

# TESTIMONY OF

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before the

**Committee on the Judiciary**  
**Subcommittee on Oversight, Federal Rights, and Agency Action**  
**U.S. Senate**

## **Hearing on**

Justice Delayed: The Human Cost of Regulatory Paralysis

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Mr. Chairman, ranking member Hatch, and members of the subcommittee, I appreciate the opportunity to testify today on how regulations—particularly those issued by the Environmental Protection Agency (EPA)—have saved many lives and how the public’s health would be better protected if agencies like the EPA were not systematically and relentlessly frustrated in their efforts to fulfill the statutory missions assigned by Congress.

The subcommittee deserves tremendous credit for airing the truth about the public health regulations that agencies are writing as directed by Congress. The costs of delay are as real as they should be unnecessary, given the clear mandates of the law. Unfortunately, the overwhelming clout of Fortune 100 companies and their relentless, self-serving effort to ignore the great benefits provided by these essential protections has dominated the airwaves.

One does not need to look far to see how essential regulations are. Just ask anyone whose life was saved by a seat belt, whose children escaped brain damage because the EPA took lead out of gas, who turns on the faucet knowing the water will be clean, who takes drugs for a chronic illness confident the medicine will make them better, who avoided having their hand mangled in machinery on the job because an emergency switch was there to cut off the motor, who has taken their kids on a trip to a heritage national park to see a bald eagle that was saved from the brink of extinction—the list goes on and on.

The EPA’s regulations are among the most beneficial safeguards the U.S. regulatory system has ever produced. For example, a 2011 EPA analysis assessing Clean Air Act

regulations found that in 2010 these rules saved 164,300 adult lives and prevented 13 million days of work loss and 3.2 million days of school loss due to pollution-related illnesses such as asthma. By 2020, **if the rules are issued promptly and Congress resists shrill demands that it derail them yet again**, the annual benefits of these rules will include 237,000 adult lives saved as well as the prevention of 17 million work loss days and 5.4 million school loss days.<sup>1</sup> Even the most conservative practitioners of cost-benefit analysis, including John Graham, President Bush's regulatory czar, acknowledge what an amazing bang for the buck these regulations deliver in relationship to the costs they impose.

Conversely, because Clean Air Act regulations have been so long delayed—after all, Congress passed the Clean Air Act Amendments in 1990 and we sit here 23 years later—thousands of additional lives have been lost, hundreds of thousands of people have had heart attacks and visited the hospital because of respiratory illness, and people have lost millions of days off work and out of school.

Instead of acknowledging that they have reached the end of the line on delaying tactics that are within the law, the owners and operators of coal-fired power plants, chemical production facilities, oil companies, and motor vehicle manufacturers have shifted focus to the fraught world of polarized politics that you know only too well. These efforts have turned what should be an expert-driven, science-based process for formulating public policy into a blood sport, with the party able to spend the most money becoming the most likely to win. Nothing less than the future integrity of the administrative process is at stake.

In fact, several of my students are in the audience today, and I am pained to tell you that when they study health, safety, and environmental regulation, they are learning more about scofflaw than law. They see that when Congress votes on a piece of legislation by overwhelming margins—the Senate approved the 1990 Clean Air Act amendments by a margin of 89 to 10—everything you write down as an apparently ironclad mandate is far from certain to become reality. They see that instead of trying to muster enough votes to repeal a law, regulated industries have learned to go underground and sabotage it, in the process doing irreversible damage to the credibility not just of the EPA, but of the Senate and the House.

Industry lobbyists characterize the Clean Air Act rules that have finally reached the end of the pipeline as a “train wreck” dreamed up by Lisa Jackson, EPA administrator in President Obama's first term. But Ms. Jackson did not take a trip to the basement of what was then known as the Ariel Rios building where the agency is housed and get drunk on her own whiskey, writing down her best fantasies for torturing industry. Rather, she did her best—at long last—to satisfy congressional mandates instructing her agency to impose more stringent controls on power plants, automobile fuel, boilers, etc. Fighting through the considerable resistance confronting her at the White House, resisting last-minute threats by industries that had successfully battled against this day of reckoning for two decades, Ms. Jackson tried to do what Congress instructed her, in no uncertain terms, to do.

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<sup>1</sup> See ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

The truth is that these rules, and the civil servants who write them, do not sweep industry's hard-earned money into a pile and set it on fire for no good reason. The regulations impose costs, but they also deliver tremendous benefits. Ignoring those benefits has become standard practice in the House of Representatives, and we are delighted to see the Senate correct these distortions. Just like the controls on smoking you have championed throughout your career in Congress, Senator Hatch, the chemical and manufacturing sectors have fought these important rules with a disinformation strategy that should sound quite familiar: disputing the danger of air emissions of smog and toxic chemicals and distorting the content of the rules the EPA has proposed. Nothing less than the health of millions of people is at stake. This subcommittee, with its jurisdiction over the efficient and effective implementation of the law, is well positioned to investigate this record and help get the administrative process back on track.

I am a law professor at the University of Maryland Francis King Carey School of Law and the President of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). Founded in 2002, CPR is a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. We have a small professional staff funded by foundations. I joined academia mid-career, after working for the Federal Trade Commission for seven years and the House Energy and Commerce Committee for five years. For seven years, I served as the lawyer for small, publicly-owned electric systems. My work on environmental regulation includes four books, and over thirty articles (as author or co-author). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, co-authored with Professor Sidney Shapiro of Wake Forest University's School of Law, which comprehensively analyzes the state of the regulatory system that protects public health, worker and consumer safety, and natural resources, and concludes that these agencies are under-funded, lack adequate legal authority, and consistently are undermined by political pressure motivated by special interests in the private sector. I have served as consultant to the EPA and testified before Congress many times.

My testimony today makes three points:

- ***Regulations have benefited our country greatly, while the persistent delay of needed safeguards has produced great harm. These costs of delay represent real harms to real people—harms that are by definition preventable.***
- ***Agencies' efforts to implement and enforce public safeguards have attracted a fierce backlash from corporate interests that would prefer to continue shifting the harms associated with their activities onto the public at large.***
- ***Agencies are not carrying out their statutory missions of protecting people and the environment in a timely and effective manner, which should be of great concern to Congress. I encourage this committee to investigate the various causes of this regulatory dysfunction, including political interference in agency rulemaking, "bureaucracy bashing," inadequate resources, and outdated legal authority.***

## **The Benefits of Regulation, and the Costs of Regulatory Delay**

Even when measured against the rubric of cost-benefit analysis—the inherently anti-regulatory yardstick espoused by corporate interests and small government ideologues—the EPA’s regulations are revealed to be huge winners for society. The 2011 report on the EPA’s Clean Air Act regulations concluded that these safeguards would produce benefits worth \$2 trillion annually by 2020, dwarfing the \$65 billion in compliance costs.<sup>2</sup> Similarly, a recent report by the Economic Policy Institute (EPI) evaluated the total impact of major EPA rules developed during the Obama Administration. The report derived its results by simply aggregating the cost-benefit analyses that the EPA has prepared for these rules. It found that the major EPA rules issued during the first two years of the Obama Administration produced total annualized benefits of between \$44 billion and \$148 billion, as compared to total annualized costs of between just \$6.7 billion and \$12.5 billion. The EPI report also found that four of the EPA’s then-pending proposed major rules generated total annualized benefits of between \$173 billion and \$457 billion, as compared to total annualized costs of between just \$14 billion and \$15 billion.<sup>3</sup>

Other specific examples of the benefits that EPA regulations have produced include the following:

- 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.<sup>4</sup>
- 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.<sup>5</sup>
- Working together, the EPA and the state of California have reduced the number of Stage 1 Smog Alert days in Southern California from 121 days in 1977 to zero days since 1997.<sup>6</sup>
- 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 of blood (µg/dL) during the years 1976 to 1980 to 2.7 µg/dL during the years

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<sup>2</sup> *Id.*

<sup>3</sup> Isaac Shapiro, *Tallying Up the Impact of New EPA Rules: Combined Costs of Obama EPA Rules Represent a Sliver of the Economy and are Far Outweighed by Cumulative Benefits* (Econ. Pol’y Inst., Briefing Paper No. 311, 2011), available at <http://w3.epi-data.org/temp2011/BriefingPaper311.pdf>.

<sup>4</sup> G. Tracy Mehan, *The Clean Water Act: An Effective Means To Achieve a Limited End*, WATER ENVIRONMENT & TECHNOLOGY, Oct. 2007, available at [http://www.wef.org/publications/page\\_wet.aspx?id=4692&page=ca&section=CWA%2035th%20Anniversary](http://www.wef.org/publications/page_wet.aspx?id=4692&page=ca&section=CWA%2035th%20Anniversary).

<sup>5</sup> William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 584-85 (2004).

<sup>6</sup> South Coast Air Quality Management District, State of California, About South Coast AQMD: Progress So Far, <http://www.aqmd.gov/aqmd/index.html#progress> (last visited June 14, 2011); Air Res. Bd., California Env’tl. Protection Agency, Fact Sheet: Reducing Emissions from California Vehicles, available at <http://www.arb.ca.gov/msprog/zevprog/factsheets/reducingsmog.pdf>.

1991 to 1994. Because of its harmful effect on children's brain development and health, the Center 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.<sup>7</sup>

EPA rules have brought great benefit to the United States without any significant economic dislocation. A recent CPR report reviewed all 30 of the available retrospective rule reviews that the EPA has conducted pursuant to section 610 of the Regulatory Flexibility Act, and each of these reviews concluded that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impact on the regulated industries, including on small businesses.<sup>8</sup> Specifically, all of these reviews reached the following findings:

- The country has a “continued need” for regulation, meaning that a significant risk to public health or the environment exists, and that the controls called for in the regulation continue to be successful in reducing that risk.
- The regulations did not require any major modification to increase their effectiveness or reduce their costs.
- The regulations have not been unduly costly on industry nor did it have a significant adverse impact on the industry.
- Regulated entities often support existing regulations, and when they did not, they supported reform, not elimination. In several cases, the EPA received no comments from regulated entities when it reviewed a regulation.

These reviews also confirm the results of several economic studies on the employment impact of environmental regulations, which all found either that environmental regulations have a net neutral effect on jobs, or in some cases can even lead to a net increase in employment. (See Table 1 below.) These findings should not be surprising. After all, money spent on regulation contributes to the economy, because firms must buy equipment and labor services in order to comply with regulation. In some cases, regulations can also increase employment by making the affected industry more profitable and more productive. For example, in conducting its Regulatory Flexibility Act review for the Cotton Dust Standard, the Occupational Safety and Health Administration found that compliance with the standard led the textile industry to

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<sup>7</sup> U.S. Env'tl. Protection Agency, Blood Lead Level, <http://cfpub.epa.gov/eroe/index.cfm?fuseaction=detail.viewInd&lv=list.listbyalpha&r=224030&subtop=208> (last visited June 15, 2011); 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](http://www.progressivereform.org/articles/PRIA_909.pdf).

<sup>8</sup> Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-27 (Ctr. for Progressive Reform, White Paper 1109, 2011), available at [http://www.progressivereform.org/articles/RegBenefits\\_1109.pdf](http://www.progressivereform.org/articles/RegBenefits_1109.pdf).

modernize their facilities. The investments in new equipment increased the industry’s productivity and profitability, enabling it to invest in additional job creation.<sup>9</sup>

Source	Segment of Economy Affected by Environmental Regulation	Net Impact on Employment
Bezdek et.al. (2008) <sup>10</sup>	Entire economy	<ul style="list-style-type: none"> <li>• Increase</li> </ul>
Morgenstern et.al. (2000) <sup>11</sup>	Four polluting industries	<ul style="list-style-type: none"> <li>• Increase in petroleum and plastics</li> <li>• No statistically significant impact in pulp and paper and steel</li> </ul>
Berman & Bui(2001) <sup>12</sup>	Los Angeles area (Clean Air Act)	<ul style="list-style-type: none"> <li>• No evidence of decrease</li> <li>• Probable slight increase</li> </ul>
Goodstein (1999) <sup>13</sup>	Entire economy	<ul style="list-style-type: none"> <li>• 7 of 9 available studies found increase</li> <li>• 1 study found decrease</li> <li>• 1 study found mixed results</li> </ul>

**Table 1: Impact of Environmental Regulation on Employment**

While the EPA has achieved remarkable success over the past 40 years, it is important not to lose sight of the fact that serious hazards remain. The EPA has several important pending rulemakings, almost all of which are long overdue—victims of the distressing state of dysfunction and delay currently afflicting the U.S. regulatory system. As described below, the continuing delay of these critical safeguards is harming public health and environmental quality:

- *Tier III Standards for Motor Vehicles.* Originally scheduled to be completed in 2012, this long-delayed rule would significantly reduce automobile emissions of harmful air pollutants, including nitrogen oxides, volatile organic compounds, particulate matter, and carbon monoxide. According to agency estimates, this rule will eventually prevent up to 2,400 premature deaths, 3,200 emergency room visits, and 1.8 million lost school days, work days and minor-restricted activities every year.<sup>14</sup>
- *New Source Performance Standards (NSPS) to Control Greenhouse Gas Emissions from New and Existing Power Plants.* Power plants account for roughly 40 percent of U.S. greenhouse gas emissions. Reducing greenhouse gas emissions from these sources will be essential for averting the worst consequences of climate change. For the past few years, the EPA has been

<sup>9</sup> OCCUPATIONAL SAFETY & HEALTH ADMIN., OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA’S COTTON DUST STANDARD 22, 35-38 (2000) [hereinafter OSHA, COTTON DUST REVIEW], available at [http://www.osha.gov/dea/lookback/cottondust\\_final2000.pdf](http://www.osha.gov/dea/lookback/cottondust_final2000.pdf).

<sup>10</sup> Roger H. Bezdek, Robert M. Wendling, & Paula Di Perna, *Environmental Protection, the Economy, and Jobs: National and Regional Analyses*, 86 J. ENVTL. MGMT. 63 (2008).

<sup>11</sup> Richard D. Morgenstern, William A. Pizer, & Jhih-Shyang Shih, *Jobs versus the Environment: An Industry-level Perspective* (Resources for the Future, Discussion Paper 99-01-REV, 2000), available at [http://www.globalurban.org/Jobs\\_vs\\_the\\_Environment.pdf](http://www.globalurban.org/Jobs_vs_the_Environment.pdf).

<sup>12</sup> Eli Berman & Linda T.M. Bui, *Environmental Regulation and Labor Demand: Evidence from the South Coast Air Basin*, 79 J. PUB. ECON. 265 (2001).

<sup>13</sup> EBAN GOODSTEIN, *THE TRADE-OFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT* (1999).

<sup>14</sup> U.S. EPA, Fact Sheet: EPA Proposes Tier 3 Motor Vehicle Emission and Fuel Standards, available at <http://www.epa.gov/otaq/documents/tier3/420f13016a.pdf>.

working on separate rules to limit greenhouse gas emission from future and existing power plants, respectively. President Obama recently made these rules the centerpiece of his comprehensive climate change plan. If implemented, these rules will go a long way toward reducing U.S. greenhouse gas emissions, leading to significant public health and environmental benefits.

- *Ozone National Ambient Air Quality Standards (NAAQS)*. In September of 2011, the EPA was set to strengthen the health-based standard for ozone pollution, when the Obama Administration stepped in to block the effort at the last minute. (Prior to then, the ozone standard had not been updated since 1997, though the Clean Air Act requires reviews and updates to take place at least once every five years.) The Obama Administration justified blocking the 2011 update on the grounds that another update was set to be completed by 2014; however, the EPA's slow progress on the rule makes it more likely that the update will not be completed until 2015 or perhaps even later. The agency projects that a stronger ozone standard would annually prevent up to 12,000 premature deaths, 5,300 non-fatal heart attacks, 2,200 cases of chronic bronchitis, 420,000 lost work days, and 2,100,000 missed school days.
- *Coal Ash Disposal Rule*. Three long years have elapsed since the EPA proposed a rule to protect communities from coal ash—a byproduct of coal-power generation that's filled with toxic chemicals like arsenic, lead, and mercury—and still a final rule is still nowhere in sight. Meanwhile, power plants are dumping an additional 94 million tons of it every year into wet-ash ponds and dry landfills that are already filled to capacity. A strong rule is necessary to prevent improperly stored waste from leaking hazardous pollutants into ground and surface waters located near coal ash dump sites, potentially contaminating drinking water supplies and destroying affected aquatic ecosystems. In addition, a strong rule would help prevent future spill catastrophes, such as the one that occurred in Kingston, Tennessee, in December of 2008, when a surface impoundment collapsed, ultimately spilling 1.1 *billion* gallons of inky sludge across 300 acres of a nearby town at depths of three feet—a spill larger in quantity than the Deepwater Horizon catastrophe in the Gulf of Mexico this past summer. According to agency records, the EPA will likely not complete this rule until sometime in 2014 or even later. Even then, the EPA might issue a weak version of their originally proposed rule, which would be inadequate to protect against water pollution and spill contamination.
- *Power Plant Cooling Water Intake Rule*. When implemented, this rule will help protect delicate aquatic ecosystems by preventing harm to fish and other animal and plant species. Even though the EPA was only able to put a dollar figure on a small slice of the benefits this rule would generate, the agency still found that these limited benefits outweighed the rule's costs by a ratio of up to 14 to 1. Nevertheless, it has been subjected to a series of ongoing delays for several years.
- *Scope of the Clean Water Act Guidance/Rulemaking*. Thanks to a couple of muddled Supreme Court decisions, the scope of waters subject to jurisdiction under the Clean Water Act has been thrown into hopeless confusion, effectively

handcuffing efforts by the EPA and the U.S. Army Corps of Engineers (USACE) to protect wetlands and other ecologically significant waterbodies. The EPA has been working for more than three years on an effort to issue updated guidance that would clarify the scope of the Clean Water Act's protective authority, which would provide greater regulatory certainty to landowners, farmers, and businesses. This effort has been stymied by a series of troublesome delays. Currently, the draft final guidance remains stuck in White House review, where it has languished for nearly a year and a half—well beyond the time limit allowed. Agency records also suggest that the EPA anticipates formally codifying this guidance in a rulemaking, though whether and when this rulemaking will ever see the light of day is anybody's guess.

- *National Stormwater Program Rule.* Stormwater is a ubiquitous source of water pollution, channeling a highly polluted cocktail of motor oil, lawn fertilizer, pet waste, and other contaminants directly into lakes, rivers, and estuaries around the country. The stormwater runoff from urban areas, which constitute a mere 3 percent of the total landmass in the United States, is estimated to be the primary source of impairment of 13 percent of assessed rivers, 18 percent of assessed lakes, and 32 percent of assessed estuaries.<sup>15</sup> The EPA began working on a national stormwater program rule in 2009, but progress has been plagued by a series of ongoing delays. The agency is under a court order to issue a proposal by June of 2013, but it has already missed that deadline. According to agency records, the EPA has no plans to issue the proposal within the next year, which suggests that a final rule will likely not be completed until 2015 or even later.
- *Chemicals of Concern List.* Estimates vary, but it is safe to say at least 40,000 unique chemicals exist, and many of those create risks to human health and the environment. Harmful chemicals are supposed to be regulated under the Toxic Substances Control Act (TSCA), but because of various shortcomings in that statute, the EPA has little ability to limit or place restrictions on chemicals that are discovered to be harmful. Nonetheless, Congress did include a provision in TSCA that at least allows the EPA to warn the public about the dangers posed by toxic chemicals. Section 5(b)(4) of TSCA gives the EPA the authority to publish a “Chemicals of Concern List”—that is, a list of chemicals that the agency has determined “may present an unreasonable risk of injury to health or the environment,” based on “all relevant factors” including hazard and exposure data specific to both humans and the environment. The EPA has drafted a proposed rule that would add several potentially harmful chemicals to the Chemicals of Concern List, including a category of eight phthalates, a category of polybrominated diphenyl ethers (PBDEs), and bisphenol A (BPA). The agency submitted for review its draft proposal to the White House Office of Information and Regulatory Affairs (OIRA) in May of 2010, and it has been stuck there ever since. Trapped for over three years—well beyond the maximum 120 days permitted under executive order—the Chemicals of Concern List proposal has become the poster child for OIRA interference.

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<sup>15</sup> NAT'L ACADEMIES, REPORT IN BRIEF: URBAN STORMWATER MANAGEMENT IN THE UNITED STATES (2008), available at [http://www.nctcog.dst.tx.us/envir/SEEClean/stormwater/nrc\\_stormwaterreport\\_fs.pdf](http://www.nctcog.dst.tx.us/envir/SEEClean/stormwater/nrc_stormwaterreport_fs.pdf).

Together these delayed rulemakings are imposing massive costs on public health and the environment. The fact that these rules have fallen victim to continuous delays also directly refutes the claim made by regulatory opponents that agencies such as the EPA are unleashing a “regulatory tsunami.”

### **The Repeating Pattern of Special Interest Attacks Against Public Safeguards**

Despite the vast evidence demonstrating the value of their regulations, the EPA has become the target of vicious attacks by conservative policymakers and their allies in industry. In these attacks, the agency is painted as an unaccountable, power-hungry behemoth hell-bent on destroying the economy. For example, last year, the Republican congressman from Alaska Don Young penned an op-ed in which he assailed the EPA as the “Employment Prevention Agency.”<sup>16</sup>

EPA Administrators have frequently been hauled in for hostile oversight hearings in the House of Representatives, where Republican committee members seem more concerned with hurling inflammatory invective than with learning about the agency’s activities. During a heated exchange with then-EPA Administrator Lisa Jackson at a March 2010 hearing, Rep. Tim Johnson of Illinois maligned the agency as “absolutely the poster child . . . for usurpation of legislative authority.” Rep. Fred Upton of Michigan, the Chair of the House Energy and Commerce Committee later remarked in 2011 that Administrator Jackson would need her own parking spot on Capitol Hill, since he planned on requiring her to testify before the committee so often.

This bullying and intimidation persists. In the recent build-up to EPA Administrator Gina McCarthy’s confirmation hearing, Republican Members of the Senate Environment and Public Works Committee slammed her with more than 1,000 questions—by far the most any presidential nominee has received in history. Of this harassment, long-time congressional observer and respected political scientist Norman Ornstein remarked, “One thousand questions is beyond the point of absurdity.”<sup>17</sup>

When the complete abandonment of even a modicum of decorum is not enough, members of Congress have resorted to punitive legislative action against the EPA. For example, the full House of Representatives is slated to vote this week on the so-called Energy Consumers Relief Act (ECRA). This bill would give another agency—the Department of Energy—the power to unilaterally veto EPA’s rules based solely on its unreviewable, non-expert opinion that the rule might negatively impact the economy in some way. In short, this bill would subordinate the EPA’s policy judgments on matters that are central to carrying out its statutory mission of protecting people and the environment to those of the Department of Energy. Of course, the

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<sup>16</sup> Rep. Don Young, Op-Ed, *Obama’s EPA as an Employment Prevention Agency*, POLITICO, Mar. 15, 2012, available at <http://www.politico.com/news/stories/0312/74072.html>.

<sup>17</sup> Noah Bierman, *GOP presses EPA pick with 1,000 questions*, THE BOSTON GLOBE, May 16, 2013, available at <http://www.bostonglobe.com/news/nation/2013/05/16/the-questions-keep-coming-and-coming-for-would-environmental-chief/83s5PRqKAKZ0bu9sThJYEI/story.html>.

desired effect of this bill would be to delay—if not block completely—those rules, which the politically powerful energy industry finds inconvenient.

The House of Representatives' pending appropriations bill for the EPA, the Department of the Interior and related agencies for Fiscal Year 2014 is another example of punitive legislation directed toward the EPA. The bill would cut the EPA's budget by 34 percent compared to Fiscal Year 2013 levels, and well beyond the cuts required under sequestration. If enacted, this appropriations bill would cut the EPA's funding to levels that haven't been seen since the Reagan Administration. With a budget that low, the EPA would be prevented from carrying even its core mission—an effect the authors of the bill likely intended. To make matters worse, the appropriations bill is larded up with several policy riders that would prevent the agency from carrying out key components of the mission that Congress assigned to it. Among other things, these riders would prevent the EPA from using appropriated funding to work on the Tier III Standards for Motor Vehicles, the New Source Performance Standards to Control Greenhouse Gas Emissions for New and Existing Power Plants, the National Stormwater Program Rule, the Scope of the Clean Water Act Guidance/Rulemaking, and the Power Plant Cooling Water Intake Rule—virtually all of the EPA's most crucial pending safeguards.

While no doubt extreme, these attacks on the EPA are not unprecedented. The tobacco industry worked with its allies in Congress to launch a similar campaign against government programs to reduce smoking. Beginning in the 1960s, the U.S. government has instituted a series of tobacco control programs that have helped to dramatically reduce smoking rates in this country. This stands as one of the greatest public health achievements in the history of the United States, though much work remains. Tobacco use is still the leading cause of preventable death in the United States, and the reduction in tobacco use rates has slowed considerably in recent years, particularly among younger Americans.

Early government tobacco control programs began with efforts to educate the public about the health hazards of smoking and to restrict tobacco product advertising. In 1964, the publication of the Surgeon General's report, which concluded that smoking increases the chances of lung cancer and other diseases, helped to usher in a new era of public consciousness about the dangers of tobacco use. Subsequently, Congress passed laws requiring tobacco companies to include health warnings on their labels and prohibiting advertising for tobacco products on television and radio. Later in the 1970s and 1980s, the federal government continued with efforts to educate the public about the dangers of secondhand smoke. Congress also sought to discourage smoking by increasing federal taxes on cigarettes. Meanwhile, state and local governments were able to augment these efforts by prohibiting smoking in certain public places, while public health organizations began undertaking extensive campaigns to educate the public about the harms of smoking and the benefits of quitting. In the 1990s, Congress began instituting programs designed specifically to prevent people under the age of 18 from smoking. Most recently, Congress, in 2009, passed the Family Smoking Prevention and Tobacco Control Act, which authorizes the Food and Drug Administration (FDA) to regulate the sale and distribution of tobacco products, particularly with an aim toward curbing use by individuals under the age of 18.

These programs have helped to reduce the rate of tobacco use in the United States by about one-half since 1964. These reductions reflect successful efforts to prevent people from starting to smoke as well as encouraging existing smokers to quit. The reduced smoking rates in turn have yielded significant public health benefits. The National Cancer Institute estimates that federal tobacco control programs to reduce smoking helped to prevent around 800,000 deaths between 1975 and 2000.<sup>18</sup> Targeted federal programs have also produced promising results. The Centers for Disease Control and Prevention (CDC) worked with the State of Massachusetts on programs to help existing smokers quit. The CDC estimates that the program helped reduce participants' smoking rate by 26 percent. During the period studied, the rate of hospital admissions for program participants fell by 46 percent, while hospital admissions for other heart disease episodes fell by 49 percent.<sup>19</sup>

For its part, the tobacco industry has not stood idly by. During this time, tobacco companies have launched an aggressive and comprehensive campaign aimed at thwarting the government's tobacco control programs. For example, in 1979 the tobacco industry started working with the American Legislative Exchange Council (ALEC)—a secretive organization that works to advance pro-business policies—to undermine federal and state-level efforts to reduce smoking rates. Together, they waged several campaigns against tobacco control policies, including the Food and Drug Administration's (FDA) attempt to regulate nicotine as a drug in the 1990s. As part of this campaign, they sought to push members of Congress to oppose the regulations on the grounds that the FDA's regulation would infringe on states' rights.<sup>20</sup> They attempted to paint the agency as out-of-control and power-hungry, much as the EPA's detractors do today. Later in 1999, the tobacco industry and ALEC helped devise a "legislative plan." Part of this plan included launching a negative public relations campaign against the FDA focused on portraying the agency's tobacco regulations as overreaching and contrary to individual freedom of choice.<sup>21</sup>

In the late 1950s, several tobacco product manufacturers formed the Tobacco Institute, an industry trade association that worked effectively to attack tobacco control programs until it was dissolved in 1998 as part of the Tobacco Settlement Master Agreement. One of the Tobacco Institute's primary tasks was to undermine scientific studies showing adverse health effects from tobacco use, including those studies produced by the federal government. In some cases, these efforts involved direct attacks at the government with accusations of malfeasance. For instance, in response to a 1986 study by the Surgeon General on the harmful effects of secondhand smoke, the Tobacco Institute issued a press release accusing government scientists of deliberately "attempt[ing] to censor the views of independent scientists and abuse science on the question of

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<sup>18</sup> Press Release, National Cancer Institute, Nearly 800,000 Deaths Prevented Due to Declines in Smoking; NIH Study Examines the Impact of Tobacco Control Policies and Programs, and the Potential for Further Reduction in Lung Cancer Deaths (Mar. 14, 2012), *available at* <http://www.cancer.gov/newscenter/newsfromnci/2012/TobaccoControlCISNET> (last visited July 29, 2013)

<sup>19</sup> Centers for Disease Control and Prevention, *Chronic Disease Prevention and Health Promotion: Tobacco Use: Targeting the Nation's Leading Killer at a Glance 2011*, <http://www.cdc.gov/chronicdisease/resources/publications/aag/osh.htm> (last visited July 29, 2013).

<sup>20</sup> Anne Landman, *ALEC and the Tobacco Industry*, THE CENTER FOR MEDIA AND DEMOCRACY'S PR WATCH, July 15, 2011, *available at* <http://www.prwatch.org/news/2011/07/10787/alec-and-tobacco-industry> (last visited July 29, 2013).

<sup>21</sup> *Id.*

cigarette smoke in the air and the health of nonsmokers.”<sup>22</sup> Today, opponents of the EPA routinely make similar accusations against the agency regarding their findings related to the science of climate change.

### **The Causes of Regulatory Dysfunction and Delay**

I appreciate the committee taking up the critical issue of regulatory delay and the costs it imposes on the public interest. For too long on Capitol Hill, the debate on regulation has focused on only one side of the story. Self-righteous crusaders against regulators have become fond of railing against the “costs” that come with regulatory decision-making, but they conveniently ignore the most critical question: Costs for whom? Industry, or the public that suffers from industry’s polluting activities? By ignoring this question, opponents of regulation are free to continue pretending that if we dismantled the regulatory system, we would suffer no negative consequences and instead reap a windfall in saved money.

A big part of the reason that opponents of regulation have been able to ignore the costs of delay is because no conscious effort has been made to identify and aggregate these costs. My organization attempted to shine a light on these costs in a 2009 white paper.<sup>23</sup> The white paper concluded that delays of just three rules imposed unconscionable, preventable costs on society every year, including:

- The birth of 94,000 children with elevated blood mercury levels (*i.e.*, levels high enough to leave them with irreversible brain damage) as the result of a delayed rule to control toxic air pollution from power plants;
- An estimated \$1 billion in damages caused by the proliferation of zebra mussels, an invasive species, in the Great Lakes as the result of a delayed rule to prevent the spread of invasive species through ballast water discharges; and
- 53 premature deaths and 155 non-fatal injuries as the result of a delayed regulation to prevent accidents involving cranes and derricks at construction sites.

By contrast, several dubious efforts have been made to attach a dollar figure to the total compliance costs that regulations impose. The efforts include the White House Office of Management and Budget’s (OMB) annual *Report to Congress on the Benefits and Costs of Federal Regulation* and the thoroughly debunked “Crain and Crain” study, produced under contract for the Small Business Administration’s Office of Advocacy.

As a preliminary matter, I would urge this subcommittee to use its oversight authority to obtain a better accounting of the costs of regulatory delay. A good place to start would be to direct the OMB to identify and document the costs of regulatory delay as part of its annual *Report to Congress on the Benefits and Costs of Federal Regulation*. The annual OMB report is fundamentally flawed in that it only considers the costs and benefits that result once a regulation

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<sup>22</sup> Press Release, The Tobacco Institute, Government Health Officials Involved in Efforts to Censor Dissenting Scientific Views (Dec. 11, 1986), available at <http://legacy.library.ucsf.edu/tid/btw19e00/pdf>.

<sup>23</sup> Catherine O’Neill et al., *The Hidden Human and Environmental Costs of Regulatory Delay* (Ctr. for Progressive Reform, White Paper 907, 2009), available at [http://www.progressivereform.org/articles/CostofDelay\\_907.pdf](http://www.progressivereform.org/articles/CostofDelay_907.pdf).

has been completed. But costs and benefits result from regulations that are unreasonably delayed. Invariably, the benefits of delayed rules flow to industry while the costs flow to the public at large. By ignoring the impacts of delayed rules, the annual OMB report presented a distorted picture of how well the regulatory system is performing. Accordingly, this subcommittee should direct the OMB to expand its annual report to include a list of rules that are being unreasonably delayed and a qualitative or quantitative description of the costs that are being imposed on the public interest as a result of that unreasonable delay.

Beyond this preliminary exercise of attempting to get a better grasp of the size and scope of the problem of regulatory delay, I would also urge this committee to investigate several of the contributing causes of what I call “regulatory dysfunction,” or the persistent and severe failure of agencies to carry out the missions that Congress has assigned to them. There are many symptoms of “regulatory dysfunction,” and “regulatory delay”—the topic of today’s hearing—is one of the most important of those symptoms. The causes of “regulatory dysfunction” largely fall into the following four categories:

- *Political Interference.* On a daily basis, agency staff are engaged in the important, if mundane, analysis of science and policy that enables them to understand and respond to the threats facing workers, consumers, and the environment. Unfortunately, over the last 30 years, this work, which Congress specifically delegated to agencies because of the specialized training and expertise of their staff, has increasingly come under strict oversight and control by the political denizens of the White House. OIRA—which serves as the primary choke point for new regulations as they go through centralized review pursuant to Executive Orders 12866 and 13563—provides perhaps the most troubling illustration of political interference. Any rule that might trouble a politically powerful constituency will be reviewed at least twice by OIRA. During these reviews, a steady stream of industry lobbyists use OIRA as a court of last resort to weaken or block any pending regulations that they find inconvenient. Critically, agencies may not publish a proposed or final rule that is undergoing review until it has received OIRA’s blessing, which sometimes means agreeing to drastic changes to the rule’s substance. The EPA’s recently proposed effluent limitation guidelines (ELG) for power plants illustrates this dynamic. Several industry groups lobbied OIRA while the draft proposal was undergoing OIRA review. By the time it emerged, OIRA had forced the EPA to include several new weaker “regulatory options” and to abandon its original “preferred” regulatory options—which were stronger—in favor of the new weaker ones. As documented in a recent CPR white paper, this OIRA-led political interference in agency rules follows a broader trend. The white paper studied 10 years’ worth of data covering OIRA reviews, and found that when industry lobbied OIRA, the review was more likely to be delayed, going beyond the 120-day limit permitted by Executive Order 12866. The white paper also found that rules were more likely to be changed during those OIRA reviews in which industry lobbied.<sup>24</sup>

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<sup>24</sup> 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](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf).

- Inadequate Resources.* Regulatory agencies are chronically underfunded. For decades, the U.S. population and workforce have grown, the consumer products industry has ballooned, and threats to the environment have become increasingly intractable. Yet all the while, these agencies' budgets, staff, and resources have failed to keep pace. The Consumer Product Safety Commission (CPSC) is the poster child for agencies that strive to achieve broad statutory mandates with woefully insufficient resources. It is responsible for ensuring the safety of almost every durable good that U.S. consumers buy, from lamps to computers. Its jurisdiction covers more than 15,000 categories of products; or, put another way, it covers everything but food and drugs; automobiles, boats, and airplanes; alcohol, tobacco, and firearms. The consumer goods that CPSC regulates are designed, manufactured, and sold through a complex, multibillion dollar international supply chain, yet the agency operates with a staff of just over 500 employees working on what is, comparatively speaking, a shoestring budget of about \$115 million. The small budgets impair the ability of the CPSC and other agencies to issue regulations required by law in a timely and effective manner. It also impairs these agencies' ability to implement and enforce those regulations that are already on the books, which has led to full-scale industrial catastrophes, such as the BP Oil Spill in the Gulf of Mexico and the Upper Big Branch mine explosion. At the time of the BP Oil Spill, the Department of the Interior agency that regulated offshore oil drilling was responsible for regulating about 3,795 offshore production platforms and managing about 8,124 active oil and gas leases on approximately 43 million acres of the outer continental shelf. That agency, however, only had about 60 inspectors to police those drilling activities.<sup>25</sup>
- Outmoded Laws.* Regulatory agencies' ability to respond to all of the health and environmental threats in their domain is constrained by laws that were conceived at a time when Congress had a fundamentally different understanding of both the threats to be regulated and the agencies' capacity to address those threats. In the intervening years, knowledge about science, public administration, and regulatory policy has evolved, but the statutes that set the boundaries on the protector agencies' powers have remained largely the same. For example, flaws in the Toxic Substances Control Act (TSCA)—the only major environmental law to have never been updated—make it all but impossible for the EPA to adequately protect the public and the environment against hazardous chemicals. Outmoded laws also undermine agency enforcement efforts. Under the Occupational Safety and Health Act, the penalties for a first-time conviction for a willful violation of the statute that results in a worker's death are limited to \$10,000 and six months in jail.<sup>26</sup> By comparison, the maximum penalty for harassing a wild burro on public lands is one year in jail.

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<sup>25</sup> Opening Statement of Rep. Bart Stupak, Chairman, Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, *Hearing on the Role of the Interior Department in the Deepwater Horizon Disaster, Before the Subcomm. on Energy and Environment and the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce 1* (July 20, 2010), available at <http://energycommerce.house.gov/documents/20100720/Stupak.Statement.07.20.2010.pdf>.

<sup>26</sup> 29 U.S.C. § 666(e).

- *Bureaucracy Bashing.* It would be bad enough if the public servants that work for federal agencies have to contend with the difficult circumstances outlined above. To make matters worse, though, their hard work, dedication, and expertise are regularly marginalized by politicians. Together, these conditions are contributing to a demoralized federal workforce. A demoralized federal workforce, in turn, threatens to add to regulatory dysfunction on two important fronts. First, it is difficult to retain workers who feel undervalued. These workers include the senior career employees who are essential to the effective functioning of agencies. Second, the demoralized workers who remain on the job are less likely to be strong ambassadors who will attract the best and brightest new employees.

Thank you. I'd be pleased to answer any questions you may have.