

**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
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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 accountable 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 10 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

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. Env'tl. 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§ion=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:

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

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.