S. HRG. 114–303

OVERSIGHT OF EPA UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

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

JUNE 7, 2016

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C O N T E N T S

OVERSIGHT OF EPA UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

TUESDAY, JUNE 7, 2016

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

The committee met, pursuant to notice, at 2:36 p.m. in room 406, Dirksen Senate Office Building, Hon. Mike Rounds (chairman of the subcommittee) presiding.

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

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

Senator ROUNDS. Good afternoon, everyone. While we are waiting on Mr. Markey to arrive, I think we will begin with opening statements just to preserve your time as well.

I would like to, first of all, let you know that the Environment and Public Works Subcommittee on Superfund, Waste Management, and Regulatory Oversight is meeting today to conduct a hearing on Oversight of EPA Unfunded Mandates on State, Local, and Tribal Governments. Today we will examine the EPA's compliance with the Unfunded Mandates Reform Act and the impact of unfunded mandates imposed by the EPA on State, local, and tribal governments.

I am pleased our witnesses include State, local, and tribal representatives with extensive experience in balancing their demands required of States, localities, and tribes in complying with EPA regulations while managing limited resources and budgets.

The Unfunded Mandates Reform Act, or UMRA, was enacted in 1995 and sought to avoid imposing unfunded Federal mandates on State, local, and tribal governments and to make certain Federal agencies take costs into account when imposing new regulations.

When a Federal agency seeks to impose regulations on a State, local, or tribal government that will result in $100 million or more a year in expenditures, UMRA requires Federal agencies to evaluate a reasonable number of regulatory alternatives and choose the most cost effective alternative that will meet the regulatory goals of the agency without imposing unreasonable compliance costs on smaller governments. However, the EPA's overly burdensome and aggressive regulatory agenda has resulted in billions of dollars in

regulatory costs on State, local, and tribal governments and often leads to citizens' footing the bill.

Under the current Administration, the regulatory burden imposed by the EPA on the American people has steadily increased. According to the American Action Forum, from 2009 to 2016, the EPA has finalized 163 overall regulations at a regulatory cost of $312.2 billion.

The number of unfunded mandates being imposed by the EPA has also increased. From 2005 to 2008, EPA finalized seven regulations that triggered UMRA. However, from 2009 to 2014, the EPA issued 19 rules that contained unfunded mandates, a total of more than three annually. Further, in just the past 2 years, the EPA has moved forward with finalizing multiple regulations that will impose unprecedented costs on State, local, and tribal governments.

Despite the Administration's insistence that most of these rules are not unfunded mandates, in reality, rules such as Waters of the U.S., the ozone NAAQS rule, and the Clean Power Plan will undeniably result in hundreds of millions of dollars of compliance costs imposed on small governments faced with limited resources. For these rules, State, local, and tribal governments were not properly consulted throughout the rulemaking process as required by UMRA. The EPA finalized these regulations without considering the impact these regulations will have, and the EPA did not consider alternatives that would be more cost effective and easier to comply with before imposing these large, one-size-fits-all regulations that will have little environmental benefit.

As a result, State, local, and tribal governments will be forced to use limited resources to comply with burdensome Federal regulations when they could put them to better use providing basic services and benefits to their citizens. Further, some small governments have no other choice but to raise taxes on American families in an attempt to manage the cost of complying with these Federal regulations.

UMRA was created to make certain Federal agencies took the time to consider how Federal regulations would impact those required to comply with them. Unfortunately, the EPA has issued regulations in a way counter to the core intent of UMRA and continues to impose burdensome, costly regulations without undertaking proper consultation process or analyzing more cost effective alternatives.

Federal agencies cannot continue to impose billions of dollars in regulatory costs on State, local, and tribal governments. We must recognize the unique characteristics of these governments that are tasked with managing multiple Federal, State, local and responsibilities with limited resources, while also trying to provide for American families. State, local, and tribal governments should be equal partners with the EPA in the regulatory process rather than victims of an adversarial regulatory process.

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.

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

Senator MARKEY. Thank you, Mr. Chairman, very much, and I thank you very much for scheduling today's hearing.

Imagine rivers catching fire, cities choking on smog, and toxic chemicals seeping into the classrooms of school children. Imagine an odorless, tasteless, and colorless toxic gas being sprayed across your entire community. These aren't the plots of a horror movie, but the stories of the Cuyahoga River, Los Angeles, Love Canal, and the former prolific use of the insecticide DDT, described by Rachel Carson in her book, Silent Spring.

These catastrophes started an environmental revolution in our country. President Nixon created an Environmental Protection Agency in 1970, saying that we must preserve "the earth as a place both habitable by and hospitable to man." And in an unbelievable decade of environmental activism between 1970 and 1980, Congress passed the Clean Water Act, the Safe Drinking Water Act, the Toxic Substances Control Act, and the Resource Conservation and Recovery Act, and significantly strengthened the Clean Air Act and the Federal Insecticide, Fungicide, and Rodenticide Act.

These laws have saved countless lives and billions of dollars in health costs and created an expectation that the air we breathe, the water we drink, and the land we use are safe.

Much has changed since those bedrock environmental laws were first enacted. Eight-track tapes, the Ford Pinto, and pet rocks were, thankfully, left in the 1970s. But what has also changed is that EPA has been so effective that people now take clean air, clean water, and land that is also clean—they take those laws for granted.

Contrary to the doom and the gloom prognostications of polluters, we have cleaned up the environment and grown the economy at the same time. Since the strengthening of the Clean Air Act in 1970, there has been a 70 percent reduction in smog, a 70 percent reduction in soot, and a 70 percent reduction in other pollutants. Meanwhile, American gross domestic product has grown by more than 200 percent.

From Flint, Michigan, to the Tar Creek Superfund site on the lands of Chairman Berrey's Quapaw Tribe, we have a responsibility to ensure that all people have access to clean air and safe water and land. The Unfunded Mandates Reform Act was enacted in 1995 as a way to better understand the economic impact of Federal mandates on State, local, and tribal governments and ensures that they are consulted, establishes a procedural mechanism for Congress to block consideration of legislation containing unfunded mandates, and requires detailed cost-benefit analysis.

Since 1995, Executive Orders 12866 and 13123 have also established cost-benefit analysis requirements for agency regulations. Similarly, the Administrative Procedures Act requires agencies to conduct cost-benefit analysis when issuing rules.

The EPA is actually the most aggressive agency of the entire Federal Government in implementing Executive Order 13123, having voluntarily applied its requirements to more of its rules than required, which has resulted in a 10-fold increase in EPA rules requiring consultation with State and local governments. Yet some in

Congress want to add even more requirements, analysis, and roadblocks to the already lengthy and extensive regulatory process.

Everyone on this committee agrees that the EPA should have to do cost-benefit analysis and consult with stakeholders. Everyone should also agree that adding so many layers to the rulemaking process that it becomes paralyzed will result in the erosion of the important public health protections Congress intended these laws to provide, because undermining our public health gains could truly be the beginning of a new horror story.

Mr. Chairman, I thank you for having this hearing, and I yield back the balance of my time.

Senator ROUNDS. Thank you, Senator Markey.

Our witnesses joining us for today's hearing are Mr. George Hawkins, CEO and General Manager, District of Columbia Water and Sewer Authority; Mr. Robert Glicksman, Professor of Environmental Law, the George Washington University; Hon. Senator Mark Norris, who is the majority leader of the Tennessee General Assembly, on behalf of the Council of State Governments; Hon. Christian Leinbach, Commissioner Chair, Berks County, Pennsylvania, on behalf of the National Association of Counties.

And I would like to call upon Chairman Inhofe, as the senior member from Oklahoma, to introduce our final guest today.

Senator INHOFE. First of all, let me say that it is really nice to have John Berrey here. John Berrey is the Chairman of the Quapaw Tribe in my State of Oklahoma. We have been good friends for many years, as have Senator Boozman and John Berrey.

But, you know, I suffered through being mayor of the city of Tulsa through over-regulations and unfunded mandates, and I remember, as you pointed out, Mr. Chairman, in your opening statement, that we had to start passing tax increases because these mandates were in fact mandates, and they were unfunded. And I remember the first act I had to do was to pass a 1 cent tax increase just to take care of unfunded mandates.

So it is a problem that has been there for a long time. Yes, right now I have the Congressional Record in front of me from 1995, but our effort goes all the way back to 1979.

But back to John Berrey, a great guy, a good friend, and who is going to give us a perspective that I don't believe we have had this before, as to the tribal effects that come from unfunded mandates.

Thank you, Mr. Chairman.

[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 oversight hearing, and thank you to our witnesses for being here to testify—in particular, our State, local, and tribal representatives.

Today's topic is especially important for me because the time I spent as Mayor of Tulsa showed me how difficult it is for cities to balance compliance with unfunded Federal mandates while also responding to various local concerns and budget constraints. At that time, unfunded Federal mandates on Tulsa, primarily those from the U.S. Environmental Protection Agency (EPA), forced me to pursue a 1 cent sales tax for capital improvements. I was also on the Board of Directors for the Conference of Mayors, along with Senator Feinstein when she was a mayor, advocating unfunded Federal mandates reform, so this is a bipartisan concern that has been ongoing.

Indeed, I was an original cosponsor of the Unfunded Mandates Reform Act (UMRA), enacted in 1995, because I thought it would serve as a useful tool to safeguard other levels of government from unjustified mandates by the Federal Government.

Unfortunately, as this committee's oversight has exposed, EPA's regulatory process has a pattern where the Agency evades the requirements in laws that are meant to serve as a check on EPA's regulatory overreach.

EPA has used UMRA's definitions and exemptions to their advantage to push the Administration's priorities through the rulemaking process while minimizing the far reaching effects of its rules. For instance, EPA claimed its Waters of the U.S. (WOTUS) rule and so-called Clean Power Plan do not trigger UMRA because the rules are not expensive enough. We will hear from our witnesses today about how these rules, and many more, will impose significant costs on State, local, and tribal governments, despite EPA's assessment. It is astounding that many of EPA's costliest and most controversial rules have escaped UMRA's coverage.

While often avoiding UMRA's requirements on major rules, Obama's EPA has still been promulgating more rules that trigger UMRA than the previous Administration. Government-wide, the Office of Management and Budget has reported that rules on State, local, and tribal governments triggering UMRA have overwhelming been issued by the EPA.

Even in instances where EPA has reviewed a rule triggering UMRA, the Agency falls far short of the law's consultation requirements. Consultation with State, local, and tribal representatives is a requirement set forth in UMRA as these governments all play a critical role in regulatory compliance. Yet witnesses today and those at many other hearings have explained EPA's approach to consultation is a mere check-the-box exercise.

Better consultation is needed to align EPA's rulemaking process with the processes of other governments. For instance, many EPA rules, such as the Clean Power Plan, require State legislatures to pass legislation to give their State agencies the authority and resources to implement the mandates. Further, State, local, and tribal governments must all be coordinated in planning the implementation of these rules and relay to EPA various technical challenges they will face in implementing the rule. This consultation should happen before rules are even proposed to allow for sufficient time to plan and for rules to be altered or scrapped based on co-regulators' feedback.

This is why it is critical we hear from our State and local partners and conduct oversight over EPA's implementation of UMRA. Above all, we need to ensure that EPA action upholds the cooperative federalism framework where various levels of government work together to craft fair and efficient rules in a cost effective manner. I look forward to hearing from our witnesses today who will share their on-the-ground perspective of EPA's compliance with UMRA and implementation of EPA unfunded mandates.

I ask that my full statement be entered into the record. Thank you.

Senator ROUNDS. Thank you.

Chairman Berrey, welcome.

Now we will turn to our first witness, Mr. George Hawkins, for 5 minutes.

Mr. Hawkins, you may begin.

STATEMENT OF GEORGE HAWKINS, CEO AND GENERAL MANAGER, DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

Mr. HAWKINS. Good afternoon, Chairman Rounds, Ranking Member Markey, distinguished members of the Subcommittee on Superfund, Waste Management, and Regulatory Oversight. My name is George Hawkins. I am the Chief Executive and General Manager of the District of Columbia Water and Sewer Authority, more commonly known as DC Water.

DC Water is one of the few "one water" utilities in the country, providing drinking water, waste water, and storm water services from one enterprise to millions of retail and wholesale customers in the Washington, DC, region. DC Water is regulated by EPA Re-

gion 3 for Safe Drinking Water Act and Clean Water Act compliance. From an environmental health and public health perspective, these seminal pieces of legislation have brought forth tremendous benefits.

Growing up in the suburbs of Cleveland, Ohio, I recall visiting the Cuyahoga River on a class field trip in 1969 and will never forget seeing the surface of the river, which looked like a finger painting, water swirling with colors and powerful aromas. The same year of my visit, the Cuyahoga caught on fire from sparks of a passing railcar and burned for a week.

Today, thanks to the Clean Water Act, many of our rivers are healthy and thriving. Today, thanks to the Safe Drinking Water Act, the overwhelming majority of people in this country have safe, reliable drinking water at the tap 24 hours a day, 7 days a week, and 365 days a year.

In my view, this outcome is one of the great public policy accomplishments of the last century and one of the often overlooked miracles of modern society. However, it is the success of these statutes that highlights the need to be flexible and thoughtful to ensure that we continue to derive success in the future. We still have water quality challenges to overcome and new threats on the horizon.

Currently, DC Water is in the process of implementing two massive projects with a total cost approximating $4 billion. Under the terms of a 2005 consent decree, DC Water is implementing the $2.6 billion Clean Rivers Project. The first phase is underway to construct a massive underground tunnel system to control combined sewer overflows to the Anacostia River.

Our second massive undertaking involves removing nutrients from our treated water at our Blue Plains facility. EPA's discharge permit requires us to reduce dramatically the level of nitrogen in treated water we discharge into the Potomac River, which leads to the Chesapeake Bay. The recently completed enhanced nitrogen removal project cost approximately $1 billion.

DC Water has received some Federal funding for these initiatives, but the overwhelming portion of these projects is funded by our ratepayers and wholesale customers. Beginning in October of next year, the average monthly bill for a residential customer will for the first time be over $100, more than double the average bill when I arrived in 2009.

Given the declining role of the Federal Government in funding water infrastructure, utilities like DC Water must account for all of our costs in the rates that we charge our customers. The price of clean and reliable water is increasing, and so is the need to replace aging infrastructure.

I support full-cost accounting for water services that enables DC Water to fund our needs and enables our customers to make appropriate market choices on water use and conservation. I state this view with two reservations. First, as you well know, the District of Columbia is an urban area with a very high cost of living and a sizable low income population. Unfortunately, our affordability analysis demonstrates that many of our customers struggle to pay their water and sewer bills and will have even more challenges in

the future. This scenario is all too familiar to most jurisdictions across the country.

The practical consequences that many jurisdictions are not able to raise rates to cover their needs because of the limitations of their lowest income customers. With constrained income, utilities will nonetheless undertake mandated work, reducing focus on basic infrastructure investments. The condition of these assets then continues to deteriorate, and utilities risk falling into a downward spiral of poorer service and reduced support.

Second, I am also concerned that the success of our Nation's water statutes pushes us to continue doing what we have always done, just more so, to a point of drastically declining benefits at the margin. DC Water faces enormous escalation of costs in reducing nutrient discharges. For the years 2000 to 2015, the capital cost to remove 1 pound of nitrogen has increased about 380 times. I believe there is agreement that Chesapeake Bay goals are well intentioned and deserving, but I also believe they could be met with a more flexible and holistic watershed approach that would include regulating non-point sources like runoff from suburban development and agriculture.

I want to note that EPA has made progress in considering the fiscal impact of their regulations. Specifically, EPA's Integrated Planning Framework provides the flexibility to consider community affordability and financial capability when making Clean Water Act determinations.

Additionally, EPA Region 3 recently negotiated DC Water to modify our $2.6 billion consent decree for combined sewer overflows. As part of these negotiations, EPA thoughtfully considered the economic burden of the previous 20-year construction timeline placed on our low income customers. The modified agreement extends the latter stages of the project, which allows us to spread out rate increases.

I am confident that no one intends for regulatory requirements to feed into a cycle that generates poorer service and diminished support. I am also confident that a clear solution exists: a Federal assistance program for low income customers. An example of a similar assistance program exists in the long standing and long successful Federal program to subsidize heating assistance, the Low Income Heating and Energy Assistance Program. Providing an income based assistance program for water utility bills would help our poorest customers with this essential service, enabling water utilities to increase rates for other ratepayers who can afford to help invest in water services and infrastructure improvements.

I commend the subcommittee for holding this hearing and bringing attention to the impact Federal regulations have on State, local, and tribal governments and ultimately to all residents of the great Nation we live in. A balance must be achieved between protecting the environment and protecting our most vulnerable from rising costs. These endeavors are not mutually exclusive, and we look forward to working with the subcommittee on these matters.

I will welcome your questions. Thank you.

[The prepared statement of Mr. Hawkins follows:]

U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT, AND REGULATORY OVERSIGHT

"OVERSIGHT OF EPA UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL GOVERNMENTS"

TESTIMONY OF GEORGE S. HAWKINS, ESQ.

CHIEF EXECUTIVE OFFICER AND GENERAL MANAGER

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

TUESDAY, JUNE 7, 2016 AT 2:30 P.M.

406 DIRKSEN SENATE OFFICE BUILDING

Good afternoon Chairman Rounds, Ranking Member Markey and distinguished members of the Subcommittee on Superfund, Waste Management, and Regulatory Oversight. My name is George S. Hawkins and I am the CEO and General Manager of the District of Columbia Water and Sewer Authority, more commonly known as DC Water. It is a pleasure to provide testimony today regarding the Environmental Protection Agency (EPA) regulations' impact on state and local governments.

DC Water provides more than 672,000 residents and 17.8 million annual visitors in the District of Columbia with retail water and sewer services. DC Water's total service area is 725 square miles and includes wastewater treatment for an additional 1.6 million people living in Montgomery and Prince George's counties in Maryland, and Fairfax and Loudoun counties in Virginia. We are one of the few "one water" utilities in the country, providing drinking water, waste water and stormwater services from one enterprise, including a full accounting of all associated costs on one bill to the customer.

Our drinking water is sourced from the Potomac River and is treated on our behalf by the U.S. Army Corps of Engineers' Washington Aqueduct. After treatment, drinking water travels through 1,308 miles of interconnected pipes, four pumping stations, five reservoirs, three elevated water tanks, nearly 44,000 valves and 9,450 fire hydrants. The median age of the District's water mains is 79 years old and nine percent of this infrastructure dates back to the period between the Civil War and the 1890s. We store 61 million gallons of water throughout the District at eight facilities based on pressure and elevation.

After drinking water is used in our service area, it is transported through our 1,900 miles of sewer system to the 150-acre Blue Plains resource recovery facility at the southern tip of the District. There we treat an average of 300 million gallons of used water per day. After the water receives treatment it is returned to the Potomac River.

DC Water is regulated by EPA Region 3 for Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) compliance. From an environmental and public health perspective, these seminal pieces of legislation have brought forth tremendous benefits to our country. Growing up in the suburbs of Cleveland, Ohio, I recall visiting the Cuyahoga River on a class field trip in 1969. I will never forget seeing the surface of the river, which looked like a finger painting—water swirling with colors and powerful aromas. The same year of my visit, the Cuyahoga caught fire from the sparks of a passing railcar.

- Today, thanks to the Clean Water Act, many of the rivers that course through our major cities are healthy and thriving.
- Today, thanks to the Safe Drinking Water, the overwhelming majority of residents of this country have safe, reliable drinking water at the tap 24 hours a day, 7 days a week and 365 days a year.

In my view, this outcome is one of the great public policy accomplishments of the last century and one of the often overlooked miracles of modern society. With the perspective of where we have come from and the challenges we face as a nation, these twin statutory towers of the clean water world have been phenomenal successes.

Yet in my experience we need to be particularly vigilant and mindful as we monitor our successes, for unlike a failure, there is no automatic update or course change. In my judgment, it is the success of these statutes that highlights the need to be flexible and thoughtful to ensure that we continue to drive success in the future. We still have water quality challenges to overcome and new threats to clean water on the horizon.

Currently, DC Water is in the process of implementing two massive environmental projects with a total cost approaching $4 billion. Under the terms of a consent decree between DC Water, the District of Columbia, the U.S. Department of Justice and EPA, DC Water is implementing the $2.6 billion Clean Rivers Project. The first phase of the project is underway and involves constructing a massive underground tunnel system to control combined sewer overflows to the Anacostia River. These overflows, which currently discharge about 1.3 billion gallons of diluted sewage to the Anacostia in an average year, will be reduced by 98 percent when the tunnel system is completed in 2022. The later phases of this plan include green infrastructure and construction of similar tunnels to control overflows into the Potomac River and Rock Creek.

Our second massive undertaking involves removing nutrients from our treated used water at DC Water's Blue Plains facility. EPA's discharge permit for the facility has required us to dramatically reduce the level of nitrogen in the treated water we discharge into the Potomac River which leads to the Chesapeake Bay. These reductions have been achieved through technological and engineering projects. As the nitrogen limits are further reduced, the price increases exponentially. The recently completed enhanced nitrogen removal project cost approximately $1 billion and is at the limit of technology.

DC Water has received some federal funding for these initiatives, but the overwhelming majority of these projects are funded by our ratepayers and wholesale customers. For District of Columbia ratepayers, which includes the federal government, rates have more than doubled in the last 7 years. Beginning in October of next year, the average monthly bill for a residential customer will for the first time be over $100. Projects of this scale require us to issue long-term debt financing, which means that our rates will continue to increase for the foreseeable future.

Given the declining role of the federal government in funding water infrastructure projects, water utilities like DC Water must account for all of our costs in the rates that we charge our customers. The price of clean, safe and reliable water is increasing and so is the need to replace aging infrastructure. Water is a resource that has been woefully undervalued and in an age of $200 cable and phone bills, we believe that the value of water should reflect the fact that it is absolutely fundamental to our public safety and health.

I support full-cost accounting for water services that enables DC Water to fund our operating and capital needs, and enables our customers to make appropriate choices on water use and conservation. I state this view with two reservations.

First, as the leader of a major metropolitan water authority, I am deeply concerned about the impact our rising rates have on our most economically disadvantaged customers. As you well know, the District of Columbia is an urban area with a very high cost of living and a sizeable low income population. Unfortunately, our affordability analyses have shown that many of these customers struggle to pay their water and sewer bills currently, and will be even more challenged in the coming years. Although I focus on the consequence of this issue to water systems below, I am certainly mindful of the moral quandary of the financial challenges a person has for a service that is essential to life, not an amenity.

The practical consequence to the water utility is that many jurisdictions are not able to raise rates to adequately cover their operational and capital needs – because of the clear affordability limitations of their lowest income customers. With constrained income, utilities will nonetheless undertake federally mandated work first – reducing focus on critical investments in the pipes, pump stations, fire hydrants and other aspects of the system that are critical to providing service to the customer. The condition of these assets continues to deteriorate, service falters, and utilities risk falling into a downward spiral of poorer service, less support from customers, and then less support for rate increases, generating the next revenue squeeze and the next downward spiral.

Second, I am also concerned that the success of our nation's water statutes pushes us to continue doing what we have always done, just more so, to a point of drastically declining benefits at the margin, in comparison to drastically increased costs. As I have explored in detail in the article "Cleaner Water Act" in the Journal "Democracy," DC Water faces enormous escalation of costs in reducing nutrient discharges aimed at the important goal of restoring the health of the Chesapeake Bay. As I wrote about the cost changes between the year 2000 and 2015, "The capital cost of infrastructure to remove one pound of nitrogen has increased about 380 times, and in the last iteration alone, we achieve one-sixth the nutrient reduction for 60 times the unit cost of the first incremental reduction." I believe there is agreement that Chesapeake Bay goals are well-intentioned and deserving but I believe they could be met with a more flexible and holistic watershed approach that would include regulating non-point sources like agriculture.

The increasing cost of water services and its impact on our economically distressed neighbors does not mean we should rollback the public health and environmental benefits the SDWA and CWA have achieved to date. During my tenure at DC Water, EPA has made progress in engaging localities to consider the fiscal impact their regulations place on state and local governments. Specifically, EPA's *Integrated Municipal Stormwater and Wastewater Planning Approach Framework* provides them with the flexibility to consider community affordability and financial capability when making CWA determinations.

Additionally, EPA Region 3 recently negotiated with DC Water to modify our $2.6 billion 2005 consent decree for combined sewer overflows. As part of these negotiations, EPA thoughtfully considered the economic burden the previous 20-year construction timeline placed on our low income customers. The modified agreement extends the later stages of the project which allows DC Water to spread our rate increases over a longer period of time.

I am confident that no one intends for regulatory requirements to feed into a cycle that generates poorer service and diminished public support for water infrastructure. I am also confident that a clear solution exists: the formation of a federal assistance program for low income customers for their water bills. An example of a similar assistance program exists in the long-standing and long-successful federal program to subsidize heating assistance (known as LIHEAP – Low Income Heating and Energy Assistance Program). Providing an income-based assistance program for water utility bills would provide a safety net for our poorest customers to help with this essential service, enabling water utilities to increase rates for other ratepayers who can afford to help invest in water services and infrastructure. With a safety net, clean water initiatives can be accomplished with parallel investments in water infrastructure and service improvements. Ironically, the existing LIHEAP program provides discounts for low income households that ultimately subsidize the operations of investor-owned gas and electric utilities. No such benefit is currently provided by the federal government for water and sewer services, which are equally if not more essential, and would benefit water utilities that are primarily publicly-owned and operated.

I commend the Subcommittee for holding this hearing and bringing attention to the impact federal regulations place on local governments, and ultimately, all residents of this great nation. A balance must be achieved between protecting the environment and protecting our most vulnerable from rising costs. These endeavors are not mutually exclusive and we look forward to working with the Subcommittee on these matters.

Thank you for this opportunity to provide our perspective and I welcome any questions you may have.

Senator ROUNDS. Thank you, Mr. Hawkins.

We will now hear from Professor Robert Glicksman.

Professor Glicksman, you may begin.

STATEMENT OF ROBERT GLICKSMAN, PROFESSOR OF ENVIRONMENTAL LAW, THE GEORGE WASHINGTON UNIVERSITY

Mr. GLICKSMAN. Chairman Rounds, Ranking Member Markey, and members of the subcommittee, I appreciate the opportunity to testify on the importance of the Environmental Protection Agency's actions to protect health and the environment and on how regulatory procedures can impair the Agency's ability to perform that function.

My written statement makes four points which I will summarize today.

First, the environmental safeguards EPA has put in place have delivered enormous benefits to the American people. Second, these safeguards should be available to all Americans, regardless of location or income level. Third, a hobbled regulatory system undermines EPA's ability to carry out its statutory missions of protecting public health and environmental quality. And fourth, pending proposals to amend the Unfunded Mandates Reform Act would create duplicative requirements that would hinder EPA's ability to provide adequate health and environmental protection.

Congress passed the Nation's key environmental laws during the 1970s by overwhelming bipartisan majorities. It formulated goals while delegating to EPA standard setting authority to achieve them. This approach has allowed EPA's technical and policy experts to determine how best to achieve desired health and environmental protection goals in a manner consistent with legislative direction.

Congress also built these laws on a cooperative federalism framework, which allows the States to implement EPA's regulatory standards in ways that reflect State policy choices and accommodate local needs.

Opinion polls consistently reflect the public's strong support for these laws, and for good reason: their successes are impressive. For example, by preventing exposure to dangerous air pollutants, the Clean Air Act saves thousands of lives and avoids hundreds of millions of lost work and school days each year. EPA regulations have reduced the incident of dangerous blood lead levels which can create cognitive impairment in children from 88 percent in 1976 to 0.8 percent in 2010.

Because of the Clean Water Act, the percentage of surface waters meeting the Act's fishable, swimmable waters goal increased from between 30 to 40 percent in 1972 to as much as 70 percent in 2007.

These laws and regulations are not cost-free; they require those polluting the Nation's air and water to upgrade the technologies used to reduce pollution. But a 2015 report by the Office of Management and Budget, which performs a watchdog role over regulatory agencies, concluded that the benefits of the major EPA rules issued between 2004 and 2014 outweighed costs by a ratio of up to 20 to 1. It also found that the monetized benefits of EPA's Clean Air Act regulations alone accounted for up to 80 percent of all Fed-

eral regulatory benefits across all of the agencies examined in the report.

As new threats to public health emerge due to technological and other changes, it is critical that EPA retain its authority to continue to provide these important protections.

EPA is obliged by statute to provide the same minimum level of protection for everyone, regardless of their geographic circumstance or economic situation. Generally, subnational governments over the years have supported EPA's regulations. Some have even exercised the authority preserved to them under Federal law to adopt standards that are more protective than EPA's.

On occasion, State and local policymakers failed to take adequate steps to protect their citizens. Consequences can be dramatic, as the recent drinking water crisis in Flint, Michigan, illustrates. One reason Congress chose to require EPA to deliver universally applicable minimum safeguards was to ensure that everyone, including the Nation's most vulnerable populations, enjoy basic public health protections.

Some pending legislation, including bills that would amend the Unfunded Mandates Reform Act, would hamper EPA's ability to deliver that level of protection. EPA and other Federal agencies already must comply with procedural and analytical requirements, many of which duplicate each other, that make the process of adopting rules much lengthier than it has ever been. It can take years for EPA to adopt a single major rule. In the interim, the problems targeted by the rule continue to threaten public health and environmental quality.

The proposed unfunded mandates amendments would aggravate the situation by imposing on agencies requirements that for the most part duplicate those that already exist under the Administrative Procedure Act, the Regulatory Flexibility Act, and Presidential executive orders. The bills express concern about duplicative regulations as a source of waste for businesses, but duplicative regulatory procedures have the same effect for governing.

Delays resulting from an ossified regulatory process can harm interests across the board, including small businesses, States, localities, and tribes. The requirements that bills like H.R. 50 would impose on agencies would apply to repeal or modify rules that have become obsolete or that produce unjustified regulatory burdens as well to initial rule adoption. The Supreme Court has indicated the courts must review regulatory repeals with the same scrutiny as they do rule adoptions.

While some provisions would not duplicate existing law, they would add little value to the regulatory process. H.R. 50, for example, would require agencies to assess the costs and benefits of regulatory action before issuing even a notice of proposed rulemaking. The point of the notice and comment rulemaking process is to solicit input from affected interests, including subnational governments, on whether the agency's initial take is adequately informed and reflects sound policy.

It is hard to see how an agency can perform a meaningful cost-benefit analysis of a rule it has not even formulated in sufficient detail to be suitable for public comment. Costs of delayed protection

resulting from this requirement, therefore, are unlikely to be offset by the benefits of an improved regulatory process.

For 70 years, the Administrative Procedure Act has provided a process for adopting rules. That process balances the need for timely and responsive action by agencies whose duties are to protect the public interest with the benefits to inform regulation that result from public participation. The law is not perfect, but the reforms being considered would exacerbate its weaknesses, not cure them.

I am happy to answer any questions you may have.

[The prepared statement of Mr. Glicksman follows:]

Statement of Robert L. Glicksman
to the Senate Environment and Public Works Committee's
Subcommittee on Superfund, Waste Management, and Regulatory Oversight

Hearing on Oversight Related to Environmental Protection Agency Regulations on State, Local, and Tribal Governments
June 7, 2016

Chairman Rounds, Ranking Member Markey, and members of the Subcommittee, I appreciate the opportunity today to testify on why a vigorous and empowered Environmental Protection Agency (EPA) is essential for protecting people in communities across the country and how changes in the rulemaking process can impair its ability to perform that function.

My name is Robert Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School. I am a member scholar with the Center for Progressive Reform (CPR), and serve on the organization's Board of Directors. I graduated from the Cornell Law School and have practiced and taught environmental and administrative law for more nearly 40 years.

My testimony makes four key points:

1. The safeguards adopted and implemented by EPA have delivered enormous benefits to the American people.
2. The protections Americans receive from EPA safeguards should not be an accident of geography.
3. Our increasingly hobbled regulatory system is undermining EPA's ability to carry out its statutory missions of protecting public health and environmental integrity.
4. Various proposals to reform the Unfunded Mandates Reform Act (UMRA) would create wasteful and unproductive analytical requirements that duplicate those that exist under current law, while creating risks that EPA and other agencies will be incapable of adequately protecting public health and safety and the environment.

I. EPA HAS A LONG HISTORY OF SUCCESSFULLY PROTECTING THE PUBLIC INTEREST

Thanks to existing EPA safeguards, we have come a long way from the days when rivers caught fire and a chemical haze settled over the industrial zones of the country's cities and

towns. In every case, these safeguards derived from legislation enacted by Congress and signed by the president that directs or authorizes EPA to regulate to address public health or environmental threats. This legislation includes some of the most successful and visionary laws in our nation's history, such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act. The success of these laws is due in large part to Congress's decision to include directives and standards with which EPA must conform, while wisely granting to EPA the discretion to exercise its technical expertise, accumulated over years of experience, and make policy choices in a manner consistent with statutory goals and conditions. This approach – Congress identifies goals and delegates to the EPA standard-setting authority in broad, general terms, leaving it to fill in the details – is reflected in virtually all of the environmental statutes. It has enabled EPA's team of scientific, medical, and other technical experts to apply their specialized knowledge and skills in designing effective ways to achieve the health and environmental protection that the agency was created to provide. Crucially, EPA remains publicly accountability as a result of Congress's ability to conduct routine oversight and, if necessary, enact new legislation to respond to changing circumstances and further guide agency action in the future.

The available evidence paints a compelling picture of how EPA's safeguards have succeeded in protecting public health and the environment:

- For example, even when measured against "cost-benefit analysis," a metric that tends to be biased against environmental protection standards, a 2011 EPA study found that the benefits of EPA's Clean Air Act safeguards exceed costs by a 25-to-1 ratio.[1]
- That study also found that EPA's Clean Air Act rules saved 164,300 adult lives in 2010, and will save 237,000 lives annually by 2020. These air pollution controls also saved 13 million days of work loss and 3.2 million days of school loss in

[1] ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-9 (Mar. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

2010. By 2020, they will save 17 million work loss days and 5.4 million school loss days.[2]

- The Office of Management Budget (OMB), which performs a watchdog role over federal regulatory agencies, in its final *2015 Report to Congress on the Benefits and Costs of Federal Regulation* estimated that the benefits of all the major rules EPA issued during the ten-year period ending in September 2014 outweighed costs by a ratio of up to nearly 21 to 1. The report further noted that the monetized benefits of EPA's Clean Air Act regulations alone accounted for up to 80 percent of all of federal regulatory benefits across all of the agencies examined in that year's report.[3]
- EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children aged 1 to 5 from 14.9 micrograms of lead per deciliter (μg/dL) of blood during the years 1976 to 1980 to 2.7 μg/dL during the years 1991 to 1994. Because of its harmful effect on children's brain development and health, the Centers for Disease Control considers blood lead levels of 10 μg/dL or greater to be dangerous to children. During the years 1976 to 1980, 88 percent of all U.S. children had blood lead levels in excess of this dangerous amount; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood lead levels in excess of 10 μg/dL. The most recent survey data, covering the years 2007 to 2010, reveals even more progress – only an estimated 0.8 percent of U.S. children had blood lead levels in excess of 1010 μg/dL.[4]
- EPA regulation of the discharge of pollution into water bodies nearly doubled the number of waters meeting statutory water quality goals from around 30 to 40 percent in 1972 (when the modern Clean Water Act was first enacted) to around 60 to 70 percent in 2007.[5]
- EPA regulations protecting wetlands reduced the annual average rate of acres of wetlands destroyed from 550,000 acres per year (during the period from the mid-1950s to the mid-1970s) to 58,500 acres per year (during the period from 1986 to 1997), a nearly 90-percent reduction.[6]

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[2] *Id.* at 5-25 (Table 5-6).

[3] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 9, 12 (2015), https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

[4] U.S. Envtl. Protection Agency, *Learn About Lead*, https://www.epa.gov/lead/learn-about-lead (last visited June 1, 2016); Rena Steinzor et. al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* 17-18 (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* http://www.progressivereform.org/articles/PRIA_909.pdf; U.S. Ctrs. for Disease Control & Prevention, *Blood Lead Levels in Children Aged 1–5 Years — United States, 1999–2010*, 62 MORBIDITY & MORTALITY WEEKLY REPORT (MMWR) 245, 245-48 (2013), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6213a3.htm (last visited June 3, 2016).

[5] G. Tracy Mehan, *The Clean Water Act: An Effective Means To Achieve a Limited End, Water Environment & Technology*, Oct. 2007, http://www.wef.org/publications/page_wet.aspx?id=4692&page=ca&section=CWA%2035th%20Anniversary.

[6] William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 584-85 (2004).

- Many retrospective evaluations of government standards by EPA conducted pursuant to the Regulatory Flexibility Act have found that the standards were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.[7]

Despite these successes, this is not the time for complacency – much work remains to be done by EPA. For example, even after appearing on store shelves or being used in workplaces for several decades, thousands of potentially harmful chemicals continue to lack basic testing to evaluate the risks they might pose to human health or the environment. Looking forward, we face a future in which nanomaterials, whose characteristics differ from those of more traditional chemical substances and whose environmental impacts are not yet fully known, will become increasingly commonplace, requiring effective new protections. Ten years from now and beyond, we will face emerging public health and environmental challenges that are impossible to predict today, just as the threats posed by climate change were not in the forefront of congressional policymakers' concerns in 1970 when the Clean Air Act was adopted.

What is clear is that new risks continue to emerge as the U.S. economy evolves and technologies advance. Accordingly, a vigorous and empowered EPA will remain a critical institution for the United States in the years ahead. If EPA is to continue doing the job Congress has ordered it to do (and that the American people consistently indicate in polling that they want EPA to do), we must ensure that it has the legal authority and resources it needs to close existing regulatory gaps as well as address new and emerging threats.

II. THE PROTECTIONS OFFERED BY EPA SAFEGUARDS MUST BE AVAILABLE TO EVERYONE

[7] Sidney Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-30 (Ctr. for Progressive Reform, White Paper 1109, 2011), http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

The statutes under which EPA operates all require it to provide the same minimum level of protection for everyone, regardless of their geographic circumstance or economic situation. For example, the Clean Air Act's principal goal is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare."[8] To achieve that goal, the Act directs EPA to adopt *national* ambient air quality standards, and to oversee efforts by all of the states to achieve and then maintain air quality that is sufficient to protect the public health with an adequate margin of safety.[9] The Safe Drinking Water Act directs the EPA to establishing *national* primary drinking water regulations that "apply to each public water system in each State" and that strive to limit contaminants so that no known or anticipated adverse effects on human health occur, again allowing an adequate margin of safety.[10] Working with its state, local, and tribal partners, EPA seeks to ensure that these mandates are fulfilled, so that the protections offered by these and other federal regulatory programs are universally available to all Americans. One of the reasons Congress chose this approach was to prevent states from competing with one another for industries by adopting weak environmental standards, to the detriment of public health. Congress wanted to ensure that all Americans receive the same necessary levels of protection.

Generally, states, localities, and tribes over the years have supported the protections afforded by EPA's regulatory programs and are committed to ensuring that they are achieved. Indeed, some states have exercised the authority typically preserved to them under the federal environmental statutes to adopt laws that are more protective than EPA's, becoming leaders in the nation's environmental protection efforts. Even when states and localities are satisfied with

[8] 42 U.S.C. §7401(b)(1).
[9] 42 U.S.C. §7409(b)(1).
[10] 42 U.S.C. §§300g, 300g-1(b)(4)(A).

the levels of protection afforded by federal law, EPA can help reduce the implementation costs and improve the effectiveness of state, local, or tribal regulatory programs. For example, state or local governments are relieved of the costs associated with conducting independent scientific and medical research to ascertain the levels at which air or water pollution poses a risk to the public. Likewise, these bodies need not duplicate EPA's research into effective pollution control technologies and regulatory approaches, which EPA conducts and then disseminates the resulting information to the states.

States by and large are free to leave to EPA other implementation tasks as well, including permitting and enforcement, though most have chosen not to do so. Most of the federal environmental statutes are built on a cooperative federalism model. Congress specifies goals that apply nationwide, mandates that EPA set regulatory standards that are adequate to achieve the goals (often on the basis of the best available scientific knowledge), and authorizes states to determine the best way to achieve those goals through planning, permitting, and (in conjunction with EPA) enforcement. This approach vests broad discretion in each state to determine the pathways to compliance that are optimal for its particular circumstances. But it also creates a federal safety net – EPA can insist that states remedy deficiencies in their programs that prevent them from achieving federal standards, and, if the states fail to do so, it can resume implementation authority in a delinquent state. This cooperative federalism model ensures that minimum universal protections are achieved while accommodating state, local, and tribal prerogatives and knowledge as much as possible.

This model has served the nation well since Congress passed the first modern environmental statutes beginning in 1970. But, in rare cases, state or local policymakers fail to take adequate steps to protect their citizens, and the resulting crises provide stark reminders of

the critical need for establishing a "floor" of protection that applies nationwide. Two recent cases relating to EPA regulatory programs are instructive on this point. The first is the Flint, Michigan, drinking water crisis. There, state-appointed emergency managers in 2014 decided to switch Flint's drinking water source in order to clear room under the city's strapped budget, in apparent contravention of the Safe Drinking Water Act. This gamble may have caused long-term harm to the health of Flint's residents. Researchers have found that the number of Flint children with elevated blood lead levels – high enough to cause significant IQ loss and permanent behavioral problems, including shortened attention spans and increased antisocial behavior – nearly doubled after the city's water source changed, with children in the most impoverished areas suffering disproportionately.

The second case relates to a fertilizer storage facility explosion that occurred in West, Texas in 2013, killing 14 people, injuring more than 200 others, and nearly levelling an entire small town. The regulatory failures leading up to the disaster were legion. The storage facility contained roughly 270 tons of ammonium nitrate, a highly explosive chemical that has been used in terrorist attacks, such as the 1995 bombing of an Oklahoma City federal building. Nevertheless, the facility was located in close proximity to a nursing home, where many of the deaths and injuries occurred, and a middle school, which thankfully was not in session at the time of the explosion. The storage building itself was primarily made of wood and lacked even the most basic fire protection measures, such as sprinklers. McLennan County, the Texas county in which West is located, had not adopted a fire code, and so the facility was under no obligation to take appropriate precautions to ensure that the large amount of ammonium nitrate it contained was safely stored.

EPA is currently working on a rulemaking to update this program in response to the Texas disaster using its authority under the Clean Air Act's Risk Management Program provisions. EPA's proposal is designed to promote better planning by emergency responders, information sharing by hazardous chemical facilities, and post-accident investigations. But the most important steps – such as better zoning policies and stricter fire code requirements – will require action by state or local officials.

As these two cases show, it tends to be the most vulnerable populations who are disproportionately harmed when minimal federal protections are inadequate or poorly enforced. Many of the people who live in Flint, Michigan are lower income or minority populations. Similarly, many of those affected by the Texas explosion were senior citizens living on fixed incomes. One of the reasons that Congress chose to require EPA to deliver universally applicable minimum safeguards was to ensure that the most vulnerable populations are adequately protected.

III. THE HOBBLED REGULATORY SYSTEM UNDERMINES EPA'S EFFECTIVENESS

Like most federal agencies, EPA faces a destructive convergence of inadequate resources, political attacks, and outdated legal authority, which often combine to prevent it from effectively carrying out its statutory missions. The inevitable result is that some standards to address the most pressing threats are delayed, sometimes for many years, leading to levels of protection that fall well short of what is called for by the authorizing statute and the supporting science. In some cases, vital safeguards never see the light of day at all. Because of budget cuts and declining personnel levels, EPA faces daunting challenges in its efforts to implement and enforce the environmental laws effectively. Agency resources have held steady or declined at

the same time as the level of analytical and procedural demands has increased. Too often, the result is that health, safety, and environmental risks are not addressed or that protections designed to reduce those risks go unenforced.

In particular, the increasingly dysfunctional rulemaking process poses a significant hindrance to EPA's ability to protect public health and the environment. As with all agencies, EPA is subject to a thick web of analytical and procedural requirements, some of which derive from statutes and others from presidential executive orders. These overlapping and often duplicative requirements require agencies like EPA to conduct years' worth of analysis before they are able to adopt most significant rules. To be sure, careful analysis of both the need for and consequences of regulation is critically important. But the regulatory process has become ossified by needless or duplicative procedures and analyses. As a result, the costs of delayed or unadopted safeguards resulting from efforts to abide by all of these requirements risk swamping the incremental benefits, if any, which the newest analytical burdens are likely to provide. In 1993, EPA told the Carnegie Commission that it often takes about five years to complete an informal rulemaking, and it has only gotten worse since then.[11] As my colleague Professor Richard Pierce, one of the nation's leading experts on administrative law, has observed about the rulemaking process in general, "it is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later."[12]

A breakdown of the time it takes to complete the tasks associated with a typical significant rulemaking helps to understand why the process is so elongated. It may take:

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[11] CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).
[12] Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

- 12-36 months to develop a proposed rule
- 3 months for review of the draft proposal by the Office of Information and Regulatory Affairs (OIRA), a powerful bureau located in the White House that is charged with clearing regulations before agencies may adopt them
- 3 months for public comment
- 12 months to review comments, make appropriate revisions to the proposal, and prepare a final justification for the rule
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the public comment period only lasts 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can easily number well into the thousands for significant rules, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act, (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or of responses to rulemaking comments, they nevertheless have the potential to further delay a rule's adoption.

During these delays, the risks that EPA's regulations are meant to address do not pause or evaporate; rather, they continue unabated, threatening public health and the environment. Those who complain about the costs of EPA safeguards on American business often fail to compare those costs with the costs and disruption that result when those safeguards are blocked or delayed. The American public bears the brunt of the harm and dislocation caused by EPA's inability to put important safeguards in place.

It would be one thing if the statutes and executive orders that are the source of these delays resulted in demonstrable benefits in terms of previously unrevealed information or better analyses that facilitates useful regulatory fine-tuning. But the evidence that the analytical mandates produce those results is lacking. Much if not all of the information supplied as agencies like EPA run the gauntlet of the regulatory process's requirements can be made available to the agency through the rulemaking procedures that have been in place since 1946 under the Administrative Procedure Act (APA). Moreover, as explained below, studies of that notice and comment rulemaking process have consistently found that private parties and their representatives dominate the process both with respect to the volume of comments they submit and the influence that those comments have. Regulated entities are active participants in the regulatory process. Agencies that ignore their comments can expect to be called to account when the resulting regulations are challenged in court. From this perspective, the analytical requirements add little or nothing to the accountability already provided by the APA.

Given the degree to which the rulemaking process has already become unduly encumbered by excessive analytical and procedural requirements, policymakers should be particularly wary of legislative proposals that would add still more requirements, and that would do so without any accompanying increase in budgetary resources for agencies. Under those circumstances, the reforms may well prevent regulation, regardless of its merits, rather than improve it, even if that is not the intended result. Instead of heaping more procedural duties of questionable value on EPA and similar agencies, policymakers should explore ways to streamline the process and eliminate unnecessary requirements, so that agencies can focus their scarce resources on those rulemaking considerations that are most important, leading to a responsive regulatory system that produces higher quality rules.

IV. CURRENT PROPOSALS TO REFORM UMRA RISK HARMING THE PUBLIC INTEREST

Congress is currently considering at least two legislative proposals to overhaul UMRA: the Unfunded Mandates Information and Transparency Act (H.R. 50; S. 189) and the Unfunded Mandates Accountability Act (S. 2570). If enacted, both bills would risk undermining EPA's ability to carry out its statutory missions, rather than improve its regulatory decision-making. While their specific provisions differ, both bills raise similar types of concerns.

A. Duplicative and Burdensome Procedural and Analytical Requirements

Both bills would impose new procedural and analytical requirements for EPA and other federal agencies to undertake that would delay their ability to put critical safeguards in place and waste their scarce resources. For example, S. 2570 would expand upon UMRA's existing regulatory impact analysis requirements by directing agencies to conduct cost-benefit analyses for each of its economically significant rules. They would also need to perform a similar analysis for a "reasonable number of regulatory alternatives." This analysis would largely duplicate those that are already required to comply with Executive Orders 12866 and 13563 and, where applicable, the Regulatory Flexibility Act. It is almost sure to be the case that any rule whose impact on the economy triggers the regulatory impact analysis requirements of these bills would also trigger the requirements of the executive orders. Professor Pierce has already testified at a recent hearing that he could not identify a single requirement of these bills as they apply to private parties that is not already required by the executive orders.

A particularly troubling provision appears in section 4 of S. 2570, which would mandate that agencies choose "the least burdensome" regulatory alternative considered during the rulemaking process. The bill would also make compliance with this requirement judicially

enforceable. Significantly, the Toxic Substances Control Act (TSCA) imposed a similar requirement on rulemakings to address toxic chemicals, which all but doomed efforts to issue new safeguards under that statute, even for the most glaring public health threats such as asbestos exposure. As a result of a burdensome (and arguably unjustified) judicial interpretation of this requirement, EPA all but abandoned efforts to use TSCA's rulemaking authority for decades. It is striking that this bill would apply this provision as a kind of supermandate to all regulations at the same time that Congress is actively working to reform TSCA to rid it of unworkable provisions like this one.

H.R. 50 would also add problematic procedural requirements, including new and expanded cost-benefit analysis requirements similar to those in S. 2570, burdensome new consultation requirements, and new requirements that agencies provide a "detailed description" of their consultation efforts and a "detailed summary" of the comments they received as well as of their responses to those comments. It is unclear what value these requirements would add to the notice-and-comment procedures to which agencies are already subject under the APA, or to the consultation and analytical requirements they must perform pursuant to the Regulatory Flexibility Act and relevant executive orders. The courts have long interpreted the APA to require agency responses to well-supported critical comments, which reflects a sensible and pragmatic way to guarantee that agencies meaningfully consider the input of affected interests. H.R. 50 adds nothing of value to that existing mandate.

The degree to which these two bills would duplicate the requirements of existing law is particularly ironic given the requirement in section 8 of H.R. 50 that agencies "shall avoid regulations that are . . . duplicative with its other regulations or those of other agencies." If proponents of these bills are truly concerned about trimming government waste, they might start

by not adopting bills like these that would create overlap with and duplication of existing regulatory procedural mandates.

Regulatory delay can certainly work in favor of regulated interests; the longer a rule's adoption is delayed, the longer those whose activities are covered by the rule may avoid making compliance-related investments. But delay can also harm businesses, including small businesses, and state, local, and tribal interests. The analytical and procedural rigors that H.R. 50 and S. 2570 would foist on agencies would apply not only to initial rule promulgation, but also to agency efforts to repeal or modify rules in ways that reduce regulatory burdens. An action to repeal a rule also qualifies as a rulemaking, so that the same procedures apply as to initial rule adoption. And the Supreme Court has made it clear that courts must approach the task of reviewing regulatory repeals with the same degree of scrutiny as they do initial rule adoptions. The ossification of the rulemaking process which these bills would exacerbate would therefore hinder agency efforts to amend or repeal rules they regard as obsolete or overtaken by changed circumstances.

Some provisions of the two bills are ill-advised not because they are duplicative of existing law, but because they would add nothing of value to the regulatory process. Section 9(a) of H.R. 50, for example, would require agencies to use elaborate procedures to prepare a written statement assessing the costs and benefits of regulatory action *before* promulgating even a notice of proposed rulemaking. Requiring agencies to devote substantial time and resources to this task at that stage will have the effect of creating new obstacles to the adoption of rules, requiring agency resource commitments that will limit the number of rulemakings agencies may engage in, and delaying the promulgation of those that manage to survive statutory analytical rigors. The whole point of the notice and comment rulemaking process is to solicit input from affected

interests, including subnational governments, on whether an agency's initial take on rulemaking policy is adequately informed and reflects sound policy. How can an agency possibly perform a meaningful cost-benefit analysis of a rule it hasn't yet even formulated in sufficient detail to be suitable for public comment?

Another questionable provision of H.R. 50 also appears in section 8 of the bill. It requires agencies to "tailor [their] regulations to minimize the costs of the cumulative impact of regulations." But cost minimization is not a legitimate goal in a vacuum. Even a costly regulation (or group of regulations) will be of value to society if the benefits provided exceed the costs. A mandate to craft regulations so that they do not require useless expenditures is one thing. A requirement to minimize costs without regard to the benefits a rule would produce is quite another. A bill designed to protect the public's "right to know the benefits and costs of regulation," as section 2 of S. 2570 is, should require an even-handed treatment of costs and benefits, not induce agencies to give short shrift to or ignore the benefits of health, safety, and environmental protection regulations.

B. More Opportunities for Corporate Interests to Dominate the Rulemaking Process

The available empirical evidence demonstrates the extent to which corporate interests already dominate the rulemaking process, often to the exclusion of the broader public. For example, a 2011 study by administrative law expert Wendy Wagner of the University of Texas and two co-authors examined 39 hazardous air pollutant rulemakings at EPA and found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule.[13] These contacts included meetings, phone calls, and letters. Similarly, a 2011 CPR paper examined the extent of industry dominance at OIRA. Over the roughly ten-year

[13] Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

period covered in the paper, OIRA hosted 1,080 meetings with 5,759 appearances by outside participants. Sixty-five percent of the participants represented regulated industry interests; just 12 percent of participants appeared on behalf of public interest groups.[14]

Both bills would exacerbate this imbalance, further tilting the rulemaking process in favor of regulated, non-governmental interests. A principal function of UMRA was to ensure that state, local, or tribal governments have a seat at the rulemaking table, and ample opportunity to make their views known and advance their interests. The statute's consultation procedures were meant to provide these subnational governmental bodies with their primary avenue for participating in the rulemaking process. H.R. 50 would undercut these goals by expanding these regulatory participation opportunities and inviting non-governmental regulated entities to participate in them side-by-side with representatives of state, local, and tribal governments. The bill would require, for example, that consultations with businesses "take place as early as possible, before issuance of a notice of proposed rulemaking, continue through the final rule stage, and be integrated explicitly into the rulemaking process." The predictable result of this requirement would likely be to drown out the voices of the representatives of state, local, and tribal governments in light of the disparity in resources that subnational governmental bodies and businesses and trade groups have to devote to participation in agency rulemakings.

Another provision of H.R. 50 would aggravate the disparate opportunities that already exist to participate in rulemakings. Section 10 would require agencies to consult with state, local, and tribal officials, and with "impacted parties within the private sector (including small businesses)." What about non-governmental organizations? They are not mentioned. Because

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[14] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

the bill would create new avenues to challenge agency regulations in court for failure to comply with the bill's procedures, businesses would have a basis for attacking regulations in court (inadequate consultation) under this provision that would not be available to public interest groups. Similarly, section 10 would require agencies to seek out the views of subnational governments and impacted parties within the private sector, but not the views of regulatory beneficiaries. Congress should not endorse a bill that facilitates the input and clout of only those opposed to regulation, regardless of whether regulation would serve the broader public interest.

C. Troublesome Judicial Review Provisions

Under H.R. 50 and S. 2570, many of the most troubling procedural and analytical requirements would be judicially enforceable. Because many of these requirements are novel or vague, the bills would create pervasive uncertainty about the legal status of rules. Every new regulatory statute raises a host of interpretive questions that cannot be definitively answered until the courts have weighed in. This process can take years, or even decades. In the interim, entities affected by regulations, including state, local, and tribal governments, would exist in a state of legal limbo, wreaking havoc with governmental planning and budgeting. Uncertainty of this kind can discourage the kinds of productive investments that are essential to a well-functioning economy. This kind of uncertainty may be a reasonable price to pay for legislation that seeks to resolve problems that existing legislation does not address. It is not likely to make sense if the new legislation duplicates existing legal requirements, but uses new terminology to do so.

I'll mention just a couple of examples of the lack of clarity the two bills would create. Under S. 2570, agencies would have to perform a cost-benefit analysis on a "reasonable number of regulatory alternatives" under S. 2570, but this term is not defined anywhere in the bill. Nor

does the bill define what constitutes a rule's "anticipated costs and benefits" for the purposes of conducting such cost-benefit analyses.

H.R. 50 would require that agencies demonstrate that they have performed a "qualitative and quantitative assessment" of "any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and international competitiveness), health, safety, and the natural environment)" that a rule might have. This language does not track the provisions of existing laws such as the APA. It would create uncertainty about the circumstances in which an agency's assessment might fall short of this nebulous mandate. Compliance would often turn on judgment calls rooted in the agency's expertise on matters relating to economics, science, or other highly technical matters. There is no way to predict how judges would interpret and apply this mandate. The same is true of H.R. 50's mandate that an agency provide an adequate "detailed summary" of its determination that a rule is based on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation." Likewise, S. 2570 would require judges to evaluate whether an agency has adequately estimated "the effect of the rule on job creation or job loss, which shall be quantified to the extent feasible." Requiring judges to make decisions on these matters risks the improper delay or rejection of critical safeguards.

In short, Congress has vested in EPA the critical task of adopting measures to protect public health and the environment. Recent events in Flint, Michigan and elsewhere highlight the importance of giving EPA the legal authority and the resources it needs to carry out that job effectively so that all Americans, regardless of where they live or what their income level is, receive the protections they deserve. The adoption over the years of a host of procedural and

analytical requirements, coupled with inadequate funding, have hobbled EPA's ability to provide needed protections. Statutory changes such as those reflected in pending efforts to amend the UMRA would largely duplicate existing requirements, but in ways that would further impair EPA's ability to respond to public health and environmental threats on a timely basis. To the extent these proposed changes would create new duties, there is little evidence of which I am aware that costs that the bills would create – including the costs of damage to health and the environment caused by blocked or delayed safeguards – would be justified by improvements in the regulatory process. And the new requirements would create uncertainty that has the potential to harm all affected interests, including those of state, local, and tribal governments.

Thank you for the opportunity to testify. I would be pleased to answer any questions you might have.

Senate Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight
hearing entitled, "Oversight of EPA Unfunded Mandates on State, Local, and Tribal Governments."
June 7, 2016
Questions for Professor Robert Glicksman

Senator Markey:

The House and Senate recently approved a final bill reauthorizing the Toxic Substances Control Act (TSCA). One of the reasons why Congress voted overwhelmingly in approving this legislation was because the version of TSCA that was just replaced contained a requirement that the Environmental Protection Agency (EPA) choose the "least burdensome" regulation for industry. This provision resulted in a 1991 industry victory in a lawsuit that both overturned EPA's proposed asbestos ban and rendered the statute all but unusable.

1. Do you agree that legislative proposals to reform the Unfunded Mandates Reform Act by requiring agencies to select the "least burdensome" regulation could end up preventing important public health measures from going forward in the same way the asbestos ban lawsuit ended up preventing EPA from regulating chemical safety for a generation? If so, why?

I agree that amending the Unfunded Mandates Reform Act to require agencies to select the "least burdensome" form of regulation could significantly impair the ability of EPA and other health, safety, and environmental protection agencies to enact necessary regulatory safeguards.

Before its amendment in 2016, the Toxic Substances Control Act (TSCA) required EPA, in regulating activities that present or will present an unreasonable risk of injury to health or the environment to choose "the least burdensome requirements." 15 U.S.C. § 2605(a). In *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), a panel of the Court of Appeals for the Fifth Circuit invalidated EPA regulations that would have phased out most commercial uses of asbestos. The court characterized this ban as "the most burdensome of all possible alternatives listed as open to EPA under TSCA." The court then reasoned that "EPA's regulation cannot stand if there is any other regulation that would achieve an acceptable level of risk." The ban was deemed invalid because EPA only compared the status quo with the effects of a total ban on asbestos-containing products instead of demonstrating that no other, less onerous form of regulation authorized by TSCA would not suffice. The court concluded that:

> the EPA has failed to show that there is not some intermediate state of regulation that would be superior to both the currently-regulated and the completely-banned world. Without showing that asbestos regulation would be ineffective, the EPA cannot discharge its TSCA burden of showing that its regulation is the least burdensome available to it.
>
> Upon an initial showing of product danger, the proper course for the EPA to follow is to consider each regulatory option, beginning with the least burdensome, and the costs and benefits of regulation under each option. The EPA cannot simply skip several rungs,

> as it did in this case, for in doing so, it may skip a less-burdensome alternative mandated by TSCA. Here, although the EPA mentions the problems posed by intermediate levels of regulation, it takes no steps to calculate the costs and benefits of these intermediate levels. . . . Without doing this it is impossible, both for the EPA and for this court on review, to know that none of these alternatives was less burdensome than the ban in fact chosen by the agency.

Thus, the court interpreted the "least burdensome requirement" provision of TSCA to require EPA to conduct a detailed cost-benefit analysis of all available regulatory alternatives.

The ruling in *Corrosion Proof Fittings* prevented EPA from regulating asbestos, a substance banned in at least 52 other countries because of its known adverse health effects. *See* Robert L. Glicksman et al., *Environmental Protection: Law and Policy* 834 (7th ed. 2015). It also effectively killed TSCA as a mechanism for regulating chemicals that pose serious health risks. According to one prominent expert in environmental law, the court's reading of the "least burdensome requirement" provision of TSCA "sent EPA on a potentially endless analytical crusade in search of the holy grail of *the* least burdensome alternative that still protected adequately against unreasonable risk." To avoid the "analytical nightmare" imposed on it by *Corrosion Proof Fittings*, EPA was presented with a Hobson's choice of either adopting regulations "that were sufficiently inoffensive to the regulated industry to avoid legal challenge or . . . giving up the quest altogether." Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525, 548 (1997). Another leading environmental law scholar subsequently concluded that "[a]lthough TSCA was designed to provide EPA with . . . comprehensive regulatory authority, the *Corrosion Proof Fittings* decision effectively crippled the agency's ability to conduct multi-source, multi-media regulation by imposing seemingly impossible analytical preconditions on regulation." Robert V. Percival, *Who's Afraid of the Precautionary Principle?*, 23 Pace Envtl. L. Rev. 21, 77 (2006). *See also* Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 Va. Envtl. L.J. 1, 16 (2007) ("In *Corrosion Proof Fittings v. EPA*, the Fifth Circuit purported to endorse the concept of multi-media precautionary regulation, but it insisted that the Toxic Substances Control Act required the EPA to conduct such detailed, product-by-product analyses of the risks posed by asbestos, the risks of substitute products, and intermediary regulatory alternatives as to make such regulation impossible. ").

Other observers have provided similar assessments. *See, e.g.*, David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. Envtl. Aff. L. Rev. 1, 90 (2005) (arguing that the ruling in *Corrosion Proof Fittings* "would suggest that non-arbitrary decisions under [cost-benefit analysis] might often prove impossible"); Joyce Merritt, *Standard of Review Under the Toxic Substances Control Act: Corrosion Proof Fittings v. EPA*, 8 J. Nat. Resources & Envtl. L. 167, 167 (1992) (arguing that "[t]he decision in *Corrosion Proof Fittings* . . . turns the attempt by Congress to protect health and the environment, by allowing the EPA to ban dangerous substances under the TSCA, into a virtually useless tool"); Charles Franklin, TSCA Reform Versus Replacement: Moving Forward in the Chemical Control Debate, 44 ABA Trends 9, 11 (2013) (claiming that *Corrosion Proof Fittings* rendered EPA's regulatory authority under TSCA a "dead letter"); Joyce Merritt, *Standard of Review Under the Toxic Substances Control Act: Corrosion Proof Fittings v. E.P.A.*, 8 J. Nat. Resources & Envtl. L. 167, 176 (1992) ("The decision in

Corrosion Proof Fittings, however, turns the attempt by Congress to protect health and the environment, by allowing the EPA to ban dangerous substances under the TSCA, into a virtually useless tool.").

Perhaps the most salient post-mortem on the pre-2016 version of TSCA after *Corrosion Proof Fittings* was provided by the President's Cancer Panel of independent medical, legal, and policy experts in a 2010 report. It concluded:

> The Toxic Substances Control Act of 1976 (TSCA) may be the most egregious example of ineffective regulation of environmental contaminants. . . .
>
> In 1989, EPA issued a ban on asbestos based on 45,000 pages of documentation on its risks. However, TSCA stipulates that chemicals should be restricted using the least burdensome regulations available. In 1991, the Fifth Circuit Court of Appeals nullified EPA's ban, ruling that EPA had failed to show that asbestos posed an unreasonable risk, as defined by TSCA, that was best addressed by banning it. Because of TSCA's constraints and weakness, EPA also has been unable to substantially restrict or eliminate the use of other known carcinogens such as mercury and formaldehyde, and has not attempted to ban any chemical since the 1991 court ruling. . . .
>
> In January 2009, [the Government Accountability Office] added TSCA to its list of government programs at "high risk" of failure, because the law does not provide the agency with enough authority to effectively regulate chemicals.

The President's Cancer Panel, *Reducing Environmental Cancer Risk: What We Can Do Now* (April 2010), http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP_Report_08-09_508.pdf.

There is every reason to believe that if Congress were to amend the Unfunded Mandates Reform Act to condition regulation by agencies such as EPA on a showing that the chosen method of regulation reflects the "least burdensome requirements" available, the result would be the same crippling of effective regulatory authority that resulted from *Corrosion Proof Fittings*'s interpretation of TSCA.

Senator ROUNDS. Professor Glicksman, thank you very much for your testimony.

Our next witness is Senator Mark Norris.

Senator Norris, you may begin.

STATEMENT OF HON. MARK NORRIS, MAJORITY LEADER, TENNESSEE SENATE, ON BEHALF OF THE COUNCIL OF STATE GOVERNMENTS

Mr. NORRIS. Thank you, Chairman Rounds and Ranking Member Markey, and members of the committee. Thank you for the opportunity to testify today. I think it is very important that you are giving us this opportunity because one of the things that we are frustrated about at the State level these days is the lack of the opportunity to communicate in this way with our friends in the Federal Government.

I am Mark Norris. I am the Senate Majority Leader from the State of Tennessee. I have the honor of serving the citizens of the 32rd district, which I mention because it is part of the west coast of Tennessee. We are along the Mississippi River, which means we deal with things like basin authorities and the Corps of Engineers, which brings relevance to me today for why I am here.

In the interest of full disclosure, I should also mention that I am the Senate representative from Tennessee on the Southern States Energy Board, and I had the privilege of serving as the chairman of the Council of State Governments in 2014, also known as CSG, and Chairman Rounds served as our president in 2010.

So on behalf of CSG and State leaders throughout the country, we appreciate the opportunity to be heard. And I should also mention that CSG is the only organization of its kind that serves all three branches of government in all 50 States, so we understand bipartisanship, and we understand the separation of powers.

Last week in Tennessee we celebrated the 220th anniversary of our statehood. This is statehood week whereby Tennessee became the 16th State in the Nation. The act was signed by none other than President George Washington himself, and Thomas Jefferson commented on our constitution in Tennessee as the least imperfect and most republican of State constitutions. It provides that the citizens have the power and the right of exercising sovereignty so far as is consistent with the Constitution of the United States, recognizing the Articles of Confederation and the Bill of Rights.

And I mention this at the outset because really what we are talking about here today is sort of the two Cs, as I hear them, not only the Constitution, but more effective communication under the Constitution.

As Chairman Rounds would particularly understand, the States are the foundation of our Federal system as enshrined in the Tenth Amendment. This is the foundation upon which States develop innovative ideas and policies and often fulfill their roles as the laboratories of democracy. But all too often today we find that those laboratories are being interfered with. State-based innovation is increasingly adversely impacted by the growth of some of these Federal policies and regulations and rules that we have been talking about which often manifest in the form of unfunded mandates.

We can talk perhaps in the Q&A portion of this, but Chairman Rounds mentioned the Clean Power Plan and the Clean Water Rule, both of which are being challenged by a number of States in Federal court. Interestingly, perhaps, Tennessee is not a party to the 111(d) legislation; it is a party to the waters of the State, the Clean Water rule litigation. And the difference is that the Federal Government, the EPA, and the particular departments and agencies involved in the 111(d) case gave us much more advanced notice, gave us much more opportunity to participate and be heard than was the case with the Clean Water Rule.

Notwithstanding that, studies do show that Tennessee could experience electricity price increases of as much as 15 percent under the Clean Power Plan, and Tennesseans already spend an estimate average of 12 percent of their after tax income on energy, so the impact is disproportionately high.

Along with the cost of financing these new unfunded mandates, the majority of Federal regulations have too often been enacted with insufficient input, if any, nor adequate consultation from State and local governments; and more often Federal agencies regularly process rules without even conducting an appropriate analysis of the potential economic costs as required by UMRA. This is what led, in part, to the formation of our federalism task force at CSG. My colleague, Alaska State Senator Gary Stevens, and I put forth a study over a period of 2 years to examine what we could do better to not only adopt a seat of principals that articulate a helpful vision, but how we would implement those.

I have included in my submission a full list of the principals that we adopted, and they focus, generally speaking, on avoiding preemption, avoiding unfunded mandates, promoting State flexibility, promoting State input on international trade policy, and also focusing on civics; not only making sure that civics are being taught so that our next generation understands the nature of our government, federalism, how things work in our Republic, or should, but also make sure that we are teaching each other, as State legislators with responsibilities, about the rule of law and constitutionalism as it affects our daily responsibilities.

It is this type of tension and the lack of constructive communication that has led to a number of initiatives, one of which is the adoption by eight States, including Tennessee, of the resolution calling for Congress to adopt the Regulation Freedom Amendment to the United States Constitution.

In the past years, we have held a variety of meetings with the White House, Federal agencies, and Members of Congress on all of these issues, but all too often we feel as though we are incidental, rather than integral, to the process. In a word, folks feel the Federal Government simply doesn't care, and that is not constructive for anyone.

So this brings me to an important point, which is that we need to take a closer look at what we call consultation with the States. Many of our State legislators, like me, are truly citizen legislators. It is sort of a full-time part-time job. But it is very difficult for us to keep up with the proliferation of rules and regulations, even for our departments to do so and communicate with us in a meaningful way.

We are thankful for organizations like the Council of State Governments, which is our eyes and ears in Washington, but we also need to identify other real and concrete ways to improve the consultation process.

In the past year, CSG has had the opportunity to chair the organization known as the Big 7, and under the leadership of CSG's Executive Director, David Adkins, the coalition also worked to identify recommendations on how to improve the State-Federal regulatory process. Those recommendations are also included in my materials.

As you will see, they include updating UMRA, establishing consistent State-Federal advisory committees within Federal agencies, and simply ensuring State legislators know how to contact each Federal agency, who to contact it, and how to do it in a meaningful way. Navigating the relationship between State and Federal Governments is no easy task, but we are hopeful that we can take practical steps to improve our cooperation.

In conclusion, Members, I want to stress the importance of establishing a process that ensures States are true partners in our Federal system and not just another stakeholder. I believe, with your leadership, we can take steps to improve the outreach and consultation between our States and the Federal Government.

Thank you very much for the opportunity to appear before you today, and I look forward to your questions.

[The prepared statement of Mr. Norris follows:]

Statement from Tennessee Senate Majority Leader Mark Norris, on behalf of The Council of State Governments

**U.S. Senate Environment and Public Works Committee,
Subcommittee on Superfund, Waste Management and Regulatory Affairs**

"Oversight of EPA Unfunded Mandates on State, Local, and Tribal Governments"

June 7, 2016

Chairman Rounds, Ranking Member Markey, and Members of the Committee, thank you for the opportunity to testify before you today.

My name is Mark Norris; I am the Senate Majority Leader of the great state of Tennessee. I have the honor of serving the citizens of the 32nd district of Tennessee, which includes Tipton and most of Shelby County, including portions of Memphis and the municipalities of Arlington, Bartlett, Collierville, Lakeland and Millington.

I serve as Tennessee's Senate Representative on the Southern States Energy Board. I also had the privilege of serving as the National Chair of The Council of State Governments – also known as CSG – in 2014, and I am here in that capacity today.

On behalf of CSG and our state leaders throughout the country, I want to thank you for convening this important hearing and for your leadership in exploring ways to improve the working relationship between our states and the federal government.

Founded in 1933, The Council of State Governments is the nation's only organization serving all three branches of state government. CSG is a region-based, non-profit, and non-partisan organization that fosters the exchange of insights and ideas to help state officials shape public policy. CSG has also been a leader in advancing the role of the states in our federal system and working to identify real solutions to improve the regulatory process.

Last week, we celebrated the 220th anniversary of statehood in Tennessee and our entry as the 16th sovereign state in the union ratified by Congress in an act signed by George Washington, including a state constitution recognized by Thomas Jefferson as "the lest imperfect and most Republican of state constitutions."

It provides: "the people have the right of exercising sovereignty ... so far as is consistent with the Constitution of the United States, recognizing the Articles of Confederation [and] the Bill of Rights."

As a former Governor, Chairman Rounds, you understand that states are the foundation of our federal system as enshrined in the Tenth Amendment which provides:

"(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the state respectively, or to the people."

This is the foundation upon which states develop innovative ideas and policies and often fulfill their role as "laboratories of democracy."

However, state-based innovation is increasingly being adversely impacted by the growing web of federal policies and regulations which regularly come in the form of unfunded mandates.

A 2015 report by the White House's Office of Management and Budget (OMB) estimated that federal regulations and unfunded mandates cost states, cities and the general public between $57 and $85 billion each year. This is no different in Tennessee.

Recent examples of regulatory overreach by the federal government include the Clean Power Plan and Clean Water Rule, both of which are being challenged by a number of states in federal court. In Tennessee, though far from perfect, the Clean Power Plan was presented better than the Clean Water Rule.

Notwithstanding the foregoing, studies have shown that Tennessee could experience electricity price increases of approximately 15 percent under the Clean Power Plan. Tennesseans already spend an estimated average of 12% of their after-tax incomes on energy.

Along with the cost of financing these new unfunded mandates, the majority of federal regulations have too often been enacted with limited – or no- input nor adequate consultation from state and local governments. Moreover, federal agencies regularly process rules without even conducting an appropriate analysis of the potential economic costs – as required by the Unfunded Mandate Reform Act.

This is what led my colleague, Alaska State Senator Gary Stevens, and me to start a multi-year initiative within CSG focused on improving the role of states in our federal system. We convened a bi-partisan Federalism Task Force and adopted a set of principles that outline our vision.

I've included the full list of principles in my written testimony. Briefly, they focus on the importance of avoiding pre-emption, avoiding unfunded mandates, promoting state flexibility, and promoting state input on international trade policy.

It is also what has led to adoption by eight states, including Tennessee, of resolutions calling for Congress to adopt the Regulation Freedom Amendment to the U.S. Constitution.

In past years, we've held a variety of meetings with the White House, federal agencies, and Members of Congress on these issues. However, there has been little response or real action to help resolve them. All too often, we, meaning states, are treated as incidental, rather than integral, to our republic and the process of governing.

This brings me to an important point. We need to take a closer look at what we call "consultation" with states. Many of our state legislators, like me, are truly citizen legislators -- we hold full time jobs in addition to our public service. It is difficult, if not impossible, to keep up with and meaningfully respond to the proliferation of regulations and paperwork required.

We are thankful for organizations like CSG which are our eyes and ears in Washington, but we also need to identify other real and concrete ways to improve the consultation process.

In the past year, CSG has had the opportunity to chair the coalition of state and local government organizations - also known as the Big 7 – and have made this issue a priority. Along with CSG, the organizations include the National Governors Association, National Conference of State Legislatures, National Association of Counties, National League of Cities, U.S. Conference of Mayors, and the International City/County Management Association.

Under the leadership of CSG's Executive Director and CEO, David Adkins, the coalition has worked to identify recommendations on how to improve the state-federal regulatory process. I have provided the list of recommendations in my written testimony.

As you can see, the recommendations include updating the Unfunded Mandates Reform Act; establishing consistent state-federal advisory committees within federal agencies; and simply ensuring state legislators know who to contact in each federal agency.

Navigating the relationship between state and federal governments is no easy task, but we are hopeful that we can take practical steps to improve our cooperation.

In conclusion, I want to stress the importance of establishing a process that ensures states are true partners in our federal system, and not just another stakeholder. I believe, with your leadership, we can take steps to improve the outreach and consultation, between our states and the federal government.

Again, thank you and the Committee for the opportunity to appear before you today, and I look forward to your questions.

U.S. Senate Environment and Public Works Committee,
Subcommittee on Superfund, Waste Management and Regulatory Affairs

"Oversight of EPA Unfunded Mandates on State, Local, and Tribal Governments"

June 7, 2016

Materials for the Record

1. The Council of State Governments – Statement of Principles on Federalism
2. The Big 7 Coalition – Adopted Principles for Regulatory Reform
3. The Council of State Governments and Big 7 – Federal Regulation Process Recommendations
4. The Council of State Governments – Resolutions on EPA Related Issues
5. The Council of State Governments West – Letter to Senate EPW
6. The Big 7 Coalition – Letter Supporting the Unfunded Mandates and Information Transparency Act (UMITA)

STATEMENT OF PRINCIPLES ON FEDERALISM

The diversity of policy experimentation and accountable governance made possible by the 10th Amendment to the U.S. Constitution has enabled our nation to thrive despite the changing needs of a global economy. Given the importance of federalism to our future, it is essential that The Council of State Governments dedicate itself to preserving the role of the states as the "laboratories of democracy" and work both to limit unnecessary federal intrusions into areas of state responsibility and to foster effective cooperation in areas of shared jurisdiction.

Principles for State-Federal Relations

Though the federal government has a vital role to play in advancing national priorities through the powers enumerated to it by the U.S. Constitution, our founders recognized long ago that many of the challenges our citizens face can best be addressed at the state level. The Council of State Governments affirms the vital importance of the federal system to our nation's future and encourages the federal government to adhere to the following principles when developing laws, enacting regulations or rendering judicial rulings which impact state powers.

Principles on Avoiding Pre-emption – Before 1900 the federal government had enacted only 29 statutes that pre-empted state law; but since1900, there have been more than 500 federal pre-emptions.

- Federal pre-emption of state authority and responsibility should be the exception rather than the rule. While there is a legitimate role for federal pre-emption when the national interest is at risk, pre-emption should be engaged in sparingly and should be avoided in traditional areas of state responsibility, such as education and criminal justice.
- Federal entities should not take actions that serve to pre-empt, directly or indirectly, state revenue systems as the independent revenue raising authority of states is essential to their exercise of sovereign powers.

Principles on Avoiding Unfunded Mandates – A 2015 report by the White House's Office of Management and Budget (OMB) on the cost of federal regulation and the impact of unfunded mandates noted that federal mandates cost states, cities and the general public between $57 and $85 billion each year.

- Congress and the administration should avoid the imposition of both unfunded federal and partially funded mandates on states.

- The federal government should work with states to ensure the actions by independent federal agencies, not originally covered by the Unfunded Mandate Reform Act of 1995, receive the same level of scrutiny for unfunded mandates that acts of Congress currently receive.

Principle on Promoting Flexibility – In 2015, federal funds to state and local governments represented more than 30 percent of total state spending. Most of the 42 major state-federal grant programs, however, will see substantial cuts over the next decade as a result of the federal fiscal crisis.

- The federal government should ease restrictions, in times of federal funding decline, on the maintenance of effort, grant reporting requirements, and provide maximum flexibility, including the transfer of funds among related grant funding streams, to ensure that programs can be administered as effectively as possible without imposing new burdens on state budgets.

Principles on Promoting State Input in International Trade Agreements – While the power to make treaties is solely a federal role, modern international trade agreements have moved beyond setting tariff limits to include commitments on state government procurement, regulatory transparency standards, and other requirements that impact the powers and duties of state governments.

- The federal government should actively work with states to preserve state interest in international trade agreements.
- The federal government should expand its single point of contact communications system on trade policy negotiations, which currently includes only the state executive branch, to include state legislative and judicial branch contacts.

Adopted by The Council of State Governments' Leadership Council this 14th Day of May, 2016 in Lexington, Kentucky.

Recommended Principles for Regulatory Reform

- Avoid pre-emption of state and local laws.
- Require early analysis and consultation with state and local leaders during the rulemaking process.
- Ensure federal agencies recognize the differences in geography and resources among state and local governments to make certain none are disproportionally affected.
- Communicate proposed rules and regulations clearly and consistently to state and local governments.
- Avoid unfunded mandates—federal programs must not impose unreimbursed costs on state and local governments.
- Provide state and local governments with sufficient time to implement new guidelines or regulations and take into consideration legislative calendars.
- Provide maximum flexibility in the administration and maintenance of federal programs, to ensure that programs do not impose new burdens on state and local budgets.
- Make certain federally mandated administrative requirements are uniform across federal agencies.
- Harmonize federal regulations with current actions at the state and local levels.

THE COUNCIL OF STATE GOVERNMENTS

Recommendations to Improve the Federal-State Regulatory Process

- **Update the Unfunded Mandates Reform Act:** Federal agencies, including independent agencies, regularly fail to quantify and assess the impact of federal regulations on state, local and tribal governments. Closing the loopholes to ensure federal agencies fully examine the potential economic costs is important in minimizing any unfunded mandates.

- **Establish State and Local Government Advisory Committees within federal agencies:** Absent the Advisory Commission on Intergovernmental Relations (ACIR), there is no advisory board consistent throughout federal agencies. Establishing a state and local advisory committee within each federal agency would help ensure there is consistent input, consultation, and analysis of proposed rules and regulations.

- **Develop annual or bi-annual sessions between agency staff and association staff:** This would allow all groups to make introductions and facilitate dialogue, including with both political and career federal agency staff. Also exchange rosters of key contacts between senior agency officials, including career and political employees responsible for writing regulations (i.e. Deputy Assistant Secretary) and Big 7 staff.

- **Employ individuals with experience in state and local government**: When vacancies appear, consider hiring employees with knowledge and experience in state and local government affairs. In addition, OIRA can include having experience in state and local government in the job description and application process.

- **Establish oversight reports on federal agency regulatory coordination:** Instruct agency Inspector Generals, Government Accountability Office (GAO), or other oversight agencies to conduct assessments on the agencies outreach and coordination with state and local governments.

- **Offer a 101-type session for agency staff on topics related to state and local government:** These could address some of the basics about the roles and responsibilities of state and local governments, but could also include things like what how county budgets are determined and their budget cycles.

- **Create an internal alert system (or communication) that informs state and local organizations when agencies bypass necessary process requirements:** Have OIRA flag rules that have bypassed standard agency intergovernmental procedures, and communicate those rules to state and local associations. In example, when agencies fail to quantify a major rule that may have a direct effect on state and local governments.

- **Identify best practices for intergovernmental cooperation:** Document and highlight best practices around intergovernmental coordination and outreach from federal agencies. These can be instrumental for continued improvements among federal, state and local governments.

The Council of State Governments

RESOLUTION

RESOLUTION CONCERNING CLEAN WATER ACT REGULATIONS AND U.S. EPA'S DEFINITION OF "WATERS OF THE U.S."

WHEREAS, the Clean Water Act (CWA) and implementing regulations of the past four decades recognize the partnership between federal, state, and local governments to achieve the objectives of the Act; and

WHEREAS, Section 101(g) of the CWA expressly states that it is "the authority of each state to allocate quantities of water within its jurisdiction [that] shall not be superseded, abrogated, or otherwise impaired by this Act"; and

WHEREAS, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers have a proposed rule to redefine "waters of the U.S." that could significantly increase the cost and regulatory requirements for state and local governments and ultimately the costs for state and local residents and businesses; and

WHEREAS, the proposed rule has no prescribed limits to federal jurisdiction and does not clearly define what waters are to be regulated under the federal government and what waters are under the state's jurisdiction; and

WHEREAS, the proposed rule will apply to all programs of the CWA and, therefore, subject more activities to CWA permitting requirements, National Environmental Policy Act (NEPA) analyses, mitigation requirements, and citizen suits challenging local actions based on the applicability and interpretation of new-found authorities; and

WHEREAS, the costs of obtaining U.S. Army Corps of Engineers wetlands permits are significant, averaging 788 days and $271,596 for an individual permit; 313 days and $28,915 for a nationwide permit – not including the costs of mitigation or design changes – and the greatest burden will fall on small landowners and small businesses least able to absorb the costs; and

WHEREAS, the proposing agencies' economic analysis for this rule did not consider impacts of the full range of CWA programs affected, or of economic impacts to small businesses, and the analysis relies on nearly 20-year-old cost data that has not been adjusted for inflation and, in concluding, that the proposed rule would increase the waters subject to permitting requirements by only 2.7 percent, the

proposing agencies rely on a data base that is incomplete and not representative of those waters that are subject to jurisdiction under current regulation; and

WHEREAS, the justification for the scope of the proposed rule rests on a scientific analysis that is still under review and the proposing agencies decided to proceed with development of a proposed rule addressing issues associated with the connectivity of waters prior to being informed by the Science Advisory Board Review and the implications of its findings; and

WHEREAS, the proposed rule does not provide an explanation or clear understanding about how the proposed expansion of CWA jurisdiction and transfer of ultimate authority might affect other CWA programs, state laws and responsibilities, water rights, land use, governances, and regulated parties; and

WHEREAS, the EPA and the U.S. Army Corps of Engineers have not fulfilled statutory obligations to fully consult with the states, thus undermining the cooperative federalism intent at the heart of the CWA; and

NOW THEREFORE, BE IT RESOLVED, as co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters; and

BE IT FURTHER RESOLVED, that The Council of State Governments urges the EPA and the U.S. Army Corps of Engineers to defer adopting any redefinition of the waters of the U.S. rule until:

- The Science Advisory Board concludes its review and the EPA and the U.S. Army Corps of Engineers incorporates the conclusions of the Science Advisory Board review; and
- An economic analysis is completed that addresses the full economic impact of the rule and uses properly updated data.

BE IT FURTHER RESOLVED, copies of this resolution shall be transmitted to the president, all members of Congress, the Administrator of the U.S. EPA, and the leadership of the U.S. Army Corps of Engineers, and the CSG staff is directed to advocate for policies that reflect these principles.

Adopted this 13th Day of August, 2014 at CSG's 2014 National Conference in Anchorage, Alaska.

The Council of State Governments

RESOLUTION

RESOLUTION CONCERNING U.S. EPA PROPOSED GREENHOUSE GAS REGULATIONS FOR EXISTING FOSSIL-FUELED POWER PLANTS

WHEREAS, states believe that electricity affects all aspects of American life and is indispensable for quality of life, economic growth, and the sustainability of modern society; and

WHEREAS, electricity will only become more important in the future as the demand for electricity continues to increase; and

WHEREAS, President Obama issued a June 25, 2013 memorandum directing the U.S. (EPA) to issue proposed carbon pollution standards, regulations or guidelines, as appropriate, for modified, reconstructed and existing power plants by no later than June 1, 2014 and to issue final standards, regulations or guidelines, as appropriate, by June 1, 2015; and

WHEREAS, the United States Constitution calls for the federal government to respect and preserve state sovereignty; and

WHEREAS, the regulation of retail electricity sales and local distribution is a sovereign state function and each state has the responsibility to ensure a reliable and affordable supply of electricity for their citizens; and

WHEREAS, economic output of states has increased while states have managed electricity generation, distribution and transmission to cost-effectively reduce greenhouse gas emissions according to the U.S EPA using multiple methodologies; and

WHEREAS, the president directed the U.S. EPA to engage the states recognizing, "they will play a central role in establishing and implementing standards for existing power plants;" and

WHEREAS, at the invitation of U.S. EPA, elected legislative bodies and individual elected officials, policymakers, and stakeholders provided input to the U.S. EPA recommending U.S. EPA only provide guidelines on achievable carbon dioxide emission reduction measures states could take at affected coal-fired electric generating units and giving states credit for all previous actions to reduce their emissions so states could make decisions on additional generation and end-use efficiency measures if

necessary as provided by the Clean Air Act Section 111d and its 40 CFR 60 implementing regulations; and

WHEREAS, the U.S. EPA published proposed emission reduction regulations for existing fossil-fueled power plants in June 2014 requiring state-specific plans to further reduce emissions that the U.S. EPA acknowledges will cause significant and rapid changes in states' energy mixes including almost 50 gigawatts of retirements of baseload coal generation between 2016 and 2020 in addition to the 71 gigawatts retired between 2010 and 2020, increases in the price of electricity and significant numbers of jobs to be lost with less than 24-month timeline for states to comply by 2020 after U.S. EPA approves state plans; and

WHEREAS, states likely will be challenged to implement real-world efficiency improvements at affected units and end uses by consumers, renewable and nuclear energy deployments, natural gas electricity capacity factors at levels determined by U.S. EPA and could be forced to retire additional units in order to comply with emission reduction goals and timeline U.S. EPA has set for them; and

WHEREAS, states simultaneously support reasonable environmental protection with assured energy security, production, distribution, efficiency and economic growth in the United States but they find that the U.S. EPA plans would transform their electricity generation and delivery systems with risks to power 60 million homes, their citizens, communities, businesses, and agriculture; and

NOW, THEREFORE BE IT RESOLVED, that The Council of State Governments urges the executive branch and Congress to establish a national energy policy that encourages access to and removal of impediments to all available domestic sources of energy; and

BE IT FURTHER RESOLVED, that The Council of State Governments encourages the U.S. EPA to recognize the sovereign power of state regulators to avoid costly litigation; and

BE IT FURTHER RESOLVED, that The Council of State Governments recommends state policymakers work closely with their environmental commissioners, informed by electricity providers and other stakeholders, this resolution and the states' previous recommendations, to develop comments and where appropriate comments with other states addressing the legal, economic, employment, timing, achievability, affordability, implementation scheduling and reliability issues in the proposed regulations for their state and file them by U.S. EPA's comment deadline and to stay engaged with U.S. EPA and other relevant federal agencies after the comment period ends and the regulation is finalized to eliminate or minimize the risks and consequences from U.S. EPA's Clean Power Plan; and

BE IT FURTHER RESOLVED, that The Council of State Governments encourages states to inform their congressional delegations on their evaluations and comments and encourage these representatives to help resolve issues by reducing or eliminating negative consequences from U.S. EPA's proposed regulation; and

BE IT FURTHER RESOLVED, that The Council of State Governments' staff is encouraged to support states with education initiatives for its members by webinars, meetings, written communications and other means; and

BE IT FURTHER RESOLVED, that copies of this resolution are to be transmitted to the president of the United States, U.S. EPA, U.S. Department of Energy, National Governors Association, National Association of Regulatory Utility Commissioners, National Association of State Energy Officials, Environmental Council of the States and other relevant organizations, and leadership in all states, and CSG staff are directed to work with the Congress, federal agencies and stakeholder coalitions to achieve the goals of this resolution.

Adopted this 13th Day of August, 2014 at CSG's 2014 National Conference in Anchorage, Alaska.

CSG WEST

"Serving Western Legislatures"

The Council of State Governments West
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May 19, 2015

Honorable Mike Rounds
United States Senator
Chairman, Superfund, Waste Management, and Regulatory Oversight Subcommittee
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Honorable Edward Markey
United States Senator
Ranking Member, Superfund, Waste Management, and Regulatory Oversight Subcommittee
456 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Senator Rounds and Senator Markey,

On behalf of the Council of State Governments West (CSG West), thank you for the opportunity to contribute to the Superfund, Waste Management, and Regulatory Oversight Subcommittee's hearing on oversight of scientific advisory panels and processes at the Environmental Protection Agency (EPA). We appreciate your leadership and the subcommittee's interest in hearing from Western state legislators.

As a nonpartisan, nonprofit organization serving Western state legislatures, CSG West is dedicated to preserving the role of states as "laboratories of democracy" and fostering effective cooperation with relevant federal agencies in areas of shared jurisdiction while limiting unnecessary federal intrusion in areas of state responsibility. In no other region in our country is effective federal and state cooperation more important than in the West where federal agencies work with relevant state and local agencies on a number of critical issues affecting the sustainability of our region, including the management of our natural resources and the protection of wildlife.

Over the past several years CSG West, through resolutions and correspondence, has urged Congress and federal agencies to communicate and consult with Western states in a substantive and timely manner when considering amendments to the Water Pollution Control Act as well as other federal laws. Moreover, CSG West has urged federal agencies to adhere to Presidential Executive Order 13132, issued August 4, 1999, requiring federal agencies to "have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications."

Enclosed for your reference are copies of CSG West resolutions related to proposed amendments to the Federal Water Pollution Control Act and water-related federal rules, regulations, directives, orders and policies.

Despite our organization's call for greater consultation with Western states, communication challenges remain. In many instances state consultation by federal agencies, including U.S. EPA, has taken place in the latter part of the policy development process, placing states and regional organizations such as CSG West in a reactionary position to a proposed regulation or interpretation as opposed to engaging states on the front-end of the process to ensure that state perspectives are taken into account.

In addition to the state consultation challenges limited state representation exists in EPA advisory panels. U.S. EPA advisory panels play an important role in providing independent advice to the EPA Administrator and other high level administration officials on a number of technical issues, including the development of rules related to the jurisdiction and application of the Clean Water Act, Clean Air Act and other regulations that impact state authority. Because they provide an independent voice to complex, technical matters, it is imperative that such advisory boards be comprised by a wide array of stakeholders, including state level representatives. However, states are largely underrepresented in EPA advisory panels.

Below are some examples related to the lack of state/local participation on EPA advisory panels:

- Of the 47 members of EPA's Chartered Science Advisory Board, only three are from state and local governments.

- EPA's Hydraulic Fracturing Research Advisory Panel, a subpanel of the Science Advisory Board designed to review EPA science on hydraulic fracturing and water, has no state/local/tribal experts on the panel. Thirteen state/local/tribal experts were nominated including from Western states and local governments, but none were selected by EPA.

- For the Science Advisory Board "Connectivity" Panel, which was reviewing a highly influential scientific assessment designed to inform EPA's authority over "waters of the U.S." under the Clean Water Act, EPA did not pick any of the nine qualified state/local experts the 27-member panel. As the Western Governors' Association recently testified: "It is worth noting that the SAB panel for the review of the EPA water body connectivity report included no state representatives. The report was therefore developed without the regulatory expertise, scientific resources and on-the-ground knowledge possessed by state professionals."

- For EPA's Clean Air Scientific Advisory Committee Ozone Review Panel, which provided the critical advice for Administrator Gina McCarthy's proposed ozone regulations, only one of the 22 panelists came from a state/local perspective.

- For EPA's seven-member chartered Clean Air Scientific Advisory Committee, whose recommendations establish the range to be considered by EPA in setting national air pollution standards, not a single member has come from EPA Region 6 (AR, LA, NM, OK, TX), Region 7 (IA, KS, MO, NE), Region 8 (CO, MT, ND, SD, UT, WY), or Region 10 (AK, ID, OR, WA) since at least 2010.

CSG West recognizes that the federal government has a vital role to play in advancing national priorities. However, it is imperative that federal agencies substantially engage states when developing or enacting regulations which affect state jurisdictions, and ensure that advisory panels designed to provide an independent voice include greater state representation. We encourage you and the members of the subcommittee to address these challenges with the hope that our state and federal engagement can be strengthened for the benefit our states and communities.

Once again, thank you for your consideration of these important issues. If you or your staff has any questions, please feel free to contact CSG West Executive Director, Edgar Ruiz, at (916) 553-4423.

Sincerely,

Senator Nancy Todd
Chair, CSG West
Colorado State Senate

Representative Jeff Thompson
Chair-Elect, CSG West
Idaho House of Representatives

Representative Sam Hunt
Vice Chair, CSG West
Washington House of Representatives

Representative Craig Johnson
Immediate Past Chair, CSG West
Alaska House of Representatives

Representative Lance Pruitt
Chair, CSG West State &
Federal Relations Committee
Alaska House of Representatives

Representative Cindy Evans
Vice Chair, CSG West State &
Federal Relations Committee
Hawaii House of Representatives

CC:
Senator James M. Inhofe (OK), Chairman, U.S. Senate Committee on Environment & Public Works

Senator Barbara Boxer (CA), Ranking Member, U.S. Senate Committee on Environment & Public Works

Enclosures

- CSG West Resolution 2014-03 on water-related federal rules, regulations, directives, orders and policies.
- CSG West Resolution 2011-03 regarding U.S. EPA and the U.S. Army Corp of Engineers' draft guidance on identifying waters protected by the Clean Water Act.
- CSG West Resolution 2010-01 regarding amendments to the Federal Water Pollution Control Act, as proposed by S. 787 and H.R. 5088 in the 111th Congress.

November 17, 2015

The Honorable James Lankford
U.S. Senate
B40C Dirksen Senate Office Building
Washington, DC 20510

The Honorable Deb Fischer
U.S. Senate
383 Russell Senate Office Building
Washington, DC 20510

The Honorable Virginia Foxx
U.S. House of Representatives
2350 Rayburn House Office Building
Washington, DC 20515

The Honorable Loretta Sanchez
U.S. House of Representatives
1211 Longworth House Office Building
Washington, DC 20510

RE: The Unfunded Mandates Information and Transparency Act (S. 189/H.R. 50)

Dear Senators Lankford and Fischer and Representatives Foxx and Sanchez:

On behalf of the Big 7, a coalition of national organizations that represent state and local officials, we applaud your efforts to make improvements to the Unfunded Mandates Reform Act (UMRA) of 1995. Monitoring federal regulations and planning for unfunded mandates continues to be one of the most pressing issues for state and local leaders. In particular, we support strengthening the required analysis of pending legislation and your call for a strong regulatory look back process. This additional information is critical for improving both the legislative and regulatory processes.

As you know, UMRA was designed to limit the imposition of unfunded federal mandates on state, local, and tribal governments by requiring the Congressional Budget Office and regulatory agencies to provide a qualitative and quantitative assessment of the anticipated costs of legislation and certain regulations, respectively. As UMRA begins its third decade, its goal to "...curb the practice of imposing unfunded Federal mandates on State and local governments," is even more important.

A report by the White House Office of Management and Budget stated that federal regulations and unfunded mandates cost states, cities and the general public between $44 and $62 billion each year. With many states and local governments continuing to face difficult economic conditions, the federal government should avoid imposing any new unfunded mandates. Moreover, federal regulatory agencies should work more closely with state and local governments and other stakeholders during the rule making process to gather input and identify practical solutions.

We commend you for your leadership in advocating the enactment of this legislation, and we look forward to working with you and your staff to ensure its passage.

Sincerely,

David Adkins
CEO and Executive Director
The Council of State Governments

Matthew D. Chase
Executive Director
National Association of Counties

Dan Crippen
Executive Director
National Governors Association
Legislatures

William T. Pound
Executive Director
National Conference of State

Clarence Anthony
CEO and Executive Director
National League of Cities

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Robert J. O'Neill, Jr.
Executive Director
International City/County Management Association

CC: Members of the United States Senate and House of Representatives

Senate Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight hearing entitled, "Oversight of EPA Unfunded Mandates on State, Local, and Tribal Governments."
June 7, 2016
Questions for Senator Mark Norris

Chairman Inhofe:

1. Senator Norris, your testimony says federal agencies regularly process rules without even conducting an appropriate analysis of the potential economic costs. What factors do you think agencies should consider when assessing the economic impact of a regulation on a state?

   The assessment should take into account all direct and indirect costs of the regulation to both the governmental entity with a duty under the regulation and the costs to the entity that may be burdened by the regulation. This assessment would include any cost of compliance, such as human capital expenses to administer to new regulation.

   An emphasis should be placed on providing state and local governments with sufficient time to implement new guidelines or regulations. In addition, agencies should also take into consideration legislative calendars and the monetary constraints of budgets of respective state, local and tribal governments.

   Moreover, the strict and faithful compliance with the Regulatory Planning and Review Executive Order 12866 would be greatly beneficial. E.O. 12866 establishes the guiding principles agencies must follow when developing regulations, including encouraging the use of cost-benefit analysis, risk assessment, and performance-based regulatory standards. The analytical requirements of E.O. 12866 are an effective mechanism for holding agencies accountable, but compliance is inconsistent.

2. Your testimony mentions the need to "provide state and local governments with sufficient time to implement new guidelines or regulations and take into consideration legislative calendars."
   a. I too was a state legislator, in Oklahoma House and Senate, but a lot has changed since then – do you think federal agencies like EPA can do a better job to account for the differing schedules of state governments—whether legislative sessions or fiscal years—in its regulatory process and subsequent regulatory compliance deadlines?

b. Can you elaborate on what EPA could be doing to make consultation more effective with state legislators such as yourself who are busy with other fulltime jobs and in session only a limited part of the year?

Yes, as I mentioned in my testimony, many of our state legislators are truly citizen legislators -- we hold full time jobs in addition to our public service. It is difficult to keep up with and meaningfully respond to the proliferation of regulations and paperwork required. Legislative calendars and budget cycles should be taken into consideration during both the commenting period and during implementation. A state fiscal year often does not coincide with the federal fiscal year.

The EPA should reach out to appropriate state and local officials early in the process when they are developing rules, ideally before the rule is drafted and continuing throughout the rulemaking lifecycle. EPA should also provide a uniform and predictable process to enhance their consultation with state and local governments. Quarterly meetings with the "Big 7" (the national organizations representing state and local government) should be developed and maintained to establish some form of regularized personal contact and help build relationships with the representatives of state interests. Lastly, proposed rules should be clearly communicated and consistently published in a manner that ensures state, local, and tribal entities have access to the information and understand what the rule entails.

3. Your testimony mentions the lack of consultation between EPA and state and local governments. This is a problem and too often we have heard EPA consultation is just a check-the-box exercise.
   a. Can you walk me through some of the ways EPA can improve consultation with state governments?
   b. What does robust consultation look like to you?

The EPA needs to come to us as early as possible as a partner in the development process, as opposed to afterward when decisions have already been made. The process cannot be a hollow one. It must involve an honest exchange of views, and there must be a rigorous analytic analysis associated with the costs of rules. This is seldom the case, and instead rules all too often reflect a very general and subjective analysis that does not focus on hard cost data.

Robust consultation would involve ensuring federal agencies recognize the differences in geography and resources among state and local governments to make certain none are disproportionally affected by a one-size-fits-all approach. Also, while clearly communicating a full analysis of the economic costs, agencies should also provide options or recommendations on how to comply with the rule, the resources necessary to comply, and a detailed implementation timeline.

4. Your testimony mentions instances where you have participated in meetings with federal agencies raising issues with regulatory action, but "there has been little response or real action to help resolve them." I have heard of many instances where states provide detailed comments on rules, yet the EPA does not take them into account.
    a. Don't you think states, as co-regulators, not just mere stakeholders, deserve a thorough response and feedback from the EPA when submitting comments on rules impacting the state?
    b. Do you agree that mere solicitations for public comments or participation on a widely attended conference call do not satisfy the consultation requirement?

Yes, absolutely. As partners and co-regulators, we do deserve a thorough response to our concerns. As you know, the Tenth Amendment provided the foundational role for states to be co-regulators and partners in developing public policy. This does not mean they are just another stakeholder.

The Council of State Governments does agree that the mere solicitations for public comments or widely attended conference calls do not satisfy consultation requirements. We believe that effective consultation requires an agency to consider and take into account a party's views regardless of whether those views are accepted in whole or part.

5. In February 2016, Alaska's DEC Commissioner responded to a letter I sent stating, "The sheer volume of EPA rulemakings makes it difficult to proactively initiate actions early on all requirements."
    a. Has your state also experienced difficulties proactively initiating actions?
    b. Do you think more state resources and time are spent responding to EPA actions than proactively initiating environmental actions?
    c. In other words, what are the opportunity costs of EPA imposing all these federal mandates on your state?

Tennessee's ability to proactively implement environmental actions is very situation-specific. In some cases, we do not experience significant difficulties. In

other cases, we may experience challenges that may arise due to situations such as unfunded mandates, federal regulation being at odds with state regulation, and insufficient communication and collaboration with states. It is important to note that TDEC's compliance with regulatory requirements, EPA actions, and TDEC non-regulatory environmental efforts are in fact themselves efforts to initiate proactive environmental actions. For example, commenting upon or implementing new federal standards for air quality or requirements pertaining to the management and disposal of coal combustion residuals are actions designed to prevent future air, land, and water pollution. We may not always agree with the stringency or timeline of requirements established by EPA; there are instances in which TDEC may be challenged to implement federal environmental regulatory requirements under the prescribed timelines given limited agency resources, or circumstances within the regulated community which we see as presenting an impediment for regulated entities' compliance. But, it is important to remember that the ultimate goal of both states and EPA is protecting human health and the environment. Thus, it is important for EPA to work with states to minimize unintended consequences so that the joint goal of protecting human health and the environment is accomplished in most efficient and effective way.

As I highlighted in my testimony, the 2015 report by the White House's Office of Management and Budget, or OMB, estimated that federal regulations and unfunded mandates cost states, cities and the general public between $57 billion and $85 billion each year. Reviewing and reacting to the proposals is also extremely costly and time-consuming. Turning to your questions which focus on EPA rules, many of the regulations that the EPA proposes, like those associated with the Clean Power Plan and interpretation of the Clean Water Act, are extremely complicated and difficult to review from both a financial and human resource perspective. Moreover, these difficulties are compounded when states must review several proposals simultaneously. EPA could improve the process by being more cognizant of the issues this presents for the states. They could stagger proposals so states are not required to review more than one major proposal at one time. Additionally, the review period should routinely be expanded to commensurate with the complexity of the rule itself.

6. Senator Norris, at the hearing you mentioned the former Advisory Commission on Intergovernmental Relations (ACIR) as a model for potential improved state input on federal regulations. Can you please expand on the pros and cons of the former ACIR and what a present-day commission would look like?

The Advisory Commission on Intergovernmental Relations (ACIR) seemed to provide an effective forum for state and local governments to provide feedback and consultation. Absent something similar to the ACIR, there is no similar body to provide consistent, informed advice to federal agencies in a cost effective manner. Agencies should be encouraged to use existing processes to establish state and local advisory committees to help ensure there is consistent input, consultation, and analysis of proposed rules and regulations.

The challenge in weighing pros and cons is one of balance. In this regard, a modernized ACIR or its equivalent would need to be robust enough to do its job and provide substantive advice, but also ensure it is done in a timely and cost effective way without impeding the policymaking process. It could serve as a final-agency safeguard to ensure all the consultation steps are followed before a rule could be sent to OMB for review.

Senator Rounds:

7. The EPA often imposes one-size-fits all regulations and allows for little flexibility for compliance. How do these types of burdensome regulations actually inhibit environmental goals? Affording as much flexibility to the states as possible in how to meet the rules goals and objectives is in keeping with the principles of federalism. Keeps with the concept that problems are best solved at the local level. Allows states to take into account their own unique considerations and come up with situations that capitalize on past experiences.

   We agree with your statement above. States believe that the public interest is best served when EPA sets a goal or standard to be achieved and affords flexibility to the states and industry to determine how best to meet that goal or standard. That allows states and regulated industries to develop approaches that take their unique circumstances into account and to adopt techniques and methods that take these circumstances and individual capabilities of the states and industries into account.

8. The Council of State Governments has been engaged in an effort to improve the role of states in the federal process. Can you share with us some suggestions you have that could improve the federal regulatory process through increased state participation?

   First, I want to stress the importance for federal policy makers, including Congress, federal agencies, the White House, and other organizations, to read, understand and take into account the policy resolutions and recommendations adopted by CSG and other state and local government organizations. Then the

relevant federal agency(s) should provide a formal written response to the policy statement or resolution submitted. CSG and state and local governments rarely hear anything, either written or verbal, from the federal agency regarding the policy statement or resolution. These recommendations are the ideas, views, and best practices of a bipartisan group of state leaders, and are an important component of improving the state and federal relationship. Establishing stronger communication between federal, state and local governments is an important first step.

As stated, CSG has identified several procedural and legislative recommendations on how to improve the state-federal regulatory process. The recommendations include updating the Unfunded Mandates Reform Act; establishing consistent state-federal advisory committees within federal agencies; and simply ensuring state legislators know who to contact in each federal agency. I have provided the list of recommendations below:

- **Update the Unfunded Mandates Reform Act:** Federal agencies, including independent agencies, regularly fail to quantify and assess the impact of federal regulations on state, local and tribal governments. Closing the loopholes to ensure federal agencies fully examine the potential economic costs is important in minimizing any unfunded mandates.

- **Establish State and Local Government Advisory Committees within federal agencies:** Absent the Advisory Commission on Intergovernmental Relations (ACIR), there is no advisory board consistent throughout federal agencies. Establishing a state and local advisory committee within each federal agency would help ensure there is consistent input, consultation, and analysis of proposed rules and regulations.

- **Develop annual or bi-annual sessions between agency staff and association staff:** This would allow all groups to make introductions and facilitate dialogue, including with both political and career federal agency staff. Also exchange rosters of key contacts between senior agency officials, including career and political employees responsible for writing regulations (i.e. Deputy Assistant Secretary) and Big 7 staff.

- **Employ individuals with experience in state and local government**: When vacancies appear, consider hiring employees with knowledge and experience in state and local government affairs. In addition, OIRA can include having experience in state and local government in the job description and application process.

- **Establish oversight reports on federal agency regulatory coordination:** Instruct agency Inspector Generals, Government Accountability Office (GAO), or other oversight agencies to conduct assessments on the agencies outreach and coordination with state and local governments.

- **Offer a 101-type session for agency staff on topics related to state and local government:** These could address some of the basics about the roles and responsibilities of state and local governments, but could also include things like what how county budgets are determined and their budget cycles.

- **Create an internal alert system (or communication) that informs state and local organizations when agencies bypass necessary process requirements:** Have OIRA flag rules that have bypassed standard agency intergovernmental procedures, and communicate those rules to state and local associations. In example, when agencies fail to quantify a major rule that may have a direct effect on state and local governments.

- **Identify best practices for intergovernmental cooperation:** Document and highlight best practices around intergovernmental coordination and outreach from federal agencies. These can be instrumental for continued improvements among federal, state and local governments.

Senator ROUNDS. Senator Norris, thank you very much for your testimony.

We will now hear from our next witness, Commissioner Christian Leinbach.

Commissioner Leinbach, you may begin.

STATEMENT OF HON. CHRISTIAN LEINBACH, COMMISSION CHAIR, BERKS COUNTY, PENNSYLVANIA, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

Mr. LEINBACH. Chairman Rounds, Ranking Member Markey, EPW Chair Inhofe, and distinguished members of the subcommittee, I am honored to testify today on the impacts of EPA regulations on State, local, and tribal governments. My name is Christian Leinbach, and I serve as Chairman of the Berks County Board of Commissioners in Pennsylvania, and today I am representing the National Association of Counties.

While Berks County is considered urban, with a population close to 415,000, we have a diverse mix of urban, suburban, and rural communities. Manufacturing accounts for more than 30,000 jobs in our county, and agriculture is our No. 1 industry.

As a county commissioner, I have seen firsthand how our local communities, major employers, and important infrastructure projects have been directly and indirectly impacted by Federal environmental regulations, and today, as you continue to assess Federal regulations and their impact on State and local governments, I would like to share with you three key points for your consideration.

First, this is important because counties and other local governments play a key role in the Federal regulatory process. Counties build, own, and maintain a significant portion of public safety infrastructure that may be regulated under Federal and State laws. This includes over 45 percent of America's roads and nearly 40 percent of all public bridges. We also own and maintain roadside ditches, flood control channels, storm water culverts and pipes, and MS4, just to name a few.

But just as important as our infrastructure ownership, we share co-regulator responsibilities with Federal and State governments for a number of environmental programs, including the Clean Air Act and the Clean Water Act. So when EPA crafts new rules, their decisions have a direct impact on how we serve our residents at the local level.

Second, the growing number of Federal regulations and mandates is significantly impacting counties and our residents. In recent years, the Federal Government has increasingly relied on State and local governments to shoulder implementation costs for more than just environmental programs. This has caused an imbalance at the local level since counties are limited in our ability to generate local revenue. In fact, more than 40 States limit our ability to collect sales, property tax, and/or other fees. These leave counties with a difficult choice: do we cut critical local services like law enforcement, fire protection, and emergency services or delay needed infrastructure projects? These choices have significant repercussions for our residents and businesses and affect the quality of life within our communities.

Counties nationwide continue to be very concerned about EPA's water of the U.S. rule, the ozone rule, and risk management rule, which are quite complex and costly regulatory mandates that involve environmental compliance. These rules will extend Federal jurisdiction over a greater number of county projects and could compromise our ability to fulfill significant infrastructure construction, maintenance activities, and public safety responsibilities.

Berks County has felt the effects of the growing number of EPA regulations over the past years. In fact, one of our largest coal-fired power plants shut down due to the NAAQS rules. Seventy-five employees lost their jobs, and these were quality jobs paying around $70,000 a year.

Ultimately, counties support environmental protections and share many of the same goals as the Federal agencies. But we are concerned that the current rulemaking process does not take into account the true implications of these regulations.

Finally, and most importantly, meaningful intergovernmental consultation will create greater clarity and increase the effectiveness of Federal regulations. Even though EPA has one of the strongest internal consultation requirements, it is inconsistently applied. Although waters of the U.S., ozone and risk management rule will have a major impact on county governments, we were not meaningfully consulted with, despite repeated requests.

In conclusion, while we share many of the same goals as our Federal partners, the current consultation process must be strengthened. Counties, with our experience and expertise, stand ready to work with Congress to improve the Federal regulatory and consultation process.

Thank you for the opportunity to testify today. I look forward to your questions.

[The prepared statement of Mr. Leinbach follows:]

WRITTEN STATEMENT FOR THE RECORD

THE HONORABLE CHRISTIAN Y. LEINBACH
COMMISSIONER CHAIR, BERKS COUNTY, PENNSYLVANIA

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

OVERSIGHT HEARING ON EPA'S REGULATIONS' IMPACT ON STATES, LOCAL AND TRIBAL GOVERNMENTS

BEFORE THE SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT AND REGULATORY OVERSIGHT
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

JUNE 7, 2016
WASHINGTON, D.C.

Thank you, Chairman Rounds, Ranking Member Markey and members of the subcommittee, for the opportunity to testify on the impact of U.S. Environmental Protection (EPA) regulations on state, local and tribal governments.

My name is Christian Leinbach and I serve as Chairman of the Berks County Board of Commissioners in Pennsylvania, and today I am representing the National Association of Counties (NACo).

Elected in 2007, I am now in my ninth year serving on the county board. Additionally, I was elected to NACo's Executive Committee as the Northeastern Region representative by counties in Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania and West Virginia. I am also the past president of the County Commissioners Association of Pennsylvania.

About NACo

Founded in 1935, NACo is the only national organization that represents county governments in the United States and brings together county officials to advocate with a collective voice on national policy, exchange ideas and build new leadership skills, pursue transformational county solutions, enrich the public's understanding of county government, and exercise exemplary leadership in public service.

About Counties

Counties are highly diverse, not only in the Commonwealth of Pennsylvania, but across the nation, and vary immensely in natural resources, social and political systems, cultural, economic, public health and environmental responsibilities. Counties range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Of the nation's 3,069 counties, approximately 70 percent are considered "rural," with populations less than 50,000, and 50 percent of these have populations below 25,000 residents. At the same time, there are more than 120 major urban counties, which collectively provide essential services to more than 130 million people each day. If you've seen one county, you've seen one county, and there are 3,068 more to go.

About Berks County, Pennsylvania

While Berks County is generally considered "urban" with a population close to 415,000 residents, we have a very diverse mix of urban, suburban and rural components. The county lies in southeastern Pennsylvania and has a land mass of about 866 square miles. The county seat is Reading, the fifth largest city in Pennsylvania. While manufacturing accounts for more than 30,000 jobs in Berks County, agriculture is actually the county's largest industry with over 240,000 acres dedicated to farmland. In fact, Berks County is Pennsylvania's third largest producer of agricultural products.

As a county commissioner and a former vice president of a local advertising agency, I have seen firsthand how our state, local community, and important infrastructure projects have been directly and indirectly impacted by federal regulations—and specifically those from the EPA.

Today, I will discuss three key points for your consideration as the Committee continues to assess federal regulations and their impact on state and local governments:

1. **Counties and local governments play a key role in the federal regulatory process**

2. **The growing number of federal regulations and mandates has significant impacts on counties and our residents**

3. **Finally, meaningful intergovernmental consultation will build consensus around and increase the effectiveness of federal regulations**

First, counties and local governments play a key role in the federal regulatory process

County governments exist to deliver public services at the local level, with accountability to our constituents and communities as well as to state and federal authorities. In fulfilling this mission, counties are not only subject to state and federal regulations, but also help to implement them at the local level. **Therefore, as both regulated entities and regulators, it is critical that counties be fully engaged as intergovernmental partners through the entire federal regulatory process—from initial development through implementation.**

Counties are subject to both state and federal regulations

As major owners of public infrastructure—including 45 percent of America's road miles, nearly 40 percent of bridges, 960 hospitals, more than 2,500 jails, 650 nursing homes and a third of the nation's airports and transit systems—counties are regulated by both states and the federal government.

Many of the basic functions of county government, including ownership and maintenance of public infrastructure, are affected by federal environmental regulations. For example, counties own and maintain a wide variety of public safety infrastructure including roadside ditches, flood control channels, stormwater culverts and pipes, Municipal Separate Storm Sewer Systems (MS4), and other infrastructure used to funnel water away from low-lying roads, properties and businesses. Built and maintained by counties to prevent flooding and accidents, these also are governed by water quality regulations.

So when federal agencies, like the EPA, change or update rules, their decisions will inevitably affect our ability to serve residents at the local level.

Counties are also regulators

Charged with protecting the health and well-being of our communities, counties have the ability to issue rules and regulations. We enact zoning and other land use ordinances to safeguard valuable natural resources and protect the safety of our citizens.

For example, under the federal Clean Air Act (CAA), counties are often responsible for controlling air pollution, which may include enforcement authority for rules governing burning or vehicle emissions. Similarly, under the federal Clean Water Act (CWA), counties may enact rules on illicit discharges, remove septic tanks and adopt setbacks for land use plans, and may be responsible for water recharge areas, green infrastructure, water conservation programs and pesticide use for mosquito abatement. We also provide extensive outreach and education to residents and businesses on protecting water quality and reducing water pollution.

In Berks County, while most of the county is in the Delaware River watershed, ten percent of the county drains into the Chesapeake Bay watershed. Since 2010, the communities in the Chesapeake Bay region have been required to reduce water pollution under the Chesapeake Bay Total Maximum Daily Load (TMDL) program. To that end, our county works closely with the Berks County Conservation District to help farmers manage their operations to limit nitrogen, phosphorous and sediment runoff into the Bay.

Additionally, we have taken on further responsibilities under the Federal MS4 Program that is managed through Pennsylvania's State Department of Environmental Protection (DEP). Even though the state government has delegated the MS4 responsibilities to our municipalities, in Berks County, the City of Reading, townships and boroughs are financially unable to implement the MS4 Program. Berks County—along with Berks Nature (our local conservancy organization) and our Conservation District—has coordinated MS4 educational oversight and assistance for thirty-six of our municipalities. We have done this by creating an intergovernmental cooperation agreement among the county, Berks Nature, Berks County Conservation District and municipalities that provide educational outreach and guidance along with coordination of programming to meet MS4 regulatory requirements.

As regulated and regulating entities, counties are uniquely positioned to play a key role in the development and implementation of federal environmental regulations.

Second, the growing number of federal regulations and mandates has significant impacts on counties and our residents

Federal agencies have been issuing an increasing number of regulations in recent years. In 2015, only 114 laws were enacted by Congress, compared to 3,140 rules that were issued by federal agencies.[1] According to the

[1] Competitive Enterprise Institute, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (2016 Edition)

White House Office of Management and Budget (OMB), unfunded mandates from federal rules and regulations cost local governments, our citizens and businesses between $57 billion and $85 billion a year.[2]

These growing number of regulations come at a time when counties—regardless of size—are experiencing significant fiscal constraints and our capacity to fund compliance activities is often limited. According to NACo's County Economies report[3] released this January, only 214 of the nation's 3,069 counties have fully recovered to pre-recession economic conditions.

Even if the counties' economic picture was improved, states put significant restrictions on counties' ability to generate local revenue. In fact, more than 40 states limit counties' ability to collect sales and/or property tax. Some states also limit counties' ability to levy taxes for environmental mandates such as fees on solid waste, water and/or sewer services.[4]

Among the most complex and often costly regulatory mandates are those that involve environmental compliance.

For example, counties nationwide continue to be very concerned about EPA's final "Waters of the U.S." (WOTUS) rule. The final rule extends federal jurisdiction over a greater number of county projects, compromising our ability to fulfill significant infrastructure construction and maintenance responsibilities. The expanded federal oversight may now require additional federal permits, which can be cumbersome, time-consuming and costly, all the while falling short of the goal to protect water quality.

Additionally, EPA also proposed a rule this year to tighten existing safety programs at facilities that use chemicals like chlorine, ammonia and other flammable chemicals. While we agree with the agency's public safety goals, many local governments own water and waste water facilities and there has been very little consultation on the proposal. As a result, we have ongoing concerns about how local governments will be able to comply with costly new requirements and want to ensure that local emergency managers have the necessary resources to complete their duties.

It is important to note that the cost of compliance with EPA regulations cannot be calculated in isolation from the other responsibilities and requirements that the federal government places on counties.

Regulations and mandates come in many shapes and sizes. They can range from requiring localities to implement complex water quality regulations to providing health care services to inmates in jails.

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[2] Office of Management and Budget, Office of Information and Regulatory Affairs, Executive Office of the White House, *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, (2015)

[3] National Association of Counties, *County Economies 2015: Opportunities and Challenges*, NACo Trends Analysis Paper Series (2016)

[4] National Association of Counties, *The Impact of the Economic Crisis on County Revenue Sources—A Discussion* (March 2009)

In my state of Pennsylvania, the fiscal impact of federal and state mandates on counties is substantial. Our counties report significant unfunded mandates for prison medical costs ($70,000-$8.9 million per county), prison compliance ($70,000-$37 million), reimbursement for children and youth services ($5,000-$4.5 million), 911 service costs ($5,000-$4.5 million), county portion of costs for Medicaid nursing facility residents ($158,000-$4 million) and stormwater management plans ($2,000-$400,000).

When the true cost of implementing federal regulations is shifted to local governments, it can create budgetary imbalances that may require cuts to other critical local services like fire protection, law enforcement, emergency response, education and infrastructure or increases in local taxes and fees to make up the difference. Ultimately, it is our residents and local communities that shoulder the increased cost of federal mandates.

In addition to the impact on county budget and operations, we are also very concerned about how the growing number of EPA regulations affects our local businesses and county economies.

EPA's National Ambient Air Quality Standards (NAAQS) for Ozone rule could significantly impact local economies—especially in the Berks County region where manufacturing is one of our primary industries. Under the new rule, hundreds of counties would not meet the more stringent air quality standards and would be designated as in non-attainment status. This designation can have devastating effects on local economies—impacting everything from transportation projects to job growth.

Our county and local businesses have experienced significant challenges in trying to comply with EPA's air quality regulations. These regulations have a chilling effect on our local jobs recovery and economic growth.

In the last few years, two areas in our county were deemed in non-attainment under the 2008 NAAQS for Lead, because according to EPA, our region had only one and a half years of data to show instead of the required three years. The point being, although we were technically in compliance, EPA still gave us a negative designation, which made it difficult to attract new industries to the areas.

Additionally, in March 2014, EPA put Berks County on a maintenance plan for oxides of nitrogen (NOx). This impacted our Titus Station coal-fired power plant. Due to the high cost of compliance with the EPA regulations, the power plant closed last year. As a result, 75 employees who earned an average of $76,000 a year lost their jobs and the county lost $44,403 in annual tax revenue.

We do not necessarily disagree with the underlying objectives of many federal rules, but we are concerned that neither the rule-making process nor the enforcement mechanisms adequately balance these goals with the capacity of local communities to absorb the costs or manage the impact on our local businesses and economies.

Finally, meaningful intergovernmental consultation will create greater consensus around and increase the effectiveness of federal regulations

The American federal system of government is rooted in cooperation, with each level of government – federal, state and local – contributing to the public good. This requires balancing the need to establish national standards geared towards shared goals; adequate funding to ensure that no one level of government is left to shoulder the burden of policy implementation; and building in local flexibility while still accomplishing policy goals.

Unfortunately, the partnership is often out of balance because federal agencies impose rules without meaningfully consulting with the county officials whose experience and expertise helps us identify alternative, more cost-effective methods to address an issue.

Under the Unfunded Mandates Reform Act (UMRA), each federal agency is supposed to consult with state and local governments to help assess the effects of federal regulatory actions containing intergovernmental mandates. However, UMRA leaves the responsibility to each agency to develop its own consultation process and provides no uniform standards for agencies to follow. As a result, the requirement has been inconsistent and each agency's internal process is different.

Meaningful consultation with counties and local governments early in the rulemaking process would not only reduce the risk of unfunded mandates but would also result in more pragmatic and successful strategies for implementing federal policies.

But in order for intergovernmental consultation to be truly meaningful, Congress should direct federal agencies to engage state and local governments as partners, actively participating in the planning, development and implementation of rules. Unfortunately, all too often, our opportunity to engage in the rulemaking process has been limited to the comment period offered to the general public.

While EPA has one of strongest internal consultation requirements, it is inconsistently applied. In *"EPA's Action Development Process: Guidance on Executive Order 13132: Federalism,"*[5] it states that states and local governments must be consulted on rules if they impose substantial compliance costs of $25 million or more, preempt state or local laws and/or have substantial direct effects on state and local governments.[6] For rules that trigger this requirement, EPA is required to consult in a "meaningful and timely" manner with a specific set of state and local elected officials or their organizations. This group includes NACo, National League of Cities, U.S. Conference of Mayors, National Governors Association, National Conference of State Legislatures,

[5] Environmental Protection Agency, *Action Development Process: Guidance on Executive Order 13132: Federalism* (Nov. 2008) *available at* http://www.govexec.com/pdfs/111908rb1.pdf.

[6] Id. at 5.

International City/County Management Association, National Association of Towns and Townships, County Executives of America, Environmental Council of the States and the Council of State Governments.[7]

Throughout the development of the "Waters of the U.S." rule, EPA did not provide meaningful and timely consultation, despite repeated requests to help develop a practical rule that would accomplish our shared goals.

Throughout the development of EPA's risk management rule, local government groups were not consulted at all—despite the major potential impact on our facilities and emergency response services.

Similarly, in the development of the new ozone standards, EPA rapidly moved forward with the new more stringent standard, despite repeated requests for consultation—even though the earlier 2008 ozone standard had yet to be fully implemented.

While we share many of the same goals as our federal partners and implement these rules in our local communities, the current consultation process needs to be strengthened. If we work together, we can craft rules that relieve the pressure of unfunded mandates on local governments and are more practical to administer.

CONCLUSION

Chairman Rounds and Ranking Member Markey, counties are encouraged by your efforts to study the impacts of EPA regulations on state and local governments. Although UMRA provides a framework, it is clear that the consultation process must be strengthened. Counties stand ready with innovative approaches and solutions to work side-by-side with our federal and state partners to ensure the health, well-being and safety of our citizens.

Thank you again for the opportunity to testify today on behalf of America's 3,069 counties. I would welcome the opportunity to address any questions.

Attachments:

- NACo's Compilation on Status of Pending EPA Regulations of Interest to Counties (June 2016)
- NACo's Compilation of Unfunded Mandates and Other Regulatory Impacts on Counties (Nov. 2015)
- Joint letter submitted to EPA from National Association of Counties, National League of Cities and the U.S. Conference of Mayors on EPA's Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (May 13, 2016)
- NACo letter submitted to EPA and the Corps on the "Waters of the U.S." proposed rule (Nov. 14, 2014)

[7] Id. at 4.

- Joint letter submitted to EPA from National Association of Counties, National League of Cities, U.S. Conference of Mayors and National Association of Regional Councils on proposed ozone rule (March 17, 2015)
- Joint letter submitted to the White House's Office of Information and Regulatory Affairs from National League of Cities, National Association of Counties and U.S. Conference of Mayors on EPA's Definition of "Waters of the U.S." (Nov. 8, 2013)

NACo NATIONAL ASSOCIATION of COUNTIES

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Definition of "Waters of U.S." under Clean Water Act (CWA)	Final Rule: Aug. 2015 *Rule temporarily delayed by court	RIN: 2040-AF30	According to the EPA, the purpose of this rule is to clarify which bodies of water (and their ditches) fall under federal jurisdiction in the Clean Water Act (CWA). The rule was implemented Aug. 28, 2015.	Local governments that oversee a number of ditches (roadside, stormwater, floodwater, etc.) that would be impacted.
Forest Roads: Determination under Clean Water Act	Status: Advanced Notice of Proposed Rule-making (NPRM) Notice: June 2016	RIN: 2040-AF43	For the past couple of decades, stormwater runoff from forest roads has been regulated through state-adopted Best Management Practices (BMPs). However, due to a recent court order in *Environmental Defense Center (EDC) v. EPA, 344 F.2d 832 (9TH Cir. 2003)*, the EPA is required to assess whether the agency should regulate stormwater runoff from forest roads itself.	Whether or not a forest road is considered a point or non-point source is relevant to county governments, which own 45 percent of the roads and highways in the U.S. Additionally, county-owned roads may run through federal, state and private forested lands.
Municipal Separate Storm Sewer System General Permit Remand Rule	Status: NPRM Comment Period Closed March 2016 Final Rule: Nov. 2016	RIN: 2040-AF57	This rule derives from a 2003 court decision which stated that the EPA must update public participation and permit review requirements for Phase II small municipal separate storm sewer systems (MS4s).	MS4s are stormwater and wastewater collection systems, generally operated by local governments. Phase II "small" MS4s include "urbanized areas," as defined by the U.S. Census. Approximately 6,789 "small" MS4s will be impacted by the MS4 remand rule.
Stormwater Regulations Revision to Address Discharges from Developed Sites	Withdrawn; however, provisions will be incorporated into renewed permits	RIN: 2040-AF13	EPA was working on an updated version of its existing stormwater rule. This rule was halted after the proposal was deemed to be too expensive to implement.	While the proposed rule was halted, the agency has indicated that when a municipal separate storm sewer system (MS4) permit is renewed (every five years), the new permit may include some of the provisions included in the original proposal.
Regulations Implementation Section 1417 of the Safe Drinking Water Act: Prohibition on Use of Lead Pipes, Solder and Flux	Status: NPRM, August 2016 Final Rule: Feb. 2018	RIN: 2040-AF55	This regulation would set lead limitation levels for pipes and fixtures in drinking water systems. Additionally, EPA will codify language exempting fire hydrants from the lead rule.	This rule will impact local governments that own or operate water utilities.
Drinking Water Regulations: Regulation of Lead and Copper	Status: NPRM, Dec. 2016 (projected) Final Rule: June 2018	RIN: 2040- AF15	EPA announced it is assessing rule-making options on lead and copper in to determine if there is a national problem related to elevated lead and copper levels in drinking water.	This rule will impact local governments that own or operate water utilities.

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

Rulemaking to Establish Regulatory Procedures for Eligible Tribes to Assume Authority Over Clean Water Act Programs	Status: NPRM, Jan. 2016	RIN: 2040-AF52	The EPA is considering giving eligible Indian tribes the the same authority states have to regulate impaired waters on Indian reservations and to establish total maximum daily loads (TMDLs) standards on water resources.	This may be relevant for counties that have services or infrastructure on tribal lands or crosses tribal lands.
NPDES Permit Requirements for Municipal Sanitary Systems and Peak Flow Treatment Facilities	Status: Pre-proposal	RIN: 2040-AD02	The Agency is considering proposing standard permit conditions for inclusion in permits for publicly owned treatment works (POTWs) and municipal sanitary sewer collection systems for monitoring, reporting, and discharge obligations.	This would impact counties that own and operate sanitary sewer overflow (SSO) systems.
Water Quality Standards Regulatory Revisions	Final Rule: Aug. 2015	RIN: 2040-AF16	Water Quality Standards (WQS) are a key component of the Clean Water Act. WQS designs specific goals – e.g. fishable/swimmable – for water bodies designated as "waters of the U.S." and sets pollution-limiting criteria to protect those uses. The final rule was finalized on Aug. 21, 2015.	Local governments are tasked with achieving WQS for water pollution control – tighter standards would impact Total Maximum Daily Loads (TMDLs) and National Pollution Discharge Elimination System (NPDES) permits.
Unregulated Contaminant Monitoring Rule (UCMR 4) for Public Water Systems	Status: NPRM Dec. 2015 Final Rule: Jan. 2017	RIN: 2040-AF49	The Safe Drinking Water Act (SDWA) requires that the EPA establish criteria for monitoring no more than 30 unregulated contaminants every five years.	Relevant for counties that own drinking water utilities.
Bioreactor/Wet Land Regulations	Status: ANPR, July 2016	RIN: 2050-AG86	EPA is considering whether to create new national standards for the operations of "wet" landfills and bioreactor landfills. EPA plans to request information and data on the performance of wet landfills and bioreactors and request comments on whether new national standards are appropriate.	This proposal may be relevant for local governments that operate "wet" and bioreactor landfills. Wet and bioreactor landfills use water to speed up the the decomposition of materials, this process creates more methane gas, as well as creates more space at existing landfills.
Emissions Guidelines and Compliance Tables for Municipal Solid Waste Landfills	Final Rule: July 2016	RIN: 2060-AS23	EPA is currently undergoing a review of the air emissions guidelines for municipal solid waste landfills. The rule will also include regulatory issues on landfill gas treatment systems: startup, shutdown and malfunction.	Counties that own landfills will be required to install controls for collecting and combusting landfill gas. This applies to landfills constructed, reconstructed or modified after November 8, 1987 and before July 17, 2014.

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Lead: Renovation, Repair, and Painting for Public and Commercial Buildings	Status: NPRM Projected Final Rule: April 2017	RIN:2070-AJ56	In 2008, the EPA established a final rule to address lead-based paint (LBP) activities in housing and child care facilities. However, EPA was sued for not addressing LBP hazards in public and commercial buildings. In a settlement agreement, EPA agreed to determine whether activities that impact LBP in public buildings must be federally regulated.	This proposal will impact any county that owns a public building with lead-based paint.
Lead-Based Paint Activities: Bridges and Structures; Training, Accreditation, and Certification Rule and Model State Plan Rule	Status: Pre-proposal	RIN: 2070-AC64	On September 2, 1994, EPA proposed a rule to govern work practices for bridges and structures with lead-based paint (LBP). This rule will look at model state laws and LBP impacts for bridges and other structures.	This proposal may impact counties that own bridges that, at one point, were painted with LBP. The rule may govern bridge maintenance activities for bridges with lead-based paint.
Modernization of the Accidental Release Prevention Regulations (Risk Management Program)	Status: Final Rule, Dec. 2016	RIN: 2050-AG82	As a result of a 2013 West, Texas chemical explosion, EPA is proposing to tighten safety procedures in and around facilities that use chemicals. Additionally, the proposed rule increases emergency response protocol around these facilities, which include water/wastewater plants.	The proposed rule would potential impact counties in two ways. First, as owners of water/wastewater facilities, they would be subject to tighter reporting and emergency protocol requirements. Second, each individual facility within a local jurisdiction would be required to run notification exercises, tabletop and field exercises with local emergency personal on an annual basis.
Polychlorinated Bipherryls (PCB) Light Fixtures	Status: Projected, NPRM, June 2016	RIN: 2070-AJ38	Due to a lawsuit, EPA is considering whether to require all building operators who may still use ballast light fixtures (common in buildings older than 1978 and have not been subject to energy efficiency upgrades) to replace them. These fixtures may be common in schools, hospitals, government centers, etc.	If EPA required an immediate replacement for all PCB fixtures, this would create a substantial unfunded mandate on local governments.

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Management Standards for Hazardous Waste Pharmaceuticals	Status Final Rule: Oct. 2016	RIN: 2050-AG39	A small portion of pharmaceuticals are regulated as hazardous waste under the Resource Conservation and Recovery Act when discarded. Health care (and associated) facilities that have excess hazardous waste pharmaceuticals have reported difficulties complying with the manufacturing-oriented framework of the hazardous waste regulations.	Counties own and operate nursing homes and hospitals that may be impacted. Also uncertain is the impact on local pharmaceutical give-back programs.
Review of the National Ambient Air Quality Standards for Ozone	Status: Rule Finalized Oct. 2015	RIN: 2060-AP38	On Oct. 1, 2015, the EPA released a final rule to tighten air quality standards for ozone from 75 parts per billion (ppb) to 70 ppb. Additionally, as part of the rule, 32 states are required to expand their air monitoring season. Over the next two years, EPA will work with the states to determine final designations – likely using 2014-2015 air quality data – and the final designations will be made by Oct. 2017. The rule will likely be implemented several years after that, barring legal challenges.	Currently, 227 counties — primarily urban and in the East — are considered in non-attainment of existing ozone standards. However, under the rule, this number could increase, as could the costs for compliance. Under a 70 ppb standard, using 2011-2013 air quality monitoring data, approximately 358 counties would be in violation. Counties in non-attainment areas often have difficulty attracting and keeping businesses, which must comply with the tighter standards. Additionally, a tighter standard will impact transportation conformity plans.

May 13, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket # EPA-HQ-OEM-2015-0725

Dear Administrator McCarthy:

On behalf of the nation's cities, counties and mayors, we respectfully submit comments on the U.S. Environmental Protection Agency (EPA) proposed rule for *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket # EPA-HQ-OEM-2015-0725.*

Cities, counties and mayors across the country have a significant interest in this proposed rule. Local governments play an instrumental role in managing and overseeing public safety policy and services including police and sheriff departments, 911 call centers, emergency management professionals, fire departments, public health officials, public records and code inspectors, among others. They are the first responders in any disaster, and are often the first emergency response and recovery teams on the scene. Additionally, local governments own and operate water and wastewater facilities that would be required to comply with this proposed rule.

Under the proposed rule, local governments may be most impacted on two fronts. First, as owners and operators of publically owned water/wastewater treatment facilities, local governments would be regulated through new requirements on facilities. In particular, we are concerned that in addition to the increased managerial costs associated with compliance, EPA is considering subjecting these facilities to safer alternative technology (STAA) reviews. Safer technology alternatives to reduce risk at a water treatment plant could inadvertently counter other federal environmental quality objectives and, selecting the most appropriate water treatment chemicals and technology applications should be made by water utility managers based on science, practical experience, and their professional opinion of what will most effectively make water safe for public consumption and comply with the Safe Drinking Water Act.

Second, since local governments often serve as our nation's first line of defense before and after disasters strike, changes to emergency protocol will directly impact them. The proposed rule will expand local government responsibilities, without providing funding to implement the more complex requirements.

In EPA's cost benefit analysis, we believe that EPA has not adequately considered all the necessary local government costs that would be needed to implement these new responsibilities. The proposed rule would require local governments to coordinate emergency response activities with 11,900 individual facilities. This will be costly and complex for local governments to implement, and more staff and other resources will be needed to effectively meet the goals of the rule. Furthermore, EPA did not consider how an increased local government workload as a result of this rule would be funded. Since publicly owned water treatment systems are funded through user fees, under law, the new facility management costs would be borne by them.

Additionally, we are concerned that the costs and impacts of a more prescriptive risk management program will fall disproportionately on smaller communities, compounding their challenges of complying with the new federal mandates. These jurisdictions generally have small staffs who are already managing a wide range of issues. Larger communities will also be faced with increased reporting and activity burdens as first responders, emergency planners, and regulators of land use activities.

Moreover, while we are appreciative the agency held a one-hour briefing for our organizations during the rule's public comment period, we remain concerned about the proposed rule's direct impact on local governments. We believe the agency missed a valuable opportunity to engage local governments prior to the rule's publication in the *Federal Register*. This is counter to EPA's internal "Guidance on Executive Order 13132: Federalism" (Nov. 2008), which specifies that states and local governments must be consulted on rules if they impose substantial compliance costs, preempt state or local laws and/or have "substantial direct effects on state and local governments." If the agency had engaged us prior to public comment period, we believe we could have flagged some of these problems and identified potential solutions.

For these reasons, we urge you to delay advancing the proposed rule and perform a local government impact analysis and consultation with the nation's cities, counties and mayors before finalizing this rule.

As an intergovernmental partner, we thank you for the opportunity to comment on the proposed rule, which will have a major impact on our various constituencies. On behalf of the nation's cities, counties and mayors, we thank you for your consideration of our request. If you have any questions, please contact us: Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; or Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Matthew D. Chase
Executive Director
National Association of Counties

Clarence E. Anthony
CEO and Executive Director
National League of Cities

ENVIRONMENTAL PROTECTION AGENCY

Clean Air Act	Compliance with federal air pollution standards, including, but not limited to, monitoring air quality; retrofitting stationary and mobile sources of pollution and obtaining required permits; ozone and particulate matter (PM) standards for PM 10 and PM 2.5. While tighter standards for PM 10 have been temporary tabled, the reconsideration process for air standards resets every five years.
Particulate Matter Standards	Mentioned briefly above, lowering PM standards is problematic, especially for rural areas, where practices governing regular everyday events such as cars driving down dirt roads and agricultural practices that sustain local economies could be regulated, as could natural events such as wildfires, droughts or wind storms. Because of the high, naturally occurring, dust levels found in arid climates, many western counties have a difficult time meeting the current PM standard. This, in turn, affects their economic base, which will further restrain economic recovery. Based on previous experience, non- attainment areas have difficulty maintaining and attracting businesses to their regions, since these businesses would have to operate under the tighter standards. Most businesses chose to relocate or not even build in a non-attainment area.
Ozone Standards	The EPA is currently assessing whether to tighten the current National Ambient Air Quality Standards (NAAQS) for ozone. 358 to 558 additional counties would be considered in non-attainment under the standards. For counties designated as being in non-attainment, this impacts both economic development and transportation conformity projects.
Clean Water Act	Compliance with federal regulations and mandates related to: county owned water and wastewater treatment regulations; combined and sanitary sewer overflow consent decrees; "Waters of the U.S." definitional changes (refer below for more specific problems with the navigable "waters of the U.S." regulation program); regulation of point and non-point discharges (including those from forest roads), including standards for improving and maintaining water quality; stormwater regulations; and inconsistent blending and bypass rules.
Pesticides Regulation	The general permit for pesticides became effective the end of October, 2011. NACo has heard mixed reviews from our counties. Some counties, have changed spraying patterns, which may not be as effective as previous practices. The general permit has a heavier paperwork burden for spraying activities. This in turn has changed the way counties administer the program. Since county governments serve as primary service providers for their residents, this permit has significant effects on county programs, particularly mosquito abatement and noxious weed control efforts, creating unfunded mandates for both urban and rural counties through the tight reporting requirements. Additionally, the final "Waters of the U.S." rule may trigger expanded regulation for counties
Stormwater Regulations	CWA stormwater regulations, also known as municipal separate storm sewer systems (MS4s), apply to counties with populations of 100 thousand or more and certain counties in or near urban areas. MS4s are required to meet water criteria standards, generally through Best Management Practices (BMPs). However, in recent years MS4 permits are moving away from BMPs to stricter nutrient numerical limits which can make it both infeasible and very expensive to comply with permit requirements.

Blending and Bypass	In a March 2013 court case, *Iowa League of Cities v. EPA,* the U.S. Court of Appeals for the 8th Circuit struck down EPA's prohibitions against the practice of blending wastewater at Publically Owned Treatment Works (POTW) during wet weather events and against the use of mixing zones in permits for compliance with bacteriologic standards. Despite requests by NACo and other local government groups that this practice should not be prohibited nationwide, EPA stated that the use of blending and bypass is only applicable to areas within the 8th Circuit Court's jurisdiction and not applicable to other areas of the country. This court decision should be applied to all regions rather than just to the 8th Circuit Court region.
Drinking Water	Establishes maximum contaminant levels for contaminants in public water systems and specifies treatment techniques to be used. Upcoming regulations that will have a direct impact on local governments that own/operate drinking water facilities include the lead and copper rules and the cyanotoxin advisory requirements.
Resource Conservation and Recovery Act	Cleanup at landfills, superfund sites and underground storage tanks - Local governments who own landfills are subject to federal standards regarding location, operating criteria, groundwater monitoring, corrective actions, closure and post- closure care. For Superfund sites, the issues stem from institutional controls such as zoning around sites, setting and enforcing easements and covenants and overseeing building and/or excavation near sites.
Brownfields Redevelopment/Dioxin	Brownfields redevelopment has created some of the biggest success stories for local governments. However, the EPA is assessing whether to drop its dioxin levels to a point that would halt all brownfields development in the nation. While dioxin can be created as a byproduct through manufacturing, it is also naturally occurring. The levels the EPA proposed to lower dioxin are equal to many naturally occurring levels. NACo would urge the EPA the revisit the science used behind the health standards. Otherwise, this could be a huge loss for local governments.

ARMY CORPS OF ENGINEERS – SPECIFIC PROBLEMS DEALING WITH THE 404 PERMIT PROGRAM (EPA & USACE)

Compensation Wetland Mitigation	Rule issued in conjunction with EPA. Local governments request added flexibility in meeting wetland mitigation requirements. Specific example includes variance between state and federal requirements. In this case, the state has an expanded set of options to meet the requirement that is not necessarily followed at the federal level. Therefore a local government may satisfy state requirements but not be able to meet federal requirements.
Ditch Drainage Requirements	The excessive amount of requirements necessary to provide information for USACE to review before a project is approved is both costly and time consuming for counties. For example, a county that wished to pursue and complete a drainage project was informed that the following was needed by USACE before work could be started: detailed plans showing existing condition, photos of areas where work will be done, details concerning existing water surface elevation, ordinary high water line, calculations of amount of material to be excavated, and a wetland delineation. Just to do this, the county would need to hire engineers to survey and perform calculations. All of this would significantly add to the cost of the project without necessarily ensuring clean water.

Post construction requirements – 404 Permit Related	The post construction monitoring process adds costs for channel rebuilds and other mitigation measures. For example, one county, after completion of a bridge replacement project, was required by NOAA Fisheries and FHWA to reinitiate formal consultation due to shifting boulders in the stream bed. State fish and wildlife officials supported the county in its objection and in its request to allow the channel to continue to stabilize. An updated BA and additional reporting would cost the county $50,000 in this instance. Should the reconstruction of the stream bed be required by the agencies, almost $1M in additional costs could be incurred.
Waters of the U.S.	Any changes to "Waters of the U.S." definition within the CWA will have an impact on county owned and maintained ditches such as roadside, flood control, stormwater, etc. Additionally, since there is only one "waters of the U.S." definition in the CWA, changes would impact more than the Section 404 permit program. What those changes are is not well understood nor has it been fully studied. This may have a significant impact on local governments.

TRANSPORTATION

Grant Requirements	Requirements do not provide flexibility during implementation phase. For example, a county applies for funding to install electronic dynamic driver feedback speed limit signs. The county would like to purchase the signs using grant funding and then use county resources (e.g. staff) to install them. Requirements however, dictate that all stages of the process must be let out to private contractors, which further implies other requirements, e.g. Davis-Bacon, EEO, etc.
MAP-21	MAP-21 provides for some major reforms in regard to project delivery/environmental streamlining. It also proposes to modify the categorical exclusion process for NEPA review of certain projects. NACo continues to be engaged in rulemakings pertaining to these areas.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

National Marine Fisheries Service	The Biological Assessment (BA) process through NMFS is extremely time consuming and raises costly barriers. For example, one county was working on a joint interchange project with the state to address urban growth. In an attempt to navigate the federal environmental permitting process, the project took two years alone to navigate the BA consultation with NMFS. A standard BA consultation generally takes9-12 months but the NMFS process added more than a year in time and approximately $1M in additional engineering costs with no added value to the project.

MISCELLANEOUS/MULTIPLE AGENCIES

Inmate Healthcare	The Supreme Court required counties to provide health care for jail inmates in Estelle v. Gamble, 429 U.S. 97 (1976), while the federal government refuses to contribute to the provision of Medicaid, Medicare, CHIP or veterans' health benefits or services for otherwise eligible inmates.
Funding assistance-applications	When applying for funding assistance from separate sources/agencies for one project, multiple applications are required. The duplicity and lack of interchangeability of the forms and the agencies is very time consuming for local governments.
Use of ".gov" Domain for County Websites	The U.S. General Services Administration regulates the use of this extension. Arguably, this would make county sites easier to recall for constituents. Rules for use, however, restrict counties from enacting local ordinances/laws to assist in offsetting technology costs associated with website operation and maintenance via approved and regulated advertising.
Website Accessibility	The Department of Justice is currently considering a rule that would establish requirements to make websites for state and local governments accessible to individuals with disabilities. An advanced notice of the proposed rule was issued in 2010; however the Department has yet to issue the proposed rule. While counties support ensuring individuals with disabilities are able to access public information, the resources and additional funding needed for county websites to meet whatever standard is required by the rule will vary on a county by county basis and must be taken into consideration when determining the implementation period of the rule.
Overtime Pay	In July 2015, the U.S. Department of Labor (DOL) released a proposed rule to amend regulations under the Fair Labor Standards Act governing the "white collar" exemption from overtime pay for executive, administrative and professional employees. In the proposed rule, DOL would change (more than double) the threshold for employees who are eligible to receive overtime pay, from $23,660 to $50,440. This level would also be adjusted annually. NACo submitted comments requesting DOL to extent the 60 day comment period to allow counties to calculate the financial and administrative burden this would impose on counties. NACo counties to collect information from counties regarding the financial and administrative impact of the overtime pay change.

Assessment of Fair Housing

The U.S. Department of Housing (HUD) released a final rule on updating Affirmatively Furthering Fair Housing practices and a proposed rule on the Assessment of Fair Housing Tool. HUD grantees are supposed to use the Assessment of Fair Housing (AFH) tool to analyze their fair housing goals to more effectively carryout their obligation to affirmatively further fair housing. AFH replaces the current Analysis of Impediments (AI) process which required HUD grantees that receive CDBG, HOME and Emergency Shelter Grants funding to identify local barriers to fair housing choice. The AFH is a much more comprehensive planning process, requiring jurisdictions to look at patterns of segregation and integration; racially and ethnically concentrated areas of poverty, and disparities in access to opportunity, as well as the contributing factors of those issues. The Tool is expansive and will take staff time and likely financial resources to implement. NACo submitted comments expressing concerns about the AFH Tool due to the lack of data provided by HUD for the new planning process and because HUD is not providing any funding to grantees to implement the new planning process and because HUD is not providing any funding to grantees to implement the new planning process. NACo continues to engage the Administration and Congress about county concerns with the AFH rulemaking.

March 17, 2015

Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket No. EPA-HQ-OAR-2008-0699, National Ambient Air Quality Standards for Ozone

Dear Administrator McCarthy:

On behalf of the nation's mayors, counties, cities and regions, we respectfully submit our comments on the U.S. Environmental Protection Agency's (EPA) "Draft Documents Related to the Review of the National Ambient Air Quality Standards (NAAQS) for Ozone."

Our organizations, which collectively represent the nation's 19,000 cities and mayors, 3,069 counties and more than 500 regional councils, support the goals of the Clean Air Act (CAA) and the National Ambient Air Quality Standards (NAAQS) that protect public health and welfare from hazardous air pollutants. Local governments across the country are actively working toward meeting these goals of improving air quality.

The NAAQS applies to counties and cities within a metropolitan region and plays a critical role in shaping regional transportation plans and can influence regional economic vitality. The proposed rule would revise the current NAAQS for ozone of 75 parts per billion (ppb), which was set in 2008, proposing to reduce both the primary and secondary standard to within a range of 65-70 ppb over an 8-hour average. EPA is also accepting comments on setting the standard at a level as low as 60 ppb.

Because of the financial and administrative burden that would come with a more stringent NAAQS for ozone, we ask EPA to delay implementation of a new standard until the 2008 standard is fully implemented. The current 2008 standard of 75 ppb has yet to be implemented due to litigation opposing the standard. The 1997 standard of 80 ppb is still generally used by regions and it will take several additional years to fully implement the more stringent 2008 standard.

A more stringent NAAQS for ozone will dramatically increase the number of regions classified as non-attainment. By EPA's own estimates, under a 70 ppb standard, 358 counties and their cities would be in violation; under a 65 ppb standard, an additional 558 counties and their cities would be in violation. Unfortunately, there is very little federal funding available to assist local governments in meeting CAA requirements. According to EPA, under this proposed rule a 70 ppb standard would cost approximately $3.9 billion per year; a 65 ppb standard would cost approximately $15.2 billion annually to implement.[1]

Moreover, these figures do not take into account the impact that the proposed rule will have on the nation's transportation system. Transportation conformity is required under the CAA[2] to ensure that federally-supported transportation activities (including transportation plans, transportation improvement programs, and highway and transit projects) are consistent with state air quality implementation plans. Transportation conformity applies to all areas that are designated non-attainment or ''maintenance areas'' for transportation-related criteria pollutants, including ozone.[3] Transportation conformity determinations are required before federal approval or funding is given to transportation planning and highway and transit projects.

For non-attainment areas, the federal government can withhold federal highway funds for projects and plans. Withholding these funds can negatively affect job creation and critical economic development projects for impacted regions, even when these projects and plans could have a measurable positive effect on congestion relief.

Additionally, these proposed new ozone regulations will add to an already confusing transportation conformity compliance process due to a recent decision by the United States Court of Appeals for the District of Columbia Circuit. In 2012, after the 2008 NAAQS for ozone was finalized, EPA issued a common-sense proposal to revoke the 1997 NAAQS for ozone in transportation conformity requirements to ensure that regulated entities were not required to simultaneously meet two sets of standards—the 1997 and 2008 NAAQS for ozone. However, the court disagreed, and on December 23, 2014 ruled, in *Natural Resources Defense Council vs. Environmental Protection Agency and Gina McCarthy,* that EPA lacked the authority to revoke conformity requirements. This ruling has left state and local governments with a conformity process that is now even more confusing and administratively burdensome, and a new NAAQS for ozone will add to the complexity.

Given these financial and administrative burdens on local governments, we urge EPA to delay issuing a new NAAQS for ozone until the 2008 ozone standard is fully implemented.

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[1] The cost to California is not included in these calculations, since a number of California counties would be given until 2032–2037 to meet the standards.
[2] Section 176(c) (42 U.S.C. 7506(c))
[3] See 40 CFR Part 93, subpart A

If you have any questions, please contact us: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Joanna Turner (NARC) at 202-618-5689 or Joanna@narc.org.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Matthew D. Chase
Executive Director
National Association of Counties

Clarence E. Anthony
CEO and Executive Director
National League of Cities

Joanna L. Turner
Executive Director
National Association of Regional Councils

NACo National Association of Counties

November 14, 2014

Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314

Re: Definition of "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed rule on *Definition of "Waters of the United States" Under the Clean Water Act*.[1] We thank the agencies for their ongoing efforts to communicate with NACo and our members throughout this process. **We remain very concerned about the potential impacts of the proposed rule and urge the agencies to withdraw it until further analysis has been completed.**

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

The Importance of Clean Water and Public Safety

Clean water is essential to all of our nation's counties who are on the front lines of protecting the citizens we serve through both preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties are not just another stakeholder group in this discussion—they are a valuable partner with federal and state governments on Clean Water Act implementation. To that end, it is important that the federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

[1] Definition of Waters of the U.S. Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014).

NACo shares the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

EPA asserts that they are not trying to regulate any waters not historically or previously regulated. But this is misleading. Prior to a 2001 Supreme Court decision,[2] virtually all water was jurisdictional. The EPA's and the Corps economic analysis agrees. It states that "Just over 10 years ago, almost all waters were considered "waters of the U.S."[3] This is why we believe the proposed rule is an expansion of jurisdiction over current regulatory practices.

Hundreds of counties, including their respective state associations of counties, have submitted public comments on the proposed rule over concerns about how it will impact daily operations and local budgets. We respectfully urge the agencies to examine and consider these comments carefully.

This letter will highlight a number of areas important to counties as they relate to the proposed rule:

- **Counties Have a Vested Interest in the Proposed Rule**
- **The Consultation Process with State and Local Governments was Flawed**
- **Incomplete Data was Used in the Agencies' Economic Analysis**
- **A Final Connectivity Report is Necessary to Justify the Proposed Rule**
- **The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."**
- **Potential Negative Effects on All CWA programs**
- **Key Definitions are Undefined**
- **The Section 404 Permit Program is Time-Consuming and Expensive for Counties**
- **County Experiences with the Section 404 Permit Process**
- **Based on Current Practices—How the Exemption Provisions May Impact Counties**
- **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**
- **States Responsibilities Under CWA Will Increase**
- **County Infrastructure on Tribal Land May Be Jurisdictional**
- **Endangered Species Act as it Relates to the Proposed Rule**
- **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

Counties Have a Vested Interest in the Proposed Rule

In the U.S., there are 3,069 counties nationally which vary in size and population. They range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Forty-eight of the 50 states have operational county governments (except Connecticut and Rhode Island). Alaska calls its counties boroughs and Louisiana calls them parishes.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court

[2] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'r (SWANCC)*, 531 U.S. 159, 174 (2001).

[3] U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), *Econ. Analysis of Proposed Revised Definition of Waters of the United States*, (March 2014) at 11.

systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts our local governments in a precarious position, choosing between environmental protection and public safety. Counties do not believe this needs to be an either/or decision if local governments are involved in policy formations from the start.

Regardless of size, counties nationwide are coping with fiscally tight budgets. County revenues have declined and ways to effectively increase county treasuries are limited. In 2007, our counties were impacted by the national financial crisis, which pushed the nation into a recession. The recession affected the capacity of county governments to deliver services to their communities. While a number of our counties are experiencing moderate growth, in some parts of the country, economic recovery is still fragile.[4] This is why we are concerned about the proposed rule.

The Consultation Process with State and Local Governments was Flawed

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism. Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments.

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed "waters of the U.S." rule.

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule

[4] Nat'l Ass'n of Counties, *County Tracker 2013: On the Path to Recovery*, NACo Trends Analysis Paper Series, (2014).

could have on small entities and provide less costly options for implementation. The Small Business Administration's (SBA) Office of Advocacy (Advocacy) oversees federal agency compliance with RFA.

As part of the rulemaking process, the agencies must "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, federal agencies must provide a "factual basis" to certify that a rule does not impact small entities. This means "at minimum...a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[5]

The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, there was "no SISNOSE"—and therefore did not provide a necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed "waters of the U.S." rule was "improperly certified...used an incorrect baseline for determining...obligations under the RFA...imposes costs directly on small businesses" and "will have a significant economic impact..." Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[6] **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy conclusions.**

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. **Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.** We believe the proposed "waters of the U.S." rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.[7] **A federalism impact statement was not included with the proposed rule.**

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.[8] Federalism may be triggered if a proposed rule has an annual implementation cost of $25 million for state and local governments.[9] Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."[10] Even if the rule is determined not to impact state

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[5] Small Bus. Admin. (SBA), Office of Advocacy (Advocacy), *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act*, (May 2012), at 12-13.

[6] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Adm'r, EPA and Gen. John Peabody, Deputy Commanding Gen., Corps of Eng'r, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014).

[7] Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).

[8] U.S. Envtl. Prot. Agency, *EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism*, (November 2008).

[9] *Id.* at 6.

[10] *Id.* at 9.

and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."[11]

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."[12] While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue substantial discussions during this intervening period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.**

Recommendations:

1. **Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a "no SISNOSE" determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA**

2. **Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns**

3. **Complete a multiphase, rather than one-time, Federalism consultation process**

4. **Charter an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation**

5. **Accept an ADR Negotiated Rulemaking process for the proposed rule**: Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached.

Incomplete Data was Used in the Agencies' Economic Analysis

As part of the proposed rule, the agencies released their cost-benefit analysis on *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014). We are concerned about the limited scope of this analysis since it bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. Since EPA has held its 2011 Federalism briefing on "waters of the U.S.," **we have repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.**[13] [14] [15]

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[11] *Id.* at 11.

[12] 79 Fed.Reg. 22220.

[13] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA & Jo Ellen Darcy, Assistant Sec'y for Civil Works, U.S. Dep't of the Army, "Waters of the U.S." Guidance (July 29, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf.

[14] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA, Federalism Consultation Exec..Order 13132: "Waters of the U.S." Definitional Change (Dec. 15, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Dec%2015%202011_final.pdf.

The economic analysis uses CWA Section 404 permit applications from 2009-2010 as its baseline data to estimate the costs to all CWA programs. There are several problems with this approach. Based on this data, the agencies expect an increase of approximately three percent of new waters to be jurisdictional within the Section 404 permit program. The CWA Section 404 program administers permits for the "discharge of dredge and fill material" into "waters of the U.S." and is managed by the Corps.

First, we are puzzled why the agencies chose the span of 2009-2010 as a benchmark year for the data set as more current up-to-date data was available. In 2008, the nation entered a significant financial recession, sparked by the housing subprime mortgage crisis. Housing and public infrastructure construction projects were at an all-time low. According to the National Bureau of Economic Research, the recession ended in June 2009,[16] however, the nation is only starting to show signs of recovery.[17] By using 2009-2010 data, the agencies have underestimated the number of new waters that may be jurisdictional under the proposed rule.

Second, the economic analysis uses the 2009-2010 Corps Section 404 data as a baseline to determine costs for other CWA programs run by the EPA. Since there is only one "waters of the U.S." definition used within the CWA, the proposed rule is applicable to all CWA programs. The Congressional Research Service (CRS), a public policy research arm of the U.S. Congress, released a report on the proposed rule that stated "costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the proposal." The report reiterates there would be "additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges...for discharges to waters that would now be determined jurisdictional)."[18]

We are concerned the economic analysis focuses primarily on the potential impacts to CWA's Section 404 permit program and does not fully address the cost implications for other CWA programs. The EPA's and the Corps economic analysis agrees, "...the resulting cost and benefit estimates are incomplete...Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis." [19]

Recommendation:

- **NACo urges the agencies to undertake a more detailed and comprehensive analysis on how the definitional changes will directly and indirectly impact all Clean Water Act programs, beyond Section 404, for federal, state and local governments**

- **Work with national, state and local stakeholder groups to compile up-to-date cost and benefit data for all CWA programs**

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[15] Letter from Tom Cochran, CEO and Exec. Dir., U.S. Conf. of Mayors, Clarence E. Anthony, Exec. Dir., Nat'l League of Cities, & Matthew D. Chase, Exec. Dir., Nat'l Ass'n of Counties to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. and Budget, EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule & Connectivity Report (November 8, 2013) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/NACo%20NLC%20USCM%20Waters%20of%20the%20US%20Connectivity%20Response%20letter.pdf.

[16] Nat'l Bureau of Econ. Research, Bus. Cycle Dating Comm. (September 20, 2010), *available at* www.nber.org/cycles/sept2010.pdf.

[17] Cong. Budget Office, *The Budget & Economic Outlook: 2014 to 2024* (February 2014).

[18] U.S. Cong. Research Serv., EPA & the Army Corps' Proposed Rule to Define "Waters of the U.S.," (Report No. R43455; 10/20/14), Copeland, Claudia, at 7.

[19] Econ. Analysis of Proposed Revised Definition of Waters of the U. S., U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'r, 11 (March 2014), at 2.

A Final Connectivity Report is Necessary to Justify the Proposed Rule

In addition to the aforementioned issues, we are also concerned that the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, used as a scientific basis of the proposed rule, is still in draft form.

In 2013, EPA asked its' Science Advisory Board (SAB), which is comprised of 52 scientific advisors, to review the science behind the report. The report focused on more than 1,000 scientific studies and reports on the interconnectivity of water. In mid-October, 2014, the SAB completed its review of the draft report and sent its recommendations to the EPA.[20]

The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed "waters of the U.S." rule.

Recommendations:

- **Reopen the public comment period on the proposed "waters of the U.S." rule when the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report is finalized**

The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."

Clean water is essential for public health and state and local governments play a large role in ensuring local water resources are protected. It is important state and local governments are involved as a significant partner in the CWA rule development process.

The Clean Water Act charges the federal government with setting national standards for water quality. Under a federal agreement for CWA enforcement, the EPA and the Corps share clean water responsibilities. The Corps is the lead on the CWA Section 404 Dredge and Fill permit program and the EPA is the lead on other CWA programs.[21] 46 states have undertaken authority for EPA's Section 402 NPDES permit program—EPA manages NPDES permits for Idaho, Massachusetts, New Hampshire and New Mexico.[22] Additionally, all states are responsible for setting water quality standards to protect "waters of the U.S."[23]

"Waters of the U.S." is a term used in CWA—it is the glue that holds the Clean Water Act together. The term is derived from a law that was passed in 1899, the Rivers and Harbors Act, that had to do with interstate commerce—any ship involved in interstate commerce on a "navigable water," which, at the time, was a lake, river, ocean—was required to have a license for trading.

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[20] Letter from Dr. David T. Allen, Chair, Science Advisory Bdd & Amanda D. Rodewald, Chair, Science Advisory Bd. Panel for the Review of the EPA Water Body Connectivity Report to Gina McCarthy, Adm'r, EPA, SAB Review of the Draft EPA Report Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Sci. Evidence (October 17, 2014).

[21] Memorandum of Agreement Between the Dep't of the Army & the Envtl. Prot. Agency Concerning the Determination of the Section 404 Program & the Applications of Exemptions Under Section(F) of the Clean Water Act, 1989.

[22] Cong. Research Service, Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia, at 4.

[23] *Id.*

The 1972 Clean Water Act first linked the term "navigable waters" with "waters of the U.S." in order to define the scope of the CWA. The premise of the 1972 CWA was that all pollutants discharged to a navigable water of the U.S. were prohibited, unless authorized by permit.

In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" goes beyond traditionally navigable-in-fact waters. However, the courts also acknowledge there is a limit to jurisdiction. What that limit is within Section 404 has yet to be determined and is constantly being litigated.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers,* the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. [24] In SWANCC, Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.[25]

In 2006, in *Rapanos v. United States*, the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program.[26] In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites.[27] Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

Potential Negative Effects on All CWA Programs

There is only one definition of "waters of the U.S." within the CWA which must be applied consistently for all CWA programs that use the term "waters of the U.S." While Congress defined "navigable waters" in CWA section 502(7) to mean "the waters of the United States, including the territorial seas," the Courts have generally assumed that "navigable waters of the U.S." go beyond traditional navigable-in-fact waters such as rivers. However, the Courts also acknowledge there is a limit to federal jurisdiction.

Previous Corps guidance documents on "waters of the U.S." clarifications have been strictly limited to the Section 404 permit program. A change to the "waters of the U.S." definition though, has implications for ALL CWA programs. This modification goes well beyond solely addressing the problems within the Section 404 permit program. These effects have not been fully studied nor analyzed.

Changes to the "waters of the U.S." definition within the CWA will have far-reaching effects and unintended consequences to a number of state and local CWA programs. As stated before, the proposed economic analysis needs to be further fleshed out to recognize all waters that will be jurisdictional, beyond the current data of Section 404 permit applications. CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, will be impacted.

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[24] 531 U.S. 159, 174 (2001).

[25] *Id.*

[26] 547 U.S. 715, 729 (2006).

[27] *Id.*

Key Definitions are Undefined

The proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that will be used to claim jurisdiction more broadly. All of these terms will broaden the types of public infrastructure that is considered jurisdictional under the CWA.

"Tributary"—The proposed rule states that a tributary is defined as a water feature with a bed, bank, ordinary high water mark (OHWM), which contributes flow, directly or indirectly, to a "water of the U.S." A tributary does not lose its status if there are man-made breaks (bridges, culverts, pipes or dams) or natural breaks upstream of the break. The proposed rule goes on to state that **"A tributary...includes rivers, streams, lakes, ponds, impoundments, canals, and ditches..."**[28]

For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

"Uplands"—The proposed rule recommends that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are exempt, however, the term "uplands" is undefined.[29] This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to "waters of the U.S." It is important to define the term "uplands" to ensure the exemption is workable.

"Significant Nexus"—The proposed rule states that "a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."[30]

This definition uses the watershed approach to determine jurisdiction—a watershed is an area of land where all of the rivers, streams, and other water features drain to the same place. According to the EPA, "Watersheds come in all shapes and sizes. They cross county, state, and national boundaries. In the continental U.S., there are 2,110 watersheds, including Hawaii, Alaska, and Puerto Rico, there are 2,267 watersheds."[31]

There are very few parts of the country that are not in a watershed. This definition would create burdens on local governments who maintain public safety ditches and infrastructure near natural waterbodies; this infrastructure could be considered jurisdictional under the "significant nexus" definition.

"Adjacent Waters"— Under current regulation, only those wetlands that are adjacent to a "waters of the U.S." are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines "adjacent as "bordering, contiguous or neighboring."[32]

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[28] 79 Fed. Reg. 22199.

[29] *Id.*

[30] *Id.*

[31] U.S. Envtl. Prot. Agency, "What is a Watershed?,"*available at* http://water.epa.gov/type/watersheds/whatis.cfm.

[32] 79 Fed. Reg. 22199.

Under the rule, adjacent waters include those located in riparian or floodplain areas.[33]

Expanding the definition of "adjacency," will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety, we would encourage the agencies to assess the unintended consequences.

"Riparian Areas"—The proposed rule defines "riparian area" as "an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Riparian areas are transitional areas between dry and wet areas.[34] Concerns have been raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined.

"Floodplains"—The proposed definition states that floodplains are defined as areas with "moderate to high water flows."[35] These areas would be considered "water of the U.S." even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a "floodplain?"

Further, it is major problem for counties that the term "floodplain" is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies.

"Neighboring"—"Neighboring" is a term used to identify those adjacent waters with a significant nexus. The term "neighboring" is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring. [36] Using the term "neighboring," without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region.

Recommendations:

- **Redraft definitions to ensure they are clear, concise and easy to understand**
- **Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all federal agencies**

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

- **Create a national map that clearly shows which waters and their tributaries are considered jurisdictional**

The Section 404 Permit Program is Time-Consuming and Expensive for Counties

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

In recent years, certain Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance activities. Once a ditch falls under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.

Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily three or more years, with costs in the millions for one project.

One Midwest county studied five road projects that were delayed over the period of two years. Conservatively, the cost to the county for the delays was $500,000. Some counties have missed building seasons waiting for federal permits. These are real world examples, going on now, for many our counties. They are not hypothetical, "what if" situations. These are actual experiences from actual counties. The concern is, if more public safety ditches are considered jurisdictional, more counties will face similar problems.

Counties are liable for ensuring their public safety ditches are maintained and there have been cases where counties have been sued for not maintaining their ditches. In 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation. Counties are legally responsible for public safety infrastructure, regardless of whether or not the federal agencies approve permits in a timely manner.

It is imperative that the Section 404 permitting process be streamlined. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position—especially those who are balancing small budgets against public health and environmental protection needs.

The bottom line is, county ditch systems can be complex. They can run for hundreds of miles continuously. By their very nature, they drain directly (or indirectly) into rivers, lakes, streams and eventually the ocean. At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery,

proposing far reaching changes to CWA's "waters of the U.S." definition seems to be a very precarious endeavor and one which should be weighed carefully knowing the potential implications.

County Experiences with the Section 404 Permit Process

During discussions on the proposed "waters of the U.S." definition change, the EPA asked NACo to provide several known examples of problems that have occurred in Section 404 jurisdictional determinations, resulting in time delays and additional expenses. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process. The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark. Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal permit process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay tens of thousands in mitigation costs associated with the impacts to the concrete and metal structures. Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

Based on Current Practices—How the Exemption Provisions May Impact Counties

While the proposed rule offers several exemptions to the "waters of the U.S." definition, the exclusions are vague and imprecise, and may broaden jurisdiction in a number of areas. Specifically, we are concerned about the exemptions on ditches and wastewater treatment systems.

"Ditches"— The proposed rule contains language to exempt certain types of ditches: 1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and 2) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.[37]

For a ditch to be exempt, it must be excavated and drain only to a dry area and be wet less than 365 days a year. This is immediately problematic for counties. County ditches are not dug solely in dry areas, because they are designed to drain overflow waters to "waters of the U.S."

Counties own and manage different types of public safety ditches—roadside, drainage, flood control, stormwater—that protect the public from flooding. They can run continuously for hundreds, if not thousands, of miles throughout

[37] *Id.*

the county. Very few county ditches just abruptly end in a field or a pond. Public safety ditches are generally dug in dry areas, run through a transition area, before connecting directly or indirectly to a "water of the U.S."

Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a "water of the U.S.," will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch's physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not "contribute to flow," directly or indirectly to "waters of the U.S.," will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate "no flow" to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. **Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.[38] Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety.**

The agencies have reiterated that the proposed rule leaves in place the current exemption on ditch maintenance activities.[39] EPA has indicated this exemption is automatic and that counties do not have to apply for the exemption if they are performing maintenance activities on ditches. **However, in practice, our counties have reported the exemption is inconsistently applied by Corps districts across the nation. Over the past decade, a number of counties have been required to obtain special Section 404 permits for ditch maintenance activities.**

These permits often come with tight special conditions that dictate when and how the county is permitted to clean out the relevant ditch. For example, one California county has a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch six months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens. In the past several years, we've heard from a number of non-California counties who tell us they must get Section 404 permits for ditch maintenance activities.

Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the "recapture provision" to override the exemption.[40] Under the "recapture clause," previously exempt ditches are "recaptured," and must comply for the Section 404 permitting process for maintenance activities.[41] Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, etc.[42] Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

Other districts require entities to include additional data as part of their request for an exemption. One Florida county applied for 18 exemptions at a cost of $600,000 (as part of the exemption request process, the entity must provide data and surveying materials), three months later, only two exemptions were granted and the

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[38] 79 Fed. Reg. 22202.

[39] See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).

[40] U.S. Army Corps of Eng'r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).

[41] *Id.*

[42] *Id.* at 4.

county was still waiting for the other 16 to be granted. At that point, the county was moving into its seasonal rainy season and fielding calls from residents who were concerned about flooding from the ditches.

This is what is happening to counties now. If the approval process for ditch maintenance exemptions is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety ditches.

It is the responsibility of local governments to ensure the long-term operation and protection of public safety infrastructure. **The federal government must address problems within the current CWA Section 404 regulatory framework, to ensure that maintenance activities on public safety infrastructure do not require federal approval. Without significantly addressing these problems, the federal agencies will hinder the ability of local governments to protect their citizens.**

Recommendations:

- **Exclude ditches and infrastructure intended for public safety**
- **Streamline the current Section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process**
- **Provide a clear-cut, national exemption for routine ditch maintenance activities**

"Waste Treatment Systems"—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term "waste treatment" can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that "waste treatment systems,"—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.[43] In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendations:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA**

[43] 79 Fed. Reg. 22199.

Counties Need Clarity on Stormwater Management and Green Infrastructure Programs

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S."[44] They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. **Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.**

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

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[44] 40 CFR 122.26(b)(8).

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendations:

- **Explicitly exempt MS4s and green infrastructure from "waters of the U.S." jurisdiction**

States Responsibilities Under CWA Will Increase

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.[45] Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. State WQS are intended to protect jurisdictional "waters of the U.S.," such as rivers, lakes and streams, within a state. As part of the WQS process, states must set designated uses for the waterbody (e.g. recreation, drinkable, fishable) and institute Total Maximum Daily Loads (TMDL) for impaired waters.

Currently, WQS regulation focuses on waters regulated under federal law, however, NACo is concerned the proposed rule may broaden the types of waters considered jurisdictional. This means the states will have to regulate more waters under their WQS and TMDL standards. This would be extremely costly for both the states and localities to implement.

In EPA's and the Corps economic analysis, it states the proposed rule "may increase the coverage where a state would...apply its monitoring resources...It is not clear that additional cost burdens for TMDL development would result from this action."[46] The data used to come to this conclusion is inconclusive. As discussed earlier, the agencies used data from 2009-2010 field practices for the Section 404 program as a basis for the economic analysis. This data is only partially relevant for the CWA Section 404 permit program, it is not easily interchangeable for other CWA programs.

Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "waters of the U.S." As the list of "waters of the U.S." expand, so do state responsibilities for

[45] Cong. Research Serv., Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia.

[46] Econ. Analysis of Proposed Revised Definition of Waters of the United States, U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), (March 2014) at 6-7.

WQS and TMDLS. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

- **NACo recommends that the federal agencies consult with the states to determine more accurate costs and implications for the WQS and TMDL programs**

County Infrastructure on Tribal Lands May Be Jurisdictional

The proposed rule reiterates long-standing policy which says that any water that that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an "interstate" ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).[47] Approximately 56.2 million acres of land is held in trust for the tribes[48] and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation:

- **We request clarification from the federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the "interstate" definition**

Endangered Species Act as it Relates to the Proposed Rule

NACo is concerned that provisions of the proposed rule may interact with provisions of the Endangered Species Act (ESA) and its implementing regulations in ways that may produce unintended negative outcomes.

For instance, when a species is proposed for listing as endangered or threatened under ESA, large swaths of land may be designated as critical habitat, that is essential to the species' protection and recovery. Critical

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[47] U.S. Dept. of the Interior, Indian Affairs, *What We Do, available at http://www.bia.gov/WhatWeDo/index.htm .*

[48] *Id.*

habitat requires special management and conservation, which can have enormous economic impacts on county governments and private landowners.

This effect is intensified when the Section 404 permit program is triggered. Section 7 consultation under the ESA could be required, which can be time-consuming and expensive, especially for public safety projects. Some counties are already reporting strict ESA requirements on maintenance of public safety ditches.

To further compound the issue, the vague terms used in the proposed rule such as "floodplains," may also trigger ESA compliance. In recent years, the Federal Emergency Management Agency (FEMA) has been sued for not considering the habitat needs of threatened and endangered species in National Flood Insurance Program (NFIP) floodplain designations. Local governments in certain states, who participate in the NFIP, must now certify they will address ESA critical habitat issues in floodplain areas. **This litigation-driven approach circumvents local land use planning authority and creates an atmosphere of mistrust rather than providing incentives to counties and private landowners to actively engage in endangered species conservation.**

If the agencies plan to use broad definitions within the proposed rule, regulation by litigation would seem to be an increasingly likely outcome. These issues need to be carefully considered by the agencies.

Ensuring that Local Governments Are Able to Quickly Recover from Disasters

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.[49]

Counties in the Gulf Coast states and the mid-west have reported challenges in receiving emergency waivers for debris in ditches designated as "waters of the U.S." after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "waters of the U.S."

Conclusion

We appreciate the opportunity to be a part of this process. NACo acknowledges the efforts taken by both EPA and the Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As stated earlier, we believe that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal. This is problematic because counties are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches. Furthermore, the unknown impacts on other CWA programs are equally problematic, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S." **We urge you to withdraw the rule until further study on the potential impacts are addressed.**

[49] Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at Jufner@naco.org or 202.942.4269.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

November 8, 2013

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street N.W.
Washington D.C. 20503

RE: EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule and Connectivity Report (Docket ID No. EPA-HQ-OA-2013-0582)

Dear Administrator Shelanski:

On behalf of the nation's mayors, cities and counties, we are writing regarding the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rulemaking to change the Clean Water Act definition of "Waters of the U.S." and the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* which EPA indicated will serve as a basis for the rulemaking. We appreciate that EPA and the Corps are moving forward with a rule under the Administrative Procedures Act, as our organizations previously requested, however, we have concerns about the process and the scope of the rulemaking.

Background

In May 2011, EPA and the Corps released Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance) to help determine whether a waterway, water body or wetland would be jurisdictional under the Clean Water Act (CWA).

In July 2011, our organizations submitted comments on the Draft Guidance, requesting that EPA and the Corps move forward with a rulemaking process that features an open and transparent means of proposing and establishing regulations and ensures that state, local, and private entity concerns are fully considered and properly addressed. Additionally, our joint comments raised concerns with the fact that the Draft Guidance failed to consider the effects of the proposed changes on all CWA programs beyond the 404 permit program, such as Total Maximum Daily Load (TMDL) and water quality standards programs and the National Pollutant Discharge Elimination System (NPDES) permit program.

In response to these comments, EPA indicated that it would not move forward with the Draft Guidance, but rather a rulemaking pertaining to the "Waters of the U.S." definition. In November 2011, EPA and the Corps initiated a formal federalism consultation process with state and local government organizations. Our organizations submitted comments on the federalism consultation briefing in December 2011. In early 2012, however, EPA changed course, putting the rulemaking on hold and sent a final guidance document to the Office of Management and Budget (OMB) for interagency review. Our organizations submitted a letter to OMB in March 2012 repeating our concerns with the agencies moving forward with a guidance document.

Most recently, in September 2013, EPA and the Corps changed course again and withdrew the Draft Guidance and sent a draft "Waters of the U.S" rule to OMB for review. At the same time, the agencies released a draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Concerns

While we acknowledge the federalism consultation process that EPA and the Corps began in 2011, in light of the time that has passed and the most recent developments in the process toward clarifying the jurisdiction of the CWA, we request that EPA and the Corps hold a briefing for state and local governments groups on the differences between the Draft Guidance and the propose rule that was sent to OMB in September. Additionally, if EPA and the Corps have since completed a full cost analysis of the proposed rule on all CWA programs beyond the 404 permit program, as our organizations requested, we ask for a briefing on these findings.

In addition to our aforementioned concerns, we have a new concern with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "Waters of the U.S." rulemaking process, especially since the document will be used as a basis to claim federal jurisdiction over certain water bodies. By releasing the draft report for public comment at the same time as a proposed rule was sent to OMB for review, we believe EPA and the Corps have missed the opportunity to review any comments or concerns that may be raised on the draft science report actually inform the development of the proposed rule. We ask that OMB remand the proposed rule back to EPA and the Corps and that the agencies refrain from developing a proposed rule until after the agencies have thoroughly reviewed comments on the draft science report.

While you consider our requests for additional briefings on this important rulemaking process and material, we also respectfully request additional time to review the draft science report. We believe that 44 days allotted for review is insufficient given the report's technical nature and potential ramifications on other policy matters.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast affect that a change to the definition of "Waters of the U.S." will have on all aspects of the CWA. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

Tom Cochran	Clarence E. Anthony	Matt Chase
CEO and Executive Director	Executive Director	Executive Director
The U.S. Conference of Mayors	National League of Cities	National Association of Counties

cc: Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Lt. General Thomas P. Bostick, Commanding General and Chief of Engineers, Army Corps of Engineers

Senate Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight
hearing entitled, "Oversight of EPA Unfunded Mandates on State, Local, and Tribal Governments."
June 7, 2016
QRF for Commissioner Christian Leinbach

Chairman Inhofe:

1. **Commissioner Leinbach, EPA, on its own initiative, delayed implementation of the 2008 ozone standard by three years. In 2015, before states had time to catch up, EPA lowered the standard again. Can you explain the impact on your county caused by essentially implementing two standards at the same time? Did EPA adequately consider these impacts when developing the standards? Does imposing new ozone standards, rather than working with states to fully implement existing standards create regulatory uncertainty for states?**

   Berks County is currently meeting the 2008 standard but many counties are not. The new standard will once again throw Berks and a majority of U.S. counties in the northeast out of compliance. This will have an immediate impact on growing and attracting manufacturing jobs to our county. Manufacturing jobs are our number one category at approximately 31,000 jobs. I do not believe that the EPA considers the impact on county government or our local economy. If they did they would be working with us very early in the rule making process to better understand the impacts.

2. **Commissioner Leinbach, air quality nonattainment designation carries serious economic consequences for local communities. Is EPA always making these determinations based on actual air quality? Can you explain the impact on your county caused by essentially implementing two ozone standards at the same time?**

   Nonattainment designations can create significant economic consequences for counties, and my county is no exception. We've had businesses cut back on operating hours and even shutter their plants after new federal regulations.

   We saw the loss of about 150 jobs when the Titus Station Power Plant was closed based on new NOX standards. When northeast Berks County was designated as Lead nonattainment it impacted expansion of East Penn Manufacturing with over 7,000 employees and made that region of the county far less attractive to manufacturing.

3. **EPA Administrator Gina McCarthy wrote an op-ed that said the Agency's air standards "attract new business, new investment, and new jobs." That might sound good politically, but is this your experience on the ground?**

   This is not my experience on the ground. If EPA would treat counties as partners during the rule-making process, they would understand this is simply not true. Good paying jobs are lost when area businesses must close due to EPA regulations.

4. **Some of the witnesses at the hearing suggested the analytical and consultative requirements in UMRA are too burdensome or duplicative for EPA to do its job to protect public health and the environment. This logic seems to assume that if EPA could simply write rules without input from state and local partners or did not find out the analytical requirements that we would end up with better protection.**

   - **Commissioner Leinbach can you describe some of the consequences of EPA writing rules without state and local input?**
   - **Commissioner Leinbach, do you have any recommendations for how EPA can improve its consultation with counties?**

   When EPA fails to consult with state and local governments in rulemaking efforts, there are significant consequences. States and localities are tasked to implement federal rules and regulations and can often foresee the impacts of regulations before implementation begins. A one-size-fits-all policy, like those the EPA often puts forward, is rarely workable. For example, if EPA would have consulted with us on their Risk Management Rule, we would have been able to explain to them how counties are impacted both as a facility owner and an emergency responder. We would have been able to work with EPA to craft the rule in a slightly different way that would accomplish our shared goals.

   Here is what I believe needs to change in order to fundamentally improve the current process. While EPA has among the strongest state and local consultation requirements of any federal agency, they are inconsistently applied. EPA should be required to consult with state and local governments on <u>any agency action</u> that 1) imposes compliance costs of $25 million or more; 2) preempts state or local laws; and 3) has a direct effect on state and local governments. Additionally, there should be a mechanism that empowers national, state and local government groups to trigger EPA's Federalism consultation process.

   If EPA worked in consultation and collaboration with states and localities, we could flesh out many problems and solutions before the rule is finalized. This approach will ensure that the rule is workable for all levels of government.

   In the simplest terms, if the EPA worked within the standards of their Federalism guidance document for all policies that impact state and local governments, the agency would understand our role in the regulatory process. And many of our current conflicts would be alleviated or avoided.

5. **When an agency rulemaking fails to respond or account for thoughtful comments and analysis from state and local experts, they may be left with little recourse to fix the rule other than filing a lawsuit.**
    - **Do you think truly collaborating and exercising robust consultation during the development of a rulemaking would result in less litigation and more effective regulations?**

I believe if the agency had a more collaborative rulemaking process with state and local governments, it would result in more workable regulations and less litigation. Most often this type of federal litigation arises when one party's concern have either been ignored or never considered in the first place.

6. **In February 2016, Alaska's DEC Commissioner responded to a letter I sent stating, "The sheer volume of EPA rulemakings makes it difficult to proactively initiate actions early on all requirements."**
    - **Has your county also experienced difficulties proactively initiating actions?**
    - **Do you think more county resources and time are spent responding to EPA actions than proactively initiating environmental actions?**
    - **In other words, what are the opportunity costs of EPA imposing all these federal mandates on your county?**

There are really two issues here. First because of the increasing number of federal regulations, we do not have the time or the resources proactively address other environmental issues. On the other hand, if the county willingly takes on environmental projects, it faces potential EPA involvement.

For forty years, the county has leased Kaercher Creek Park from the state's Fish and Boat Commission. But, in 2013, EPA told the county and the Commission that they must clean up battery fragments that were found in the park from a former battery plant. This was estimated to cost the county and Commission approximately $1 million. To date, EPA has not approved the clean-up, which forced closure of the park and impacted area residents that used the park.

This is why it is important that EPA restore the intergovernmental partnership between the federal, state and local governments. If we could get back to this partnership, I believe we would be able to streamline the process, cut costs and make the rules more effective and workable in our communities.

7. **Commissioner Leinbach, when the Titus Station coal-fired coal power plant was forced to close due to EPA regulations, the county lost $44,403 in tax revenue. Although this may not sound like a large amount, to small counties, this is a significant amount of revenue. Can you tell us what losing this tax revenue does to your county budget?**

Berks County has an annual budget of $491 million; $127 million is raised annually from local property taxes. While $491 million may seem like a lot, just under 50 percent of the budget is dedicated to state and federal mandated programs. These dollars run the local

services like the county's park and recreation facilities, library programs, the county jail, 911 services, emergency response and management, veteran affairs, elections and more.

The bottom line is, $44,403 may be the difference between having another employee in our parks department, another dispatcher in our 911 Center or even more books in our libraries. While this may seem like a small amount, it could have a lasting impact for Berk's County residents.

8. **Commissioner Leinbach, the Unfunded Mandates Reform Act was enacted to ensure EPA would pause and consider how costly regulations will impact state, local and tribal governments. However, UMRA has been inconsistently applied by the various federal agencies and loopholes (e.g. the definition of expenditure under UMRA) have allowed costly regulations such as WOTUS and the Clean Power Plan to be implemented without taking the time to properly consult the affected entities or analyze less costly alternatives to regulations. How should UMRA be reformed to close these loopholes and ensure agencies like EPA actually fulfill the intent of UMRA?**

As you may know, UMRA's title II only requires agencies to "develop an effective consultation process." However, UMRA leaves the development of that process to each agency and does not provide any sort of guiding principles for all agencies to follow. This has resulted in inconsistent levels of consultation not only across each federal agency but sometimes even within the same agency between different rules.

With respect to specific changes to UMRA, we are encouraged by legislation like S. 189, the Unfunded Mandates Information and Transparency Act, that we feel takes a step in the right direction to improving UMRA. For example, requiring enhanced levels of consultation and establishing principles for federal agencies to follow when assessing the effects of regulations on state and local governments could go a long way to increasing the consistency of consultation and analysis that agencies conduct during the rulemaking process.

Other changes could also include something as simple as requiring each agency to have a publicly available intergovernmental policy for consultation. Several federal agencies, including the U.S. Department of Housing and Urban Development, U.S. Department of Labor, U.S. Department of Health and Human Services, General Services Administration, and U.S. Department of Transportation, already have that now for their consultation process with tribal governments. While counties do not assert the same kind of sovereign status accorded by the U.S. Constitution to Native American tribal governments, we would suggest that we are intergovernmental partners with the agencies and that a publicly available written policy for intergovernmental consultation would promote the kind of timely and meaningful consultation envisioned by UMRA.

The bottom line is that consultation with state, local and tribal governments needs to be meaningful to be effective. All too often, county government input is relegated to the public comment period. That puts counties in the same category as stakeholders. But counties play

a bigger role than that, as implementers and co-regulators of many federal policies, we should be treated as true intergovernmental partners.

We are not interested in slowing down the rulemaking process. We just want to be certain that counties, as intergovernmental partners are consulted early, often and throughout the rulemaking process. Doing so, we feel, only increases the chances of success for implementing public policies.

Senator Rounds:

1. **Your testimony specifies that only 214 of 3,069 American counties have fully recovered from the recession. In 2014, a coal plant in your county was forced to close, resulting in 75 employees losing their jobs. Further, Berks County has been declared a non-attainment area under the 2008 NAAQS standards, despite being in compliance for the past year and a half. Please explain how EPA regulations stifle the economic recovery and job growth of U.S. counties and how a reduction in burdensome regulations would help facilitate economic growth?**

   Both our county and local businesses have experienced significant challenges in trying to comply with EPA's air quality regulations. These regulations have a significant effect on our local jobs recovery and economic growth for two reasons. First, it is difficult to attract new businesses to regions that are designated as in nonattainment. Second, areas in nonattainment often have difficulty keeping industry. In both cases, industry and businesses in nonattainment areas would be required to meet tighter air pollution standards than businesses in attainment areas. Businesses must install costly equipment or limit the hours that they are able to operate. We saw the loss of about 150 jobs when the Titus Station Power Plant was closed based on new NOX standards. When NE Berks County was designated as Lead nonattainment it impacted expansion of East Penn Manufacturing with over 7,000 employees and made that region of the county far less attractive to manufacturing.

   We share the same goal as EPA, we want to ensure our residents are protected from unnecessary pollutants. However, it means nothing at the end of the day if our constituents are out of work and can't put food on the table.

   I believe if we work together, we can both protect the environment and strengthen local economies.

2. **Some areas have been forced to raise taxes on American families or increase fees for county services as a last resort in order to have adequate resources to help them comply with federal regulations. However, as you point out more than 40 states limit counties' ability to collect taxes and some counties are limited in their ability to levy taxes for county services. In light of these restrictions, what options do counties have in order to manage their resources in a way that allows them to comply with federal mandates?**

Our options are limited. Ultimately, it may require cuts to other critical local services like fire protection, law enforcement, emergency response, education and infrastructure or increases in local taxes and fees--if we are allowed under state law--to generate new revenue to pay for ever-increasing federal compliance costs. Ultimately, it is our residents and local communities that shoulder the costs of federal mandates.

Senator ROUNDS. Commissioner Leinbach, thank you for your testimony.

Our next witness is Chairman John Berrey.

Chairman Berrey, you may begin.

STATEMENT OF HON. JOHN BERREY, CHAIRMAN, QUAPAW TRIBE OF OKLAHOMA

Mr. BERREY. Thank you, and good afternoon, Chairman Rounds, Ranking Member Markey, and also Senator Inhofe and Senator Boozman. I appreciate the opportunity to speak to you today, and I am going to echo a lot of the same concerns these gentlemen have.

I am the Chairman of the Quapaw Tribe of Oklahoma. We live in northeastern Oklahoma. We were the indigenous people of the State of Arkansas until the mid-1800s, when we were removed to Oklahoma, so we were across the river from our friend here from Tennessee.

I have a prepared statement I have delivered to you, but I am just going to make a few points that I would like to point out, and hopefully you can understand better from the tribal perspective how a lot of these rules and regulatory mandates negatively impact the tribal governments and the Quapaw Tribe in particular.

The Quapaw Tribe is a very progressive tribe. We are a self-governance tribe, which means that we do not rely as much as some tribes on the Bureau of Indian Affairs and the Department of the Interior. We take the funding, and we manage it ourselves, and we provide those programs that the Federal Government has for years provided us that we manage ourselves.

But we are more than that. We provide emergency medical service, fire protection, and law enforcement not just for our Indian community, but for the local non-Indian community in our area. Ottawa County, Oklahoma, we provide the greatest fire protection of all of the local governments. In 2011, the Joplin tornado, the Quapaw Tribe provided the 911 emergency services for the city of Joplin for 5 weeks post-tornado. So we are very involved in the community, and our resources are spent in the community, but they are not just targeted strictly to Native Americans.

So I would like to talk to you that my tribe doesn't have a tax base. That is part of being a tribe. We live on lands that aren't taxed because it is under Federal jurisdiction, and it makes it so our lands are not taxable. In some ways that is a benefit to the tribes, but in other ways it makes it very difficult for the tribe to develop an infrastructure to help develop our communities.

This means, like all Indian tribes, we must create opportunities. We must create economic development to ensure that we can provide the needs for our local community. We have a casino thanks to the Indian Gaming Regulatory Act. But we are more than that. We are building a USDA-inspected meat and beef, bison, pork processing plant now that, if I was building it across the street on fee land, it would take me probably half the money and half the time. But because I am on Federal land, and I have to follow the Federal rules and the mandates by the EPA, it is taking me twice as long and is costing me twice as much. And we are going to provide jobs not only for Native Americans but for the local community. And we

are going to provide a new source of meat cutters for the local grocery chains that are desperately looking for people to fill that trade.

We have a heavy legal burden that is put on us because we are Native Americans, and we don't get the opportunity to consult with the EPA and other agencies, so it makes it very difficult for us to keep up with the rules and regulations that come down the pike. Every time that the Quapaw Tribe tries to incorporate our resources to develop economic opportunity for not only our people, but for the people of the local community.

Earlier, Senator Markey spoke of the Tar Creek Superfund Site. That is 40 square miles within our tribal jurisdiction. It is a scar you can see from the moon. It is the result of heavy zinc and nickel mining that left a lot of contamination on the land. I believe if it wasn't for a lot of the regulations and the mandates by the EPA, we would probably be further along in the clean up than we are to date. Currently, the Quapaw Tribe is the contractor of choice for the State and for the EPA to do the removal of the contamination on the surface, but we are constantly facing new rules, new mandates that make it difficult for us to stay focused on doing what it is that we do to save the taxpayer money and get the work done.

So we are constantly dealing with this Federal system of rules and regulations that impede us in our ability to work fast, gain financing, get projects going and get them completed to actually get something that creates more jobs, more economic development, and more opportunity.

You can go across the country today, and you can fly at night, and you can see the reservations in the West purely because of regulatory mandates that tribes have difficulty meeting. The reservations are dark. You can go to North Dakota and you can spot the three affiliated reservations because it is dark, but everywhere around it is lit up as they are fracking and they are creating economic development using those resources that are there underground. But because it is so difficult for tribes under these rules, it is very visible at night because there is little activity.

It is happening in Navajo, it is happening at Crow because of the coal rules. It has killed jobs, it has killed hope, and it has killed opportunity for so many Native Americans in those regions. These are places where people freeze to death in the winter. These people are hungry. They are rural, they are isolated, and they have very little opportunity. And when we create rules and regulations without consulting with the local community, we never really understand the impacts it has on those people until they are already on the books and the saw mills close, the coal fields shut down, and then the people begin to starve.

So what we want, we are hoping for, and why we are very grateful for this opportunity is we want true consultation, we want true communication, and we want collaboration. We believe that we know what is best for our people. Native Americans don't want to trash the rivers. We don't want to trash the air. We don't want to make the world a worse place for our grandchildren. But we believe that we have the insight and the respect for Mother Nature that is necessary to come up with rules and regulations that we can fund and that will make the world a safer and better place instead

of creating confusion and stagnation based on new rules that come out without any thought put into it with the local community.

So on behalf of the Quapaw Tribe and all Native America, I want to thank you, Senator Rounds, Senator Inhofe, and you too, Senators Boozman and Markey for the work you do for Native Americans. I know you are trying to work in other venues to help the Indian people across this country, and we are very grateful for that. I am grateful for this opportunity today, and I look forward to any questions.

If you want to come out and really see where these mandates that are unfunded has created havoc, come to the Quapaw Reservation and come see the Tar Creek Superfund site, which, for 30 years, we have been battling this. They have spent millions and millions of dollars, but you can't really see what has changed except what we have worked with with Senator Inhofe, who we have been able to get through by beating up the EPA and making the things work.

[The prepared statement of Mr. Berrey follows:]

Prepared Statement of the Honorable John L. Berrey, Chairman

Quapaw Tribe of Oklahoma (O-Gah-Pah)

To the Subcommittee on Superfund, Waste Management and Regulatory Oversight

Senate Committee on the Environment and Public Works

Oversight Hearing of EPA Unfunded Mandates on State, Local and Tribal Governments

June 7, 2016

Good afternoon Chairman Rounds, Ranking Member Markey, and members of the subcommittee. My name is John Berrey and I am the Chairman of the Quapaw Tribe of Oklahoma (O-Gah-Pah, or Tribe). I very much appreciate your kind invitation to appear today to discuss the many rules and regulations issued by the U.S. Environmental Protection Agency (EPA) and the impacts of those rules and regulations on Indian tribal governments.

Background and History of the Quapaw Tribe

The Tribe is a federally recognized Indian tribe, possessing all the attributes of sovereignty associated with that status. The Tribe's government is a mature, sophisticated government which provides a variety of programs and services to its tribal members as well as to the larger non-Indian community.

In the course of strengthening its capacity, the Tribe has aggressively pursued compacts and contracts under the *Indian Self-Determination and Education Assistance Act* and *Tribal Self-Governance Act*, so that today we, and not the United States, have primary responsibility for most programs and services historically managed by the federal government.

The Tribe has also demonstrated a strategic vision and business savvy that has generated employment and better incomes for tribal members and others, and has put the Tribe on a path to real economic self-sufficiency undreamed of in years past. Our Tribe, like many others, has been actively investing in growing our economy and our revenue base. As I know you are aware, most tribes lack the ability to fund their governmental services adequately through a traditional tax base, in part because of the legacy of the allotment of tribal lands and also because of the limitations on tribal taxation jurisdiction. As a result, our Tribe—like many or most others—relies on tribally owned and operated enterprises to generate a substitute for revenues from typical governmental taxes and fees. There is a common misperception that these enterprises are just like any other commercial businesses. But in fact, the revenues they generate are the equivalent of federal and state tax revenues, and they fund governmental operations and services. Our Tribe—again, as is the case with most tribes—needs the revenues we generate from tribal enterprises. Federal program dollars are limited, and do not begin to meet the needs of the Tribe. The impact of federal policy and regulations on the ability of these enterprises to generate governmental revenues is the subject of my comments to the subcommittee.

The Quapaw Tribe has in recent years been focused on building and diversifying the tribal economy and revenue base. The Tribe has a world-class gaming resort, which is our biggest single employer. However, we have other important enterprises operating on tribal lands, including a construction enterprise and agricultural operations. The Tribe has begun a long-term project to develop a tribally-owned beef cattle and bison herd, with the ultimate objective of developing a beef processing business to market Quapaw beef products both in the United States and abroad.

A Brief History of the Downstream People

The Tribe historically was located in the American southeast, and its traditional name, the "O-Gah-Pah" (anglicized as "Quapaw"), means the "people who went downstream" or the "Downstream People." The Tribe's homeland for many centuries was near the confluence of the Mississippi and Arkansas Rivers within the present-day State of Arkansas. Despite two forced removals, our Tribe's heart remains in Arkansas. A number of our Tribe's members live in Arkansas and the soil in that state holds the remains of our ancestors.

The Quapaw people had good government-to-government relationships with France and, briefly, with Spain, beginning long before the United States became a country. Our relationship with the United States has been difficult at times. Following the Louisiana Purchase, the United States government began pushing our people off of their land. We were forcibly removed, first, to Caddo country in present-day Louisiana, where our nation faced many hardships, including starvation. We returned to Arkansas, but were landless, and our hardships continued. In 1833, the United States removed the Tribe to a reservation in the far northeastern corner of present-day Oklahoma and far southeastern Kansas. This remains our home.

The Quapaw Tribe's Long Road to Regaining Self-Determination

As I noted, our relationship with the United States has at times been difficult. In the 19th century, most of our people were forced to flee the reservation because of the lack of federal protection during the Civil War. As few years later, the federal policy of allotment had enormous negative impacts on our people. In the early years of the 20th century, the rich lead and zinc fields on our reservation began to be exploited, which had temporary financial benefits for some, but which left the Tribe with a continuing legacy of environmental contamination. The federal government had a major role in the management of lead and zinc mining in Quapaw country, but did not always carry out this responsibility consistent with the laws and with its trust obligations. Today, the Tar Creek Superfund Site covers a large part of the Quapaw Reservation, including a significant portion of the Tribe's Indian lands.

The Tribe itself did not benefit from the short-term wealth generated by mining, and through most of the 20th century had very little governmental revenue. I am often reminded that when our first modern tribal office building was built more than 30 years ago, the only heating was provided by a wood-burning fireplace. Our Tribe, however, has never ceased to function as a tribal government.

Some 20 years ago, the Tribe began accelerating efforts to regain self-governance. Unfortunately, this proved to be difficult process, due to the continual resistance of the Bureau of Indian Affairs, even though we qualified under the procedures provided by Congress. Nevertheless, we finally achieved full self-governance in 2008.

As a result of all of this recent history, we were somewhat late in regaining self-governance. But since then, I believe the Quapaw Tribe has advanced as fast as or faster than almost any other tribe in the nation in the same period.

The Quapaw Tribe Today

Over the last decade, our focus has been on creating job opportunities for our people and on expanding tribal governmental services. Today, our Tribe's governmental services include:

- Health care benefits, including a burial benefit, for every member of the Quapaw Tribe;
- Social services for tribal members who need a range of assistance, from school clothing to utility aid;
- Housing services, including temporary emergency housing;
- Services to seniors, including housing, nutrition, and transportation;
- Law enforcement services, through the Quapaw Tribal Marshal;
- A full-service Fire and Emergency Medical Services Department, which has received accolades for its assistance to area emergency responders, including following the 2011 Joplin tornado;
- Tribal courts;
- Realty and trust services, which among other things manages Quapaw lands;
- An environmental regulatory department;
- A water utility;
- A full-service tribal library;
- A tribal cultural center and museum, along with a wide range of tribal cultural programs;
- Two modern day care centers, which serve both the tribal and greater communities;
- A tribal wellness center;
- Family services, including an Indian child welfare program; and
- Quapaw Counseling Services, which offers substance abuse programs and other forms of treatment.

All of these services require funding, and most would not be possible if we had to rely solely on federal program dollars. To generate governmental revenues the Tribe relies on its enterprises, which collectively make us one of the largest employers in the so-called "Tri-State" area where the state of Missouri, Kansas, and Oklahoma meet. Today, our tribal enterprises—our important and vital tax base—includes:

- Downstream Casino Resort, a five-diamond destination resort opened in 2008, and which has 374 guest rooms and luxury suites in two towers, a casino, five restaurants, a health club, an outdoor amphitheater, and The Pavilion, an indoor meeting and event facility with almost 30,000 square feet;
- The Downstream Q Store; a modern travel plaza, convenience grocery store, and liquor store located in Missouri just off Interstate 44 near the Downstream Casino Resort;
- Eagle Creek Golf Club, an 18-hole championship golf club located near the Downstream Casino Resort in Missouri;
- Quapaw Casino, which includes a gaming floor and restaurant;
- Quapaw C Store, a travel plaza and convenience grocery store;
- Quapaw Services Authority, a construction enterprise, which most recently has, under the direction of the Tribe's Environmental Department, assisted with the remediation of lands within the Tar Creek Superfund Site business;
- Quapaw Mercantile Authority, a new tribal enterprise established to market Quapaw agricultural products, including beef and bison. Which recently opened its first retail outlet in Quapaw, Oklahoma; and
- Agricultural operations, which include: an organic greenhouse, which now fulfills most of the needs of the Downstream Casino Resort for vegetables and flowers, and which also harvest honey; and a developing canine security service.

The Tribe provided less than 50 jobs in 2002, but today has grown to become one of the largest employers in the Tri-State area, with the result that it is offering jobs to many tribal members as well as to members of the surrounding community. To sustain this tribal economy, it is necessary that the Tribe's enterprises be in a position to function efficiently, and under a reasonable regulatory regime. For my comments, I would ask you to keep in mind, again, that Indian tribes lack a sufficient tax base, and therefore must generate almost all of their governmental revenues through enterprises. Because of the relatively small size of tribal governments, regulations in many instances can have a much more costly impact than results for state and local governments.

EPA Rules and Regulations and their Impact on the Quapaw Tribe

As I noted, a large portion of our Tribe's land base is contaminated, at least to some degree. Indeed, the Tar Creek Superfund Site was the No. 1 Superfund Site in the nation until recently,

when it was ranked as No. 2. Actual cleanup of Quapaw Indian lands began only recently, and remains a small-scale program addressed only to the outlying and least-contaminated areas. This remediation work largely has been conducted by the Tribe through cooperative agreements with the EPA and through intergovernmental agreements with the Oklahoma Department of Environmental Quality.

Because of the ongoing cleanup, we have extensive experience working with the EPA. The EPA's Superfund process is cumbersome and sometimes inefficient, as is reflected in the enormous sums of money the EPA has expended at Tar Creek over the last more than 30 years, with relatively little apparent impact. Since the Quapaw Tribe assumed the lead in the cleanup of Tar Creek, the remediation process has increased in speed and efficiency. Delegating greater authority to Indian tribes under Superfund and other federal statutes likely would have similar effects on the speed and efficiency of other environmental cleanups, resulting in reductions in expenditures of tax dollars.

For instance, delegating program authority to tribes under the *Clean Air Act* and the *Clean Water Act* would result in actual benefits to the environment instead of increasing bureaucratic inefficiencies. As with so many federally administered programs, tribes are better equipped to address local environmental issues. But the current EPA process for obtaining "Treatment as a State" status under the CAA or CWA is very time-consuming and expensive and is rarely granted.

Since 2009, the EPA has issued more than 1,000 rules and regulations impacting state, local and tribal governments as well as the private sector. Below is a list of some of the new, or newly tightened *environmental* regulations that have affected, or have the potential to affect, our Tribe:

1. Newly tightened Public Water Supply regulations;
2. Newly tightened Underground Storage Tank regulations;
3. New spill response (SPCC) rules;
4. New "Waters of the U.S." rule;
5. Newly tightened air emission regulations (New Source Performance Standards);
6. Newly tightened construction storm-water regulations; and
7. New environmental due diligence requirements for Fee-to-Trust applications.

I will address a few of the impacts on our Tribe of these regulatory changes.

Environmental Site Assessments and Fee-to-Trust Applications

Many tribes, including the Quapaw Tribe, seek to consolidate their land holdings by buying land and applying to the BIA to have it taken into trust. The trust status is important for purposes of tribal jurisdiction, taxation, and other reasons, and land is taken into trust for any number of purposes including housing, energy, hospitality, grazing, ceremonies, and others.

As part of the fee-to-trust process, the BIA requires tribes to prepare "Phase I Environmental Site Assessments" (ESA). The EPA was directed by Congress to establish standards and practices for ESAs and these regulations provide that ESAs must be prepared one year before a trust acquisition. The regulations also say that specific elements of the ESA—site interviews, site visits, the record review, searches for recorded environmental cleanup liens, and others—must be conducted or updated within 180 days (six months) of the date of acquisition.

Prior to this 2005 rule, ESAs were valid for up to 12 months, twice as long as the current rule. In reviewing and considering fee-to-trust applications, the Interior Department routinely takes many months and in most cases years to make a decision on the application. With major components of the ESA expiring after 180 days, tribes are required to conduct additional time-consuming and expensive updates, which hinder development and result in weaker tribal economies than need be the case.

With inevitable delays in Interior's review of trust applications, one solution to this problem is for EPA to eliminate the 180 day requirement for Indian trust land transactions or, at minimum, return to the 12 month threshold for potential updating elements in the ESA.

Other Rules and Regulations and Impacts on Indian Country

As the subcommittee knows, the EPA has been churning out rules and regulations governing all manner of American business and industrial activity. Just this month, the EPA issued its Final Rule for minor sources in Indian country in the oil and natural gas sectors. While we are still studying this rule, the subcommittee should be aware that this is only the latest in a long line of federal rules and regulations—such as the BLM's hydraulic fracturing rule and the BLM's flaring and venting rule—aimed at severely curtailing conventional energy development on Indian lands.

These burdensome rules are combined with the need to get federal approvals for land appraisals, leases, rights-of-way and easements, and other business agreements.

While the Quapaw Tribe is not an oil or gas producer, energy tribes across the country are being besieged by the actions of federal agencies, including the EPA. Although the worst poverty in America remains in tribal communities, some Indian tribes have made great strides in creating jobs and household incomes for their members and the surrounding communities.

For tribes that rely on revenues from timber, oil, gas coal and other natural resources, these federal rules and regulations have a stifling effect on tribal businesses, with sever impacts on the government programs and services tribes provide.

Technical Assistance and Capacity-Building

As time progresses, tribes are increasingly emphasizing the establishment of businesses that benefit their members, and are becoming more and more sensitive to the often heavy hand of

federal rules and regulations.

Some regulations are redundant and burdensome and provide little benefit to tribes, e.g. the Bureau of Land Management's hydraulic fracturing rule. Others, if tailored to the circumstances of Indian country, may provide real benefits to tribal communities. In these cases, the federal government at a minimum should work with tribes to provide technical assistance so that the tribes have the internal capacity to comply with these regulations.

Observations and Conclusions

More and more Indian tribes—including the Quapaw Tribe—are creating enterprises that generate governmental revenues and the create jobs for their members and others. This is finally providing opportunities that tribes have not historically had. However, the ever-increasing regulations that affect all businesses are having a magnified—and stifling—effect on tribal enterprises. Unlike commercial businesses in the private sector, tribal enterprises operating on tribal land must comply with a litany of federal regulations that do not apply on private land (e.g., selling Quapaw chat). Although this regime is intended to protect the land and the tribal landowners, it more often only adds an undue burden on economic development. Additionally, I believe many or most Indian tribes do not have the capacity or financial resources to comply with these additional regulations.

The EPA should take a very close look at these regulations and the burdens they are creating on Indian tribes. The EPA needs to reduce many of these regulatory burdens as they impact tribes, and also to provide tribes assistance to build capacity to comply with these regulations.

I appreciate very much the Subcommittee's willingness to consider our input on this very important issue. Gun-ney-gay (thank you).

Senator ROUNDS. Chairman Berrey, thank you for your testimony.

I would note at this time that, without objection, the written testimony of all of the witnesses will be included for the record.

Senators will now each have 5 minutes for questions, and I will begin.

Let me start with Senator Norris. Senator Norris, you were involved in an effort by the Council of State Governments to improve the role of States in the Federal process. Can you share with us some suggestions you have that could improve the Federal regulatory process through increased State participation?

Mr. NORRIS. Thank you, Chairman Rounds. A couple of those that are enumerated in the materials we have submitted include these that come first to mind.

First, establishing State and local government advisory committees within Federal agencies. Not to add to bureaucracies, but absent what we used to have, the Advisory Commission on Intergovernmental Relations, ACIR, there really isn't anything equivalent to that today that is consistent through the Federal agencies, and we think that perhaps establishing a State and local advisory committee, something like that but perhaps a new generation, something different, within each Federal agency could help to ensure that there is consistent input and consultation and analysis of these proposed rules.

In Tennessee we have the Tennessee Advisory Commission on Intergovernmental Relations, which I chair, and have for a number of years, and it becomes a pretty effective think tank as well as a roundhouse, if you will, for communicating with our stakeholders, the county governments, local governments, and other State agencies.

Another idea is to develop an annual or perhaps a biannual session between agency staff and association staff. This would allow all groups to make introductions and facilitate dialogue, including with both political and career Federal agency staffs. Also, to exchange rosters of key contacts between senior agency officials, including career and political employees responsible for writing regulations. Again, this isn't rocket science, it is not earth shattering, but it is sort of common sense changes that can be made at the administrative level to really effectuate more effective communication across all these levels.

Those would be just two ideas, Chairman Rounds.

Senator ROUNDS. Thank you.

Commissioner Leinbach, States and counties are not only responsible for administering State and Federal regulations, but they also must provide other critical services to citizens, such as waste management, law enforcement, emergency services, and education. How has the recent barrage of EPA regulations impacted counties' ability to provide these vital services to American families?

Mr. LEINBACH. Looking at Berks County as an example, we have had to deal with the issue of waters of the U.S. and the potential impact on costs for counties, the implementation of roads. If you look across the country, 45 percent of roads in America are owned and maintained by counties. We believe it is imperative that counties be brought into the process in the very beginning.

In Berks County we noted, and I have more details in my formal testimony, that we lost 70 jobs with our largest power supplier, and that was the Titus Station Generating Plant. Through the lead attainment standards several years ago, our largest employer, East Penn Manufacturing, over 7,000 employees, they were already meeting the new lead attainment standard for a year and a half. They had a year and a half of data.

They came to the county and asked for help because they were notified that EPA was requiring 3 years of data. And in spite of our pleas to the EPA not to put that part of our county in non-attainment, they were placed in non-attainment. That meant that our largest employer during that period of time was not able to expand, and we were not able to attract manufacturing businesses to that region of the county. That has a direct impact economically.

If you look at county government, we are concerned about the same issues that the Federal Government is concerned about. No. 1, we believe in clean water, we believe in clean air, and public safety, No. 2, is our No. 1 job. The 911 services, police, fire, rescue, and those are costs we have to absorb. When we are challenged with the cost of regulations, those other areas often suffer.

Senator ROUNDS. Thank you, sir.

My time has expired.

Senator Markey.

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

Mr. Norris's testimony, Mr. Glicksman, cites a report that lists the costs of Federal mandates as being between $57 billion and $85 billion every single year. But that very same report estimates the benefits of regulations to be between $68 billion and $103 billion per year.

Professor Glicksman, do you agree that environmental regulation often produces more net benefits than the costs?

Mr. GLICKSMAN. I do. And the OMB report from 2015 that I cited provides ranges of estimates of environmental benefits, environmental costs for various EPA regulations. The report in all cases provides estimates in which the upper estimate of regulatory cost is lower than the lowest estimate of regulatory benefit. So even in a worst case scenario EPA regulations are providing significantly greater benefits than the costs they impose.

Senator MARKEY. Let me just stop there for 1 second. Let me just ask the next question, which is that EPA regulations have helped to protect wetlands and reduce lead in gasoline, making sure our drinking water is safe to drink and saves thousands of lives by reducing air pollution.

Do any of you disagree that EPA regulations have made people healthier and improved our environment?

Mr. LEINBACH. Senator Markey, I do not disagree. In fact, we believe, as counties, that our objective of clean air and clean water is consistent. And our issue is not with the desire for clean water.

Senator MARKEY. OK, I understand. That is the question.

Well, the situation in Flint, Michigan, has been a recent reminder that Americans look to the government to ensure that the water they drink is safe. Does anyone disagree that providing safe drinking water to everyone is an essential service that we must provide to every American?

[Affirmative nods.]

Senator MARKEY. Well, let me then move on. Experts say $1 trillion is needed to upgrade drinking and clean water infrastructure and prevent future Flints. Congress provided not $1 trillion, but a mere $1 billion each in fiscal year 2016 for drinking water and clean water State revolving funds.

Would you all support increased funding for communities to meet the public health standards established under the Safe Drinking Water Act and the Clean Water Act?

Mr. BERREY. Well, I believe I would as long as they reduce some of the regulatory burdens that they have added to it that add the costs at the end of the day don't complete the project.

Senator MARKEY. But would you support Congress appropriating $1 trillion to help the tribes and help the cities and towns and counties to deal with the issues?

Mr. BERREY. As long as it came along with a reduction with unnecessary regulatory involvement that doesn't come with consultation with the tribes.

Senator MARKEY. So you wouldn't want the money if the regulations didn't go away.

Mr. BERREY. I would want the money, but I would want to be able to get a dollar for dollar for all the work that I put into it.

Senator MARKEY. I appreciate that.

From the District of Columbia, would you want that extra money?

Mr. HAWKINS. Just to give a sense of perspective, of the $1 billion appropriated for the revolving funds, DC Water's capital budget alone is $600 million.

Senator MARKEY. That is what I am saying. Thank you. So $1 trillion is what experts say is needed to help DC and to help all the other counties.

Mr. HAWKINS. It would be the single best investment in our economy.

Senator MARKEY. I agree with you. We should not have kids not having safe drinking water.

The Clean Water Act ensures pollution is kept at a safe level in our water system. Does anyone disagree that tributaries that provide drinking water should be protected from the dumping of dangerous substances that harm public health and environment?

Mr. NORRIS. Senator Markey, how would you define tributaries? Because that is a case in point. That is one of the things we are struggling with at State and local levels now. Your definition of tributary may differ from ours. You know, a cow path from my barnyard out to the pasture does not a tributary make. However, some regulators would disagree. And that is how we are at loggerheads with one another.

Senator MARKEY. Well, again, we have an issue that if in fact any of these entities are dumping dangerous chemicals into that tributary, then ultimately some child somewhere downstream is going to be drinking it. So you have this real conundrum, don't you? You want to protect young people from drinking water, especially in their formative years, and so it is a very profound question that allows somebody just to say, well, I am small, so I should be able to dump dangerous chemicals into the water. And that is fine

for that one entity, but what about for all of the children who then have that chemical in their water as they are drinking it and as their brains are still being formed?

So I thank you, Mr. Chairman.

Mr. LEINBACH. Senator Markey, one of the problems is the definition in Waters of the U.S. of a tributary, and it says, "a tributary can be a natural, man-altered, manmade water and includes waters such as rivers, streams, canals, and ditches."

Our challenge as commissioners, ditches are the areas along the side of a roadway which historically have not been regulated by EPA and Army Corps. Our challenge is not with clean water; our challenge is with the ambiguity of the rule itself. Most people would think a tributary is some type of body of water, but by its own definition it includes ditches in tributary, and that is problematic.

Senator MARKEY. And again, I appreciate what you are saying, but a ditch used by a nefarious character can just be pouring huge amounts of dangerously laced water that has chemicals in it into the water. So one person's ditch is another person's tributary, especially if it is a bad person, and that is what we found in the Woburn Hazardous Waste Site in my congressional district.

They were just dumping all this stuff into the groundwater, and that is why all these boys and girls wound up with leukemia up there. They were just using it as a place dumping these dangerous chemicals, and they did it as secret dumpers at night, just unloading it right into the water table; and to a certain extent that is what illuminated my attitude toward this from the late 1970s on and the creation of Superfund.

And I would say, Chairman Berrey, that it is critical that we do fund Superfunds so that you have the funding that you need, but beginning in 1995, as soon as the Democrats lost power, there was a defunding of the taxes that the oil companies and the chemical companies had to pay into Superfund, which would have helped you with your problems.

Thank you.

Senator ROUNDS. As I move to Senator Inhofe, I just think part of the challenge here that we are seeing and that I think this brings out is that you have counties, who clearly are not bad actors, who have ditches that they are responsible for maintaining, and yet now they find themselves, under WOTUS, having to comply with new regulations that they did not have to comply with before, and it is adding to their costs. I think that is the point that I was hearing. It is good to have that discussion come up.

Senator Inhofe.

Senator INHOFE. I think, Mr. Leinbach and Mr. Norris, you ought to come out to Oklahoma and talk to our farmers. Tom Buchanan, who is the President of the Oklahoma Farm Bureau, says, and he is on record saying of all of the problems that farmers and ranchers, and we are a farm and ranch State, are facing, the worst is nothing that is found in the ag bill, it is the overregulation by the EPA.

And of all the overregulation by the EPA, they say that the WOTUS, those regulations scare them the most because you don't know. They have different people out there making their decisions

as to what is good, what is a bar ditch, what is something that only has temporary water after a storm. This is what I am concerned about.

Chairman Berrey, tribes have different problems than the rest of the people at this table. Do you want to elaborate on any of those that are different because of the tribal application?

Mr. BERREY. Well, I think that the real conundrum for tribes is some tribes, like the Quapaw Tribe, are sophisticated, and we are, with our resources, able to get a lot of intellectual help to develop our community. And we think, with consultation, if people at EPA would listen to us, we could get things done.

I think my fears are there are rural tribes out there that don't have the economic development that we have and the opportunities that we have, that they need added sort of capacity development to help them develop the regulatory and the infrastructure to manage their environment.

So, fortunately for us, we are very educated about it because we are in a Superfund site. But I don't think the problem with Superfund is just the lack of funding. A lot of it has been the management by the EPA in the clean up since it was identified as a Superfund site. They should have sat and talked to us a little bit, and we could have saved them about half the money they have wasted.

Senator INHOFE. You know, you and I were both there when that happened, and it was a mess.

Mr. BERREY. Yes, sir.

Senator INHOFE. Senator Norris, it is interesting. You and I have a lot of things in common. I also was the chairman of the Oklahoma State Senate. You mentioned the ACIR. I haven't heard anyone mention the ACIR, I bet, in 20 years. And 35 years ago Lamar Alexander was then Governor of Tennessee. He represented the Governors; I represent the mayors.

And then, of course, you had a representative of every political level. And it didn't occur to me until you said that that maybe that does have some application here. I mean, if you get together, you have the mayors and the Governors and the county commissioners and the State legislators, and representatives from here, that is a pretty good idea.

Mr. NORRIS. Well, thank you, Senator Inhofe. I spoke with Senator Alexander several years ago, when this idea began percolating, and of course we both share the concern that I think was primarily responsible for the sunset of ACIR in the early 1990s, and that is as it relates to cost. Apparently it was an expensive organization, and there was bureaucracy associated with it that he and I would eschew. We are not looking to create another department; we are not looking to spend a lot of money. But again, I keep using the term common sense, and I am glad you picked up on it because there is some variation on what used to be ACIR that it seems to me would be an effective forum.

Senator ROUNDS. What is ACIR again?

Mr. NORRIS. The Advisory Commission on Intergovernmental Relations. And if I remember correctly, I believe it was in 1994 or thereabouts that it sunset, as we say in State government. And I get that. We don't want to create a new bureaucracy, but we need

a forum that is recognizable and that is recognized where we can exchange these ideas and have better results.

Senator INHOFE. Well, I do want to pursue that with you. I think the idea is good. And I want to find out why that was so expensive and bureaucratic because, frankly, I don't agree with that. We had the periodic meetings.

Anyway, I do want to get one question in here because we recently had Administrator McCarthy, who said that she was unaware of any instances, and this will be for you, Mr. Leinbach, unaware of any instances where the EPA actions have negatively impacted jobs. That was her statement. That is a quote.

When asked about the statement before this committee, sitting right here, McCarthy essentially said companies use EPA as an excuse.

Let's start with you and your response to that.

Mr. LEINBACH. First of all, we have had direct experience in our own county and counties across the county, and counties across the country have experienced the same thing, that there absolutely are impacts. I need to emphasize again, as Senator Markey made, I think, legitimate points that EPA has played a critical role in cleaning up our environment over the last number of decades. We are not against the rules. We are concerned about the process. And there is an idea of federalism, that Federal Government, State government, and local governments ought to work together.

We are not a stakeholder just like anybody else; we are in a unique intergovernmental relationship. And counties have people on the ground, our engineers, our county planners, people that know what needs to be done; and unfortunately, we are brought into the process very late in the game and are not able to have the impact on the rules. And Waters of the U.S. is a great example, and the recent ozone rules. Virtually no say. We are part of the partnership, and all we are asking is for that partnership to be brought back together.

Senator INHOFE. Now, of course, we are concerned about ozone, too. All these things come within this Environment and Public Works Committee.

Mr. LEINBACH. That is correct.

Senator INHOFE. And that has such an effect on the lives of everyone, particularly everyone out there who is in business.

Under the ozone, of course, that is done by counties, and there is legislation that Senator Thune I think is the primary mover of the legislation would say we are not going to have any more reductions in the ozone until 85 percent or something of the counties comply with the old.

Do you think that is reasonable?

Mr. LEINBACH. That is the position of the National Association of Counties, that we should not be imposing new ozone regulations until the 2008 standard is met. And I would add I have been elected by counties in the northeast United States to represent them, and this is an issue we have discussed in one of our monthly conference calls, because an ozone in the northeast counties, we are unduly impacted by prevailing winds. So how is it that we are going to be held accountable from a standard when prevailing

winds are one of the major factors, and we have no control what is happening upstream?

Senator INHOFE. Well, let me ask you again to respond to this statement that she made before this committee. I know my time has expired, but let me at least get this in.

Unaware of any instances where the EPA actions have negatively impacted jobs.

Mr. NORRIS. Senator Inhofe, if I may be recognized. I would invite her to Erwin, Tennessee, the tiny town that was home to CSX Rail, which just late last year had to shut down its operations because of what we call the war on coal, and 300 jobs were lost overnight. There aren't that many folks in Erwin, Tennessee, but I have been over there to talk with them, and now we are trying to find ways to retrain them and re-educate them to get them back to work.

And I give that example because here we are in Washington, DC, and I know we talk in terms of hundreds of thousands of jobs. But in a town like Erwin, when 300 people go out because of the loss of coal, it hurts; and that is a pretty good example.

Senator INHOFE. Excellent example.

Senator ROUNDS. Thank you.

It would appear to me, as we listen to the witnesses, that there is a sense that everybody wants good environmental rules; everybody wants good environmental regulations. The challenge sometimes is to find that middle ground where we have the Federal Government looking perhaps not down at, as you may suggest, subnational governments but rather States, counties, and municipalities for their input in terms of true consultation. And that is kind of what I take away from this today, is the desire for true consultation.

Reasonable people can have clean water and clean air and still do it in such a fashion that you have consensus that you build at the local level as well, and I suspect that that should be our goal and that perhaps we are not doing the best job of getting that done in the regulatory processes that we do today that could be improved upon.

Before I close today, I would like to ask unanimous consent to enter a letter from the U.S. Conference of Mayors regarding a listing of multiple unfunded mandates that have been imposed on State, local, and tribal governments into the record.

Without objection.

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

Senator ROUNDS. With that, once again, I would like to thank our witnesses for taking the time to be with us today, and I would also like to thank my colleagues who have attended this hearing for their thoughts and questions.

The record will be open for 2 weeks, which brings us to Tuesday, June 21st.

Senator Markey, thank you for your participation and discussion as well today.

And with that this hearing is adjourned.

[Whereupon, at 3:47 p.m. the subcommittee was adjourned.]

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