regulations themselves are certainly not stifling the growth of innovation and job growth - quite the opposite in fact.

As this committee continues to review the impacts of EPA regulations on small businesses, I hope you will keep the experience of Massachusetts and Greentown Labs in mind. Creating regulations that can help promote a cleaner and efficient environment can also lead job growth and create innumerable opportunities for new businesses. Thank you again for inviting me here today and for the opportunity to speak on such an important issue.



GREENTOWNLABS

May 17, 2016

Senator James M. Inhofe
Chair, Senate Committee on Environment &
Public Works
c/o Elizabeth_olsen@epw.senate.gov
410 Dirksen Senate Office Building
Washington DC 20510

Dear Chairman Inhofe,

Thank you for the opportunity to continue the very important conversation on how federal EPA regulations can positively impact startups and young companies across the country. It was a pleasure and an honor testifying before your committee in April and I hope that my answers to your follow up questions are useful as you continue the important work of the committee.

I have included your questions along with my respective answers below. Should you have any further questions regarding my initial testimony or follow-up answers, please do not hesitate to contact me.

Again, it was a pleasure meeting you and testifying before your committee. On behalf of the entire Greentown Labs community, we hope that if you are ever in the Boston area, you and your staff will come by and visit us. Thank you again.

Sincerely,

Emily Reichert Ph.D, MBA
CEO
Greentown Labs





GREENTOWNLABS

1. Dr. Reichert, your written testimony mentions instances where the start-ups you work with have benefitted from EPA regulation.

a. What type of consultation or other interaction did these start-ups have with EPA in developing those regulations?

I am not aware of any Greentown Labs companies directly lobbying the federal government, or any other level of government, for the development of any specific regulations. In many cases, they learn about an issue while in university and then develop a product to try and address the issue - finding out along the way that various regulatory agencies are also thinking about how to address the same problem.

Regularly, if somewhat unfortunately, the young companies we deal with treat most levels of government as an afterthought or an issue to be dealt with when it comes up. The exception to this is if they have used an existing regulation to spur their company.

b. Do you think there are situations where innovation is hindered due to overly prescriptive EPA rules?

In Greentown's collective experience, it has been less about EPA regulations, and more about different state's interpretation of the EPA's regulations that causes the most issues for young companies.

We view regulations as being designed to solve a problem or fix a scenario - which is exactly what many of our startup companies do and why regulations can create opportunities for new companies. By identifying environmental issues, regulations can help highlight problems to be solved. However, sometimes a technology can advance faster than regulations and that can be an issue for a young company.

2. Do you think the Office of Advocacy plays a meaningful role in the rulemaking process?

I was not aware of the Office of Advocacy at the U.S. Small Business Administration until I was asked to testify before your Committee, so I am not in a position to advise whether the office plays a meaningful role in the rulemaking process. After the senate sub-committee hearing where I testified, it became clear to me that it is likely in the best interest of Greentown Labs' members to have a better understanding of the various agencies that are designed to advocate on behalf of small business and I believe the SBA's Office of Advocacy is one of those.



Senator ROUNDS. Dr. Reichert, thank you for your testimony.

Senators will now have 5 minutes each for questions. I will begin the questioning.

Mr. Canty, in your testimony you discuss the Small Business Advisory Council that you are a member of. When I was working as a Governor in South Dakota, we had a similar panel that would regularly review State regulations. We referred it to as the Rules Review Committee. There are 41 States that have a similar plan in place. Can you tell us the benefits of having a stakeholder panel review regulations, and in particular how this panel helps ease the regulatory burden for small businesses?

Mr. CANTY. Thank you, Mr. Chairman. Yes, I have served on this committee for 4 and a half years, since its inception. What we find is that, first, when all stakeholders get around and are required to be around the formation of new policies, proposed policies for organizations, it becomes much more balanced. They begin to understand the needs and the costs better than what they might have been before. And with all good intentions, proposals that aren't quite so solid get weeded out very early in the process or get modified.

There are, the first year, as you might expect, a significant reduction of proposed policies being reduced, but right now it has settled into about 25 or 30 percent fewer agency proposals being done. But far more important, when those policies do get through and get passed, they are better, they are more solid, they are more business friendly, and they are accepted by everyone around the table because they all had a stake in it, and they are much more friendly to the business community.

Senator ROUNDS. Thank you.

Mr. Buchanan, many farm families and ranches will be impacted by the Waters of the U.S. Rule. These are small family owned, and in some cases the land and the farm have been passed down through family to family, generation after generation. Do you believe the EPA adequately took the unique characteristics of these family farms and family owned agricultural operations into consideration when promulgating the WOTUS Rule? And what impact will this rule have on these families?

Mr. BUCHANAN. Thank you for the question, Chairman Rounds. I would tell you that I categorically would say that, no, they did not take into account the impact that this would have to those family farmers. Thank you for recognizing that the majority of farmers and ranchers in this great Nation are truly family farmers and have operated on that land for many generations now, and will continue to do that.

The impact that my neighbors are beginning to see is that certainly as this hangs over our head, being able to make business plans and implement potentially new ag business plans are on hold because we don't really know where this is going to go. Additionally, any purchase or sale of land is in question now. What could that land be used for?

So the impact is growing and is beginning to scare rural America, and is really impacting the rights of private property owners, and I would hope that this committee recognizes that. Thank you, sir.

Senator ROUNDS. Thank you, sir.

Mr. Sullivan, EPA's Brick MACT Rule is another instance where it seems EPA overlooked the impacts on small businesses. EPA estimated the rule would cost \$25 million. However, a February 2016 U.S. Chamber report, which I would like to insert in the record, reported the cost to be as much as \$100 million per year. Importantly, more than 60 of the 70 U.S. brick plants impacted by the rule are small businesses, often family owned. In South Dakota, this could cost nearly 300 good paying jobs.

I understand EPA convened a small business review panel and the Office of Advocacy recommended the EPA should grant flexibilities to minimize the impacts on these already struggling small businesses. So can you help me understand what went wrong here?

Mr. SULLIVAN. Thank you, Senator. The brick industry is a very good case example of how the proverbial straw will break the camel's back. These are family owned businesses that, unfortunately, due to regulatory pressures over and over and over again, are rapidly just folding shop, and that gets at the challenge of process versus outcome. You can have a process that I think this entire panel would agree on, that if it truly engages the small business community in a constructive discussion, you can come up with better alternatives.

The challenge with the brick MACT and several other rules that impact the brick industry is that if you have a series of panels and a series of EPA rules, eventually just that overwhelming burden is going to crush an industry, and I am afraid that that is what has gone on here.

So the solution to that challenge I think goes beyond just the Reg Flex Act into an understanding of how EPA calculates the cumulative impact. It does a very good job of calculating and making public the cumulative benefits of many of the air rules, but I think it does not do as good of a job as measuring and making public the cumulative burden. And I think if the Agency is being public about both the cumulative benefits of many Clean Air Act rules, then I think that you deserve and the public deserves an equal assessment of the cumulative burdens on those same industries.

Senator ROUNDS. Thank you, Mr. Sullivan.

Senator Markey.

[The referenced report was not received at time of print.]

Senator MARKEY. Thank you, Mr. Chairman, very much.

Dr. Reichert, I was thrilled by your ability to lay out how new companies get created when EPA identifies problems that have to be solved. So can you expand upon that a little bit more? What gets unleashed when there is a clear pollution or environmental issue that is identified from the private sector perspective?

Ms. REICHERT. Absolutely. Thank you, Senator. In fact, I think I can best do that by sharing a few additional examples of companies that have responded to environmental regulations, already in effect or about to be in effect. So in addition to the young companies that I had mentioned previously, we have several others who benefit from new markets that are created by Clean Air Act regulations already in effect or about to be in effect.

So one company creates coatings for copper tubing, which increases condensation efficiency in power plants, increasing the

plant's overall efficiency and reducing emissions. And this company will benefit from the Clean Air Act's Clean Power Plan.

A second example, one of our companies provides highly sensitive infrared sensing of methane gas leaks. Two more of our companies provide technologies to capture or use natural gas from wellheads through the multi-phase compression or microturbine technologies that they have developed. And those companies all benefit from several different Clean Air Act regulations; one is about methane emission standards for new and modified sources in the oil and gas industry, a second is the Clean Air Act's oil and gas air pollution standards, and a third, stationary internal combustion engines also under the Clean Air Act.

Senator MARKEY. Thank you. So that is kind of exciting. You don't end the old industry; you add new technology that just keeps the old industry going, but with higher environmental standards met by innovative new technologies. So I think that is pretty much what we are talking about.

Mr. Knapp, in your testimony you are saying that the Clean Water Rule enjoys a lot of bipartisan support and that you are here representing, I think you said, 200,000, 300,000 small businesses?

Mr. KNAPP. Yes. The American Sustainable Business Council.

Senator MARKEY. Yes. Could you talk about why those small businesses support the Clean Water Rule?

Mr. KNAPP. Small business owners are nothing more than regular folk out there. Who doesn't want clean water? And that is what I have always told everybody. A small business person really is just like your neighbor; they just happen to own a business. They have the same concerns that everybody else has.

So to the degree that they feel that clean water is important and they support a regulation that would in fact guaranty that their fresh source of water is going to be protected. So it is not unusual for the results that we get from our polling, because those are the same results you get from polling of the general public.

Senator MARKEY. So can you talk a little bit about this balance between regulation on the one hand and cost to businesses with the clear positive impacts that come about because of the regulations? That creates, sometimes, a little bit of a conundrum in seeing the benefits that come as well as the obvious kind of constraints that a regulation might place upon an existing way of doing business, but yet there are clear positives as well.

Mr. KNAPP. Yes. Look, regulations exist and the rules exist because there is some outcome that we are seeking, the Government wants to happen. Congress has passed some type of legislation that is going to require the implementation, which requires rules.

So will there be impacted businesses that will be negatively impacted by a rule? Yes. But again, it is the overwhelming relationship between the negative response and the positive impact. And we know that regulations and rules will be responded to by the private sector. That is what the private sector does; they recognize where they can make money, and they go there. And if a rule was established that clearly sets a path for businesses to follow, they will follow it.

Does that mean that some businesses are going to be negatively impacted? Yes, it does. But what businesses really want are fair

rules; they want those rules to be set and to not be questioned all the time, because that then creates the uncertainty that we heard about here with the Waters of the U.S.

Senator MARKEY. So once you set the goals for social or economic or health or environment outcomes, then all of a sudden you get this incredible explosion of entrepreneurial activity, which solves the problem.

Mr. KNAPP. Which the doctor just talked about.

Senator MARKEY. Not just here at Greentown, but all across America as well. And that is kind of the balance that we have always struck since the beginning of the clean water and safe foods revolution back in the early part of the 19th century; it has always been a balance. But I think in the end it is pretty clear that the net effects of it are healthier, cleaner society, and many more jobs that were created in solving the problem.

So thank you, Mr. Chairman.

Senator ROUNDS. Chairman Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Let me follow up a little bit from Chairman Rounds' questions to you, Mr. Buchanan. Your testimony mentions how the Small Business Administration Office of Advocacy told the EPA that the WOTUS Rule will have significant economic impacts on small business.

The EPA ignored what I call this expert advice, refused to consult with small businesses, and said it certified that the rule would have no small business impacts. Now, clearly they don't have to do it. They will just ignore the recommendations. The Office of Advocacy is there to advise people of what is going to happen. What is your thought about that?

Mr. BUCHANAN. I would adamantly say that the EPA should not ignore that recommendation. We have to recognize now that SBA is set there for a purpose, and in this instance their ability to function especially with independence within this process is imperative. Agencies need to recognize that SBA is here to advocate and to communicate to the other agencies about the impact of any proposed rule to small businesses across America, so they have to be listened to and have to be an integral part of this process.

Senator INHOFE. Well, Mr. Sullivan, you just heard Mr. Buchanan say the EPA's failure to consult with small businesses against the Office of Advocacy's recommendation hurt its members. Now, do you have any recommendations that we can make, make it stronger or how to reconcile agency disputes with the Office of Advocacy? I mean, they are supposed to be consulting back and forth.

Mr. SULLIVAN. Thank you, Chairman Inhofe. I have included detailed recommendations in my written testimony. I will try to summarize. I think there are a couple of fundamental things that don't work, and one of them is the legal community saying, well, if there is a problem, then after EPA finalizes the rule we can go to court. I think in the world of a small business owner, in the world of a farmer, having EPA certify that it is not going to impact small business, for SBA to throw the penalty flag and then for farmers to have to wait 2, 3, 5, 7 years before a case is—

Senator INHOFE. Let me interrupt just a little bit here because you are telling me something I didn't know.

Mr. SULLIVAN. Sure.

Senator INHOFE. You are saying that they have to certify that it is not going to hurt, and this is in light of the fact even if they were told by the Office of Advocacy that it would?

Mr. SULLIVAN. Yes. It is just an interagency disagreement. I think what makes this unique is the Office of Advocacy's independent role. This committee certainly is aware that agencies should have deliberative discussions that are private and confidential to come up with recommendations.

The Office of Advocacy's role as an independent check on regulatory authority is a significant and unique authority within the Federal Government; however, it is limited. And one of those limits is when the Office of Advocacy says, I am sorry, but you cannot certify that this rule will not significantly economically affect small businesses, then the businesses have to wait until after the rule is finalized before they go to court.

There is an unfairness there. I think in the legal community we are satisfied by saying, well, you know, the law provides a legal backstop. But the reality is that backstop happens 2, 4, 7 years later, and actually what happens in those 7 years, as you heard from Mr. Buchanan, is uncertainty and other bad things. I think that Congress can take action and try to come up with ways for quicker and more efficient resolutions of that disagreement.

Senator INHOFE. And that is helpful. That is helpful.

Before I lose my time here, Mr. Canty, a lot of the regulations coming out of the EPA's Office of Air, the Air Office, called the Clean Power Plan, I think we all need to understand what this is. This is what the President came up with and made a commitment in Paris that we in the United States would reduce emissions by between 26 and 28 percent by 2025. They don't know how they are going to do it.

We even tried to have a hearing and the EPA didn't want to come in and tell us how they are going to do it. So obviously nobody knows how that is going to happen. But it would have devastating effect on the reliability, the reliability, the predictability.

Can you kind of walk through how even a brief disruption in electricity impacts the operation at one of your manufacturing offices?

Mr. CANTY. Thank you, Senator Inhofe. You are quite right, it is not only the extra cost to a manufacturing company like mine, but when we have outages, which we have on a regular basis, it is not just the 5-minute or the 30-minute outage that we have; it is the rebooting of equipment, it is the rebooting of personnel and the rebooting of software, it is the stoppage of work and then trying to get a whole team back working. The cost is pretty significant.

And when we look at relocating, taking into power considerations is critical what we do and how we do it, and that is happening in Ohio a great deal because of the Clean Air Act being proposed to, before their time, shut down a great deal of our energy that comes out of coal plants. Everyone wants clean air, but when you are pushing it faster than technology can garner it and faster than new capacity in other forms can take it over, we end up severely hurt-

ing manufacturing companies and other businesses that are desperate for that power.

Senator INHOFE. Thank you.

Senator ROUNDS. Thank you.

Senator Booker.

Senator BOOKER. Thank you very much, Mr. Chairman. Actually, we appreciate the thorough testimony from the witnesses, and any other questions I have I will submit for the record.

Senator ROUNDS. Very good.

At this time I think we are going to try to do one more round of 3 minutes each, and we will limit ourselves on it, but this will give us an opportunity to wrap up. Let me begin.

Mr. Sullivan, in your testimony you say that there are times when the EPA approaches the Regulatory Flexibility Act as merely a bureaucratic procedural hurdle. The RFA was defined to be a safeguard for small businesses when agencies seek to implement regulations that will impact them.

When it is viewed as simply a procedural hurdle, how does this affect the quality of the regulation and the thoroughness of the review of how the regulations will impact small businesses?

Mr. SULLIVAN. Thank you, Chairman Rounds. I think when agencies, including EPA, look at the Reg Flex Act as a hurdle it doesn't work. When they look at it from a constructive exercise it does. That means committing to having a SBREFA panel early in the process, it means listening to the small business owners before the ink is dry on the proposed regulation, and it means working with the small businesses all the way through the rulemaking process, and it doesn't stop there, the actual compliance and implementation process. And if that is the case, it is a constructive dialogue, it is not an adversarial dialogue, and it can work.

Senator ROUNDS. Mr. Canty, you will soon be traveling to Poland, Germany, and China in order to begin the process of importing products for your company that you used to make in-house. Can you explain what about the regulatory environment has made it impossible for you to continue to produce these products in the United States? And when this happens, what is the overall impact on your business, including jobs in your company?

Mr. CANTY. Thank you, Mr. Chairman. We have grown in the past 10 years our employment by over 400 percent. Our company has grown in revenues by over 500 percent. Our goal has always been to in-source everything. But the magnitude, the cumulative magnitude of regulations from the EPA, from OSHA, from the Department of Labor, from the NLRB that have been passed and are currently in the process of being passed are just becoming so costly and so cumbersome that it drives manufacturers like us to go overseas, where they don't have to comply with some of those costs and certainly not to the level that they have to do here.

They also end up having an unknown. We don't know what is going to come this year or next year or the year after. What additional escalating costs are going to be coming? How are we going to have to comply? And to what level are we going to have inspectors, surprise inspectors, whether it is the EPA, in a very clean company that we have, or OSHA or someone else come in and say you are doing it wrong, so you are going to get tens of thousands

of dollars of fines because you didn't know about the rules, you didn't understand the rules? That is a huge issue. That is as important to us as the costs are.

And the impact on our company. We have invested millions the past 10 years, we are a small company, in new technologies and new equipment, processes and people. We have technology and equipment no one in the world has at this point. That won't happen with some of these product lines; it is going to go overseas. And the technology and the jobs and the processes and our manufacturing prowess both with our company and this country are going to continue to be shifted overseas instead of right here, made in America, where I would just as soon have it be.

Senator ROUNDS. Thank you, Mr. Canty.

Senator Markey.

Senator MARKEY. Thank you very much.

We only have 3 minutes. I want to give you, Mr. Knapp, and Dr. Reichert a chance to deal with this question of whether or not these environmental regulations, in their own way, create a bubbling, boiling caldron of competitiveness trying to create the new ideas to make our country cleaner and safer on the one hand, but also more prosperous with homegrown jobs.

So maybe you, Mr. Knapp, you can talk about the 200,000 companies that you are representing in this sector; and you, Dr. Reichert, maybe you can talk about the Massachusetts challenge, this accelerator going from concept to execution and starting up new companies to solve these problems.

Mr. KNAPP. I am going to let the doctor talk about the specific acceleration of companies. I want to address some things, if you don't mind, Senator, some things that were said. The Clean Power Plan is going to be implemented by the States. It is a goal set by the Federal Government, by the Administration, EPA, but it will be up to each State to decide how they are going to achieve that goal.

I don't think that any State is going to then say we are going to shut down electricity to do that. I know in South Carolina we are very fortunate, we have two nuclear plants being built that will take care of 80 percent of our goal. Coincide or not, we are going to be sitting pretty good.

But nevertheless, the proof is in the economic data that clearly shows that when you invest in new technology, you grow more jobs. I will note that you probably said that you have over 100,000 clean energy jobs in Massachusetts, and congratulations on that. I will tell you that that is actually more jobs than the coal mining industry right now. So you are going that way, and they are going the other way. But on balance we are producing a healthier and stronger economy with new technology.

Senator MARKEY. Dr. Reichert.

Ms. REICHERT. Thank you, Senator. So, in my experience as CEO of Greentown Labs since 2013, we have seen just incredible growth in the innovation in clean technology sectors here in Massachusetts. I can speak especially about all of the different support systems that have sprung up, whether they be accelerators, incubators, and other means of support to help these early stage companies get off the ground.

It is a tough thing to do, right, you are going from an idea to something that you make in the lab to something that you hope can be 5 that work in the lab to 50 that work in the field to 1,000 that hopefully work in your first customer's shop. So it is a real challenge that these startups face. They struggle with it, but it is also an incredible opportunity, and so many of them are doing so well, and we just see that really all over Massachusetts.

But we also are in touch with incubators from around the country, whether they be in Texas or Michigan or Illinois, California, New York, Hawaii. All of these other incubators we work with who are also helping early stage companies to develop their technologies, they are seeing the same thing, too.

Senator MARKEY. When I look at MIT, I know there are 2,000 kids at MIT who have self-selected themselves into the energy club. So that is 2,000 kids with 800s on their boards saying, I want to work on energy issues, and they want to do well and do good. In other words, they would like to solve the problems and get rich at the same time.

And that is not just at MIT, it is at every college all across America, regardless of the State. These kids are there, readying to go to solve the problem. And like you are saying on methane, there is a new technology there that could be used and applied to solve the problem of whether or not these other plants ever have to shut down. They just found a way of reducing by 95 percent the methane by unleashing this new technology.

So I just think it is very exciting to our country, and the potential is really unlimited in this sector, and I think that all energy technologies, as a result, can flourish simultaneously.

Thank you, Mr. Chairman.

Senator ROUNDS. Senator Boozman.

Senator BOOZMAN. Thank you, Mr. Chairman.

First of all, being from Arkansas, I want to welcome our Oklahoma neighbors that are in the audience from Oklahoma Farm Bureau, and then also USRA.

Mr. Buchanan, tell me what we can do to better encourage rule writing that takes into account impacts to small business.

Mr. BUCHANAN. Thank you for the opportunity, sir, and good to see you again.

I want you to know that what I have heard on this panel, and hopefully this answers your question, is that some people believe that Government regulation drives ingenuity and innovation and meets new needs. I will tell you that 6 million members of American Farm Bureau who are family farmers and ranchers are meeting needs today by using technologies that the market drives.

There is not a one of us that produces product that somebody doesn't want to buy. We have the ultimate regulator, and that is the American consumer. And if we are producing a safe and a quality and an affordable product, the American consumer will continue to do business with us. Regulations will do nothing but handcuff us and handicap us. I'm getting all soapbox a little bit, sir.

Senator BOOZMAN. No, we want you to get on your soapbox. That is good.

Mr. BUCHANAN. I would hope that we would recognize that regulations placed on American farmers and ranchers become, in my

view, somewhat of a food snobbery. There are many amongst us in this Nation that are having difficulties feeding their families today. In fact, in my home State of Oklahoma, one in four children goes to bed hungry at night. Food insecurity is a big issue across this Nation, across the world. I would ask you folks who can write regulations or not write regulations to not handcuff, not handicap American agriculture.

Think that when you go to the grocery store, regardless of where you shop, Senator Boozman, if that is at a discount grocery store or the boutiques, or a farmer's market on a Saturday morning, the American public today, as I alluded to, enjoys the most abundant, the highest quality and the most affordable food sources they have ever had, and that is a result of American agriculture meeting the need of the market. I am a market driven guy. Call me naive. I believe if the market requests something, wants something, that American farmers will meet that demand.

So to answer your question, Senator Boozman, what we can do to encourage rural America and American agriculture is—being a smart aleck here—get out of our way, give us the opportunity to continue to feed and clothe and start doing fueling for this Nation. We are ready to do that job, we want to do that job and will do it if you give us the chance. Thank you, sir.

Senator BOOZMAN. Thank you.

Mr. Sullivan, as you know, the EPA often creates new mandates under the sue-and-settle process. Here is how it works: the EPA will be sued by a left-wing law firm or lobbyist group; then the agency will settle the lawsuit with the group, agreeing to pass new mandates by negotiated deadline; the courts rubber stamp the agreement. In the end, the Agency gets more power, and the law firms and lobbyists get what they want, too.

Do you think these negotiated deadlines from sue-and-settle agreements can rush critical interagency reviews such as those required under the Regulatory Flexibility Act?

Mr. SULLIVAN. Yes, I do.

Senator BOOZMAN. Very good. What kind of harm and consequences are caused by the rushed interagency reviews under the Regulatory Flexibility Act?

Mr. SULLIVAN. Thank you, Senator. The harm that is caused by deadlines, whether real or false, are that agencies don't listen to small business. I am a dad; I have two little boys, and I learn every day that what helps our family is when I listen to them. Thank goodness they are not always right, but listening makes a big difference. And I think that when folks have deadlines and the incentive, every incentive is to pass a rule, then an agency is disinclined to listen, and based on that input from small business make changes that both meet the underlying statutory goal and minimize the burden on business.

Senator BOOZMAN. Very good.

Thank you, Mr. Chairman.

Senator ROUNDS. Senator Booker, would you care to?

Senator BOOKER. No.

[Laughter.]

Senator ROUNDS. OK. Very good.

Senator INHOFE. I haven't had my 3 minutes.

Senator ROUNDS. Oh, I am sorry. Mr. Chairman, would you care to take 3 minutes?

Senator INHOFE. Yes.

[Laughter.]

Senator INHOFE. Let me just share something that everybody in this room knows, and that is I am very thankful that the courts have gotten involved in some of these. What we consider, Mr. Knapp, the ones out in my State to be the most significant over-regulations, if you might, would be the WOTUS. In fact, I think I mentioned earlier that when I talked to Mr. Buchanan in his capacity as the President of the Oklahoma Farm Bureau, he identified the WOTUS bill. And then the other is the Clean Power Plan.

But the courts have come along, the Sixth Circuit put a stay on the WOTUS bill, so you have breathing room now. We don't know what the outcome is going to be. Then the U.S. Supreme Court put a stay, issued a stay on the Clean Power Plan. And of course, that is the one where we had some 27 States, more than half the States had lawsuits against the EPA on that particular regulation, the Clean Power Plan.

Now, that is all good, but it tells me that if we had done a better job of passing the regulations to begin with it wouldn't be necessary for the courts to come in and intervene. I was just on the Senate floor today with a giant chart just like this on the Clean Power Plan. If you look at what is going to happen, on February 9th the stay took place; June 2nd the case is before a three judge panel. It goes on all the way back. It is going to be 2018 before there is going to be any final decision on this thing.

Now, I see that as good news, but it is a problem because, obviously, if they had done the job right in the first place, we wouldn't have had to have all this unpredictability.

Do you agree with that, Mr. Buchanan?

Mr. BUCHANAN. Absolutely. I would assume, sir, sitting in your chair, strategically, you would be able to slow-play that. That might be a good thing, but I would tell you that when I am getting ready to plant a cotton crop and my fellow farmer neighbors and ranchers in Oklahoma are trying to get the inputs that they need to produce whatever crop they are going to produce for the coming year, the inability to know what is coming down, the inability to know what EPA or anybody else might place a new regulation upon us really makes it very tough to do business.

And if I may, sir, one thing that while agriculture has the mic, we would like to take advantage of that, and I want you to know that it appears that many times we are overlooked, being land-owners, about how we treat the land, and I hope it doesn't fall on deaf ears, but the majority of farmers don't have big 401(k) accounts, they don't have great big stock holdings; they have investment in land, and that is their retirement plan. And that retirement plan will be passed on to their sons and daughters and family members. And why in the world would anyone in good conscience pass on something to their family members that was polluted or ruined or somehow infringed upon the ability to produce?

Senator INHOFE. There is a mentality that somehow Government has to intervene to make sure you are taking care of your property and all this. I had a meeting in my office; there are four people

here that were in my office a couple hours ago, and this idea, they are more concerned than anybody else. That is why the partnership program has been one of the most successful programs that we have had. It has been very successful in Oklahoma.

Thank you, Mr. Chairman.

Senator ROUNDS. First of all, let me just say thank you to all of our panel members, and Ranking Member Markey and Chairman Inhofe. The idea behind this is to get good information, to learn, to see what we can do to do better, and it requires input from all sides, and that is what we are receiving here today.

I would like to thank you for taking the time to be with us today, and I would also like to thank my colleagues as well for attending this hearing and their thoughts.

The record for this meeting will be open for 2 weeks, which would bring us to Tuesday, April 26th.

With that, this hearing is adjourned. Thank you.

[Whereupon, at 3:53 p.m. the committee was adjourned.]

