

# William L. Kovacs

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William L. Kovacs provides the overall direction, strategy, and management for the Environment, Technology & Regulatory Affairs Division at the U.S. Chamber of Commerce.

Since coming to the Chamber in March 1998, Kovacs has transformed a small division concentrated on a handful of issues and committee meetings into one of the most significant in the organization. The Environment, Technology & Regulatory Affairs Division initiates and leads multidimensional, national issue campaigns on comprehensive energy legislation, complex environmental rulemakings, telecommunications reform, emerging technologies, and the systematic application of sound science to the federal regulatory process among others.

Kovacs has focused on finding new leadership opportunities for the Chamber. He pioneered the use of cybercasting for Chamber events, recruited and assembled the first science team to work in tandem with policy staff to ensure that federal regulations are based on sound science, formed and chaired the Chamber's Technology Coordinating Group, and helped develop numerous national coalitions in the areas of environment, energy, regulatory affairs, and technology.

Before joining the Chamber, Kovacs was director of worldwide legal affairs for Sunshine Makers, Inc., manufacturer of the Simple Green line of nontoxic cleaning products. Previously, he held the position of partner in several Washington, D.C., law firms where his practice focused on environmental law.

In government service, Kovacs served as vice chairman and chairman of the Commonwealth of Virginia's Hazardous Waste Facilities Siting Board, as chief counsel and staff director for the House Subcommittee on Transportation and Commerce, and as legislative director and counsel for a member of Congress.

During his tenure as chief counsel, Kovacs was the primary counsel on two landmark laws that were enacted in a single session of Congress: the Resource Conservation and Recovery Act, the primary federal law that regulates solid and hazardous waste; and the Rail Revitalization and Regulatory Reform Act, which reorganized the bankrupt Penn Central Railroad into Conrail, the largest corporate reorganization in the United States at that time.

Kovacs is a frequent commentator on national environmental, energy, and regulatory issues that impact the business community. He is regularly quoted in the nation's leading newspapers and appears on talk radio and television as a spokesperson for American business. He is listed in Who's Who in the World, Who's Who in America, Who's Who in American Law, and Who's Who in Emerging Leaders.

Kovacs has a law degree from the Ohio State University College of Law and a bachelor of science degree from the University of Scranton, magna cum laude.



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# Statement of the U.S. Chamber of Commerce

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**ON:** REGULATING CHAOS: FINDING LEGISLATIVE SOLUTIONS TO BENEFIT JOBS AND THE ECONOMY

**TO:** HOUSE COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

**BY:** WILLIAM L. KOVACS  
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS

**DATE:** JULY 14, 2011

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

**BEFORE THE COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY  
OF THE U.S. HOUSE OF REPRESENTATIVES**

**“Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the  
Economy”**

**Testimony of William L. Kovacs  
Senior Vice President, Environment, Technology & Regulatory Affairs  
U.S. Chamber of Commerce**

**July 14, 2011**

Good morning, Chairman Shimkus, Ranking Member Green, and members of the Subcommittee on Environment and the Economy. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss legislative solutions to fixing the regulatory system so that jobs and economic growth benefit. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today.

The very first sentence of Article I of the U.S. Constitution reads: “All legislative powers herein granted shall be vested in a Congress of the United States.” As any elementary school student knows, the Congress makes the nation’s laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to “legislate by regulation.” And at times, agency regulations create broad new policies that impact many industries in the regulated community; these policies can literally determine the fate of industrial sectors and the competitiveness of the nation. Given the current political climate, Congress cannot easily get its power back.

The Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is properly cabined within appropriate constitutional and statutory limits. For example, in 1946 Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review. Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress’s general abdication of its oversight authority combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to “fill in the legislative blanks,” the lack of congressional oversight over the agencies, and judicial deference were fundamentally altering the original constitutional balance between the legislative and executive branches of government. Starting in 1980, Congress began enacting laws to restore the balance and to check executive power. Over the past three decades, Congress has repeatedly attempted to rein in the Executive Branch agencies, but it would be an understatement to assert that efforts to control expanding agency power have been of little impact. Agencies are just too skilled at manipulating the regulatory system.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government. Therefore, the Chamber supports efforts to reform the regulatory process to make it more effective and accountable to Congress and the American people and to restore balance between regulation and job creation. My testimony will analyze the regulatory state and its impact on jobs, and propose substantive measures to restore proper checks and balances between the Legislative and Executive Branches of our government and help create jobs.

## **I. Overview of the Growing Regulatory Problem**

### **A. Number and Scope of Regulations**

The U.S. Small Business Administration estimates that the overall cost of regulations to the United States is as high as \$1.75 trillion annually.<sup>1</sup> Regulations cost \$8,086 per employee annually and impose an average of \$10,585 on small businesses.<sup>2</sup> This almost equals the amount of taxes collected by the federal government: FY2009 gross individual income tax collections (before refunds) were \$1.18 trillion, gross corporate income tax collections were \$225.5 billion, gross employment tax collections were \$858.2 billion, and combined excise, gift and estate tax collections were \$71.3 billion.

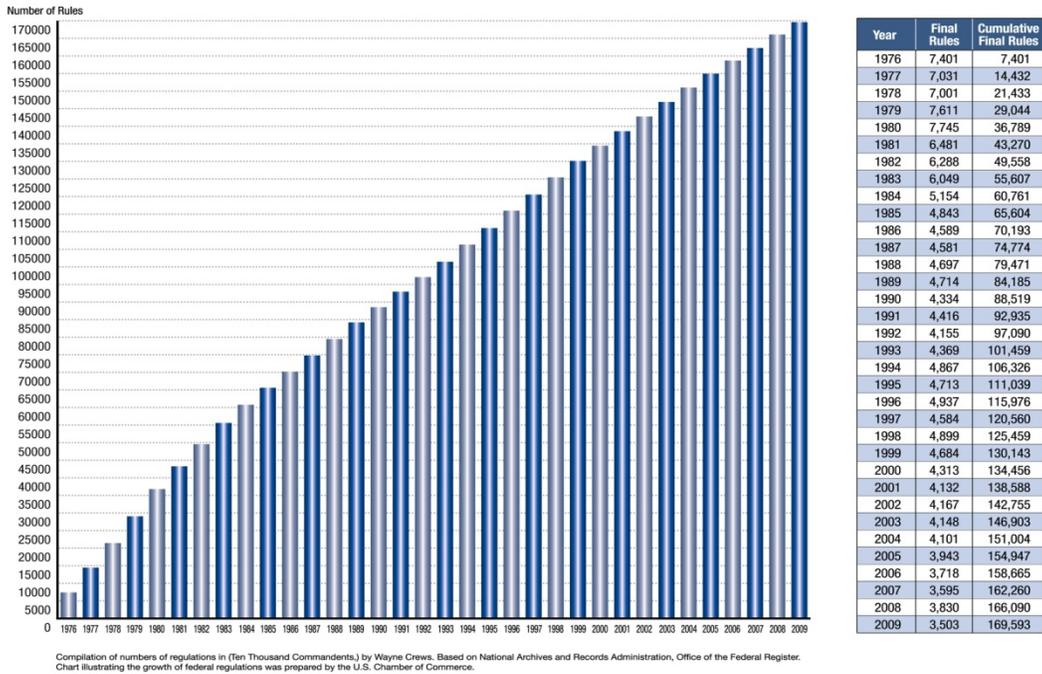
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<sup>1</sup> “The Impact of Regulatory Costs on Small Firms,” Nicole V. Crain and W. Mark Crain, analysis performed for the Small Business Administration Office of Advocacy, September 2010, *available at* <http://archive.sba.gov/advo/research/rs371tot.pdf>.

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

This \$1.75 trillion regulatory cost is the result of the accretion of roughly 170,000 individual regulations over the past four decades:

## Cumulative Number of Rules 1976–2009

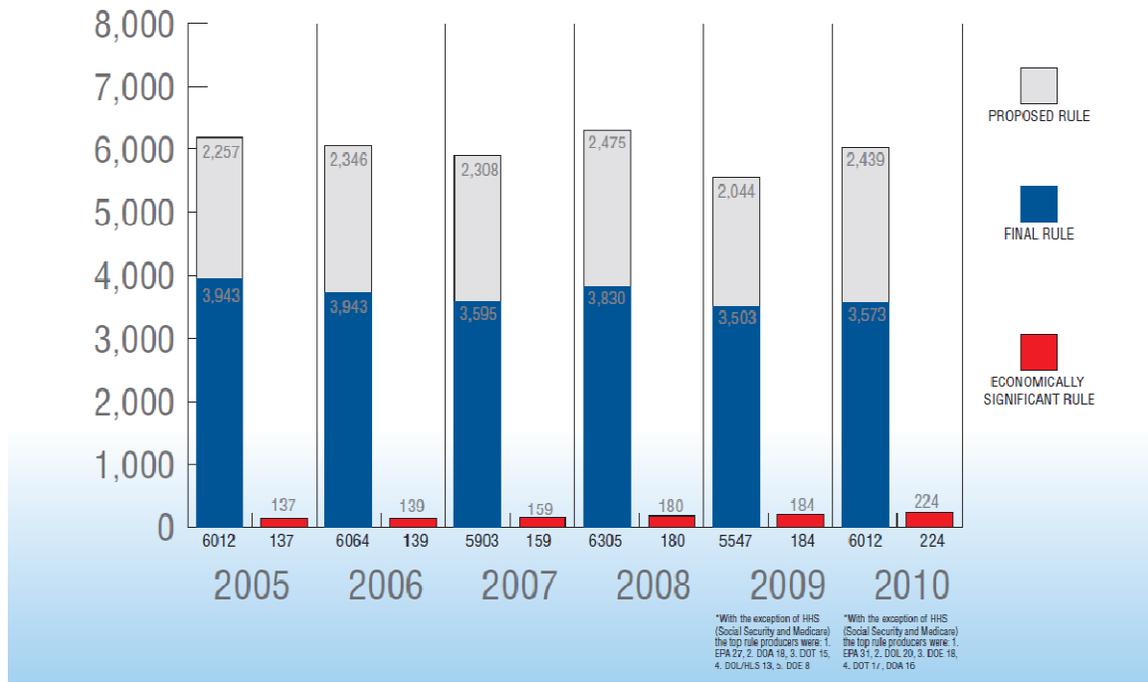


The Chamber believes the sheer number of regulations, though staggering, is not necessarily the problem that calls most for immediate attention, nor is it the reason why bipartisan concerns about the integrity of the regulatory process have intensified in recent years. Rather, the key problem is that the number of *economically significant* regulations—*i.e.*, those costing the businesses, consumers and the economy more than \$100 million—has increased substantially. As the chart below shows, the number of economically significant rules issued each year has increased more than 60 percent over the past five years, from 137 to 224<sup>3</sup>:

<sup>3</sup> The 224 rulemakings are not final, but rather “in the pipeline,” and include both final and proposed rules. Clyde Wayne Crews, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, available at <http://cei.org/10KC>.

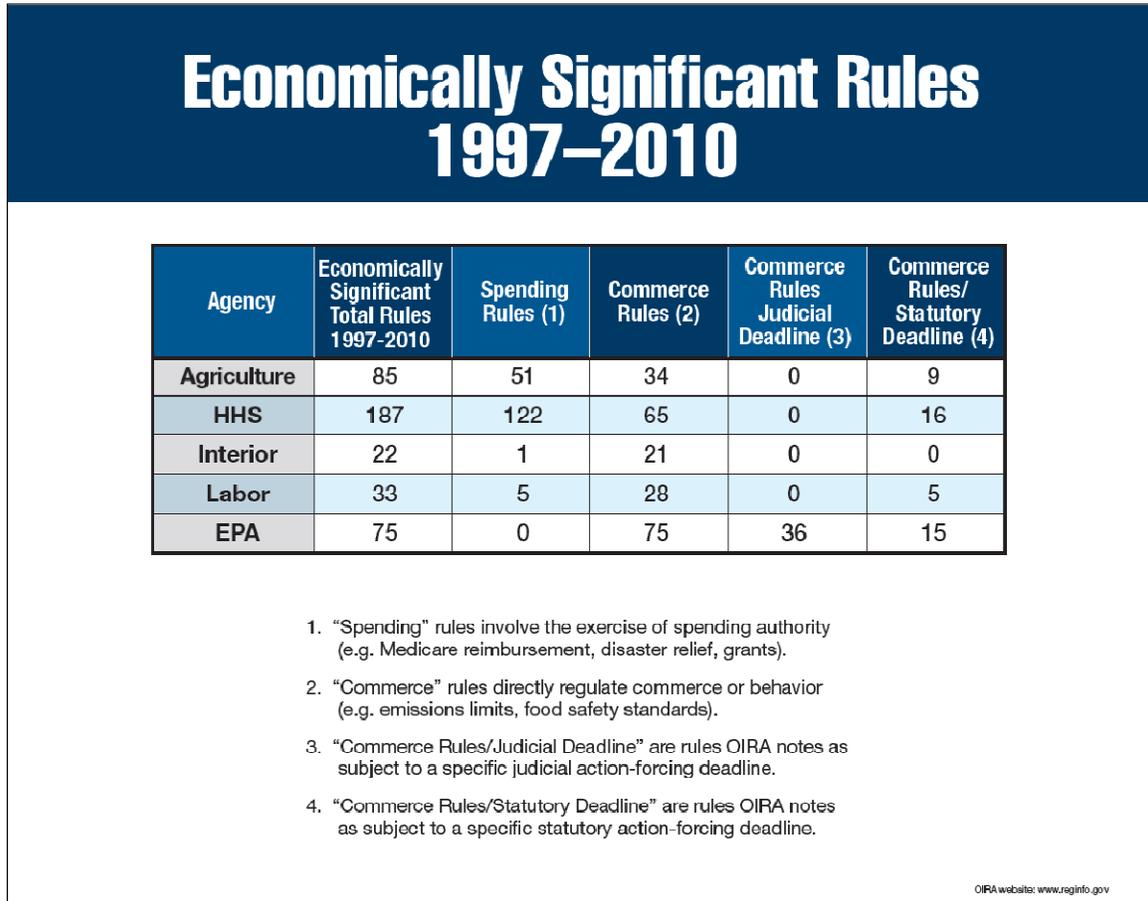


## Overview of Agency Rulemakings 2005-2010



Nowhere is this problem more pronounced than at the Environmental Protection Agency (EPA). EPA has garnered significant attention in recent years by issuing a series of one-sided, politically-charged regulations that are intended to take the place of legislation that cannot achieve a consensus in the Congress. From greenhouse gases to Clean Water Act jurisdiction to chemical regulation, EPA has not been shy about using regulations to impose broad mandates and restrictions so controversial that they could not pass even the heavily-Democratic 111<sup>th</sup> Congress.

As the chart below shows, the reasons for economically significant rulemakings vary from agency to agency:

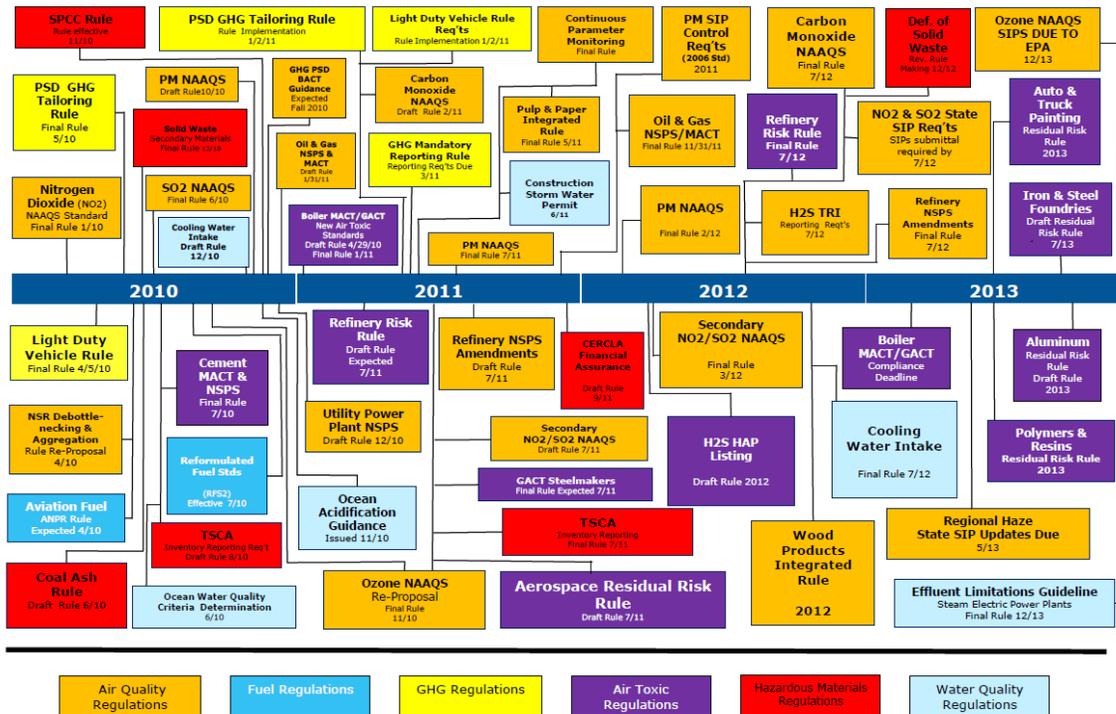


EPA appears to be an outlier among the five agencies surveyed above: more than any other agency, EPA is “forced” to act, either by court order or statutory requirement. Most troubling is that EPA is the only agency that regularly initiates rulemakings by what is commonly referred to as “Sue and Settle Rulemaking.”

Sue and Settle Rulemakings occur when EPA initiates a rulemaking to settle a lawsuit by an environmental group. When questioned about the scope or rationale for the rulemaking by Congress, EPA simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story, however, is the fact that EPA would not be bound by the court order if it simply chose to litigate. In recent years, Sue and Settle Rulemaking has resulted in several of EPA’s most controversial major rulemakings, including: New Source Performance Standards (NSPS) for greenhouse gas emissions from electric utilities and refineries; numeric nutrient criteria for the State of Florida; revisions to the Definition of Solid Waste under RCRA; NESHAP for cement kilns; Clean Water Act guidance for mountaintop removal mining permits; the California Waiver; the Stream Buffer Zone Rule; multi-industry Clean Air Act Section 112 air toxics rules; Ozone NAAQS reconsideration; Clean Air Act regulations on oil and gas drilling operations; and EPA’s proposal to regulate greenhouse gases under the Clean

Water Act. Because Sue and Settle Rulemakings occur as a result of EPA’s settlement with an environmental group, the terms of the settlement are often one-sided and give little consideration to the industry sector(s) that will be covered by the new regulations.

Between Sue and Settle rulemakings, statutory obligations, and other rules in the pipeline, EPA will continue to throw a massive number of new rules and regulations at industry over the next few years. The chart below illustrates the problem.



## B. How Regulations Stop Progress

The cumulative impact of regulatory action can be overwhelming: agencies literally have the power to decide the fate of firms and entire industries. American Electric Power Co. made headlines last month when it disclosed that EPA’s “train wreck” of coal industry regulations—Coal Ash, Utility MACT, the Transport Rule and Cooling Water Intake structures—would force the utility to retire 6,000 megawatts of coal-fired generating capacity and spend another \$6 billion to \$8 billion reworking the rest of its fleet. AEP would close three power plants in West Virginia, one in Ohio and one in Virginia, and would retire several boilers at coal plants in Indiana, Kentucky, Ohio, Texas and Virginia.

AEP is not alone. Six other power plants have announced early retirement due to excessive regulation: Portland Gas & Electric’s Boardman coal-fired power plant in Oregon; Exelon Corporation’s Oyster Creek Nuclear Generating Station in New Jersey; TransAlta Corporation’s Centralia coal-fired power plant in Washington; and, just this week, three Georgia Power plants in the next two years. In each case, the utility was

forced to choose between installing several hundred million dollars' worth of pollution controls to comply with EPA regulations, or simply shut down early. In all cases, the utility chose early retirement.

The onslaught of new requirements not only causes havoc when they are released by the agency. Once the rules have gone into effect, project-level "Not In My Back Yard" (NIMBY) activists capitalize on even more tools to stop economic development. The Chamber's *Project No Project* Web site chronicles 351 state-level projects in 49 states that have been stopped, stalled, or outright killed due to NIMBY activism, a broken permitting process and a system that allows limitless challenges by opponents of development. Results of the assessment are compiled at <http://www.projectnoproject.com>, which serves as a web-based project inventory. The purpose of the *Project No Project* initiative is to enable the Chamber to understand potential impacts of serious project impediments on our nation's economic development prospects.

The Chamber commissioned a first-of-its kind economic study to examine the lost economic value and jobs foregone by not building these 351 projects. The study, *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr. of Widener University, found that successful construction of the 351 projects identified in the Project No Project inventory could produce a \$1.1 trillion short-term boost to the economy and create 1.9 million jobs annually. Moreover, these facilities, once constructed, continue to generate jobs, because they operate for years or even decades. Based on their analysis, Pociask and Fuhr estimate that, in aggregate, each year the operation of these projects could generate \$145 billion in economic benefits and involve 791,000 jobs. While it is unreasonable to think that all 351 projects would be constructed, even a subset of the projects would yield major value. For instance, Pociask and Fuhr estimate that the construction of only the largest project in each state would generate \$449 billion in economic value and 572,000 annual jobs.

The chart below illustrates the diversity of the energy projects impacted by a broken regulatory process. *Project No Project* proves the saying that it is just as hard to site a wind farm in the U.S. as it is a coal-fired power plant.



# Project ~~No~~ Project

www.projectnoproject.com



The best way to fix the project-level regulatory impediments that developers face is to fix the federal regulatory process that places these tools into NIMBY toolbelts. And that begins by requiring agencies to follow the laws that require them to consider jobs and economic impacts of their regulations.

## II. How to Fix the Regulatory Process and Create Jobs

The Chamber has spent a great deal of time working with its members to develop legislative solutions to existing regulatory problems. Several of these can be enacted easily; others are more complex and will require substantial debate.

### A. **Permit Streamlining**

Congress should take steps to streamline the siting and permitting process for new energy projects. Potential solutions that could be included in streamlining legislation include:

- Require completion of environmental reviews within a defined time period, such as six months.
- When multiple agencies are involved in a NEPA review, a lead agency must be designated, agencies must engage early and in a coordinated way,

deadlines should be set, NEPA reviews must be concurrent, and agencies must be accountable if they do not engage early in the process.

- Provide opportunities for public engagement early and often, but also reduce default comment periods.
- All NEPA reviews must be completed “on an expeditious basis” and utilize “the shortest available NEPA process.”
- Accept state “little NEPA” reviews where the state has done a competent job, and avoid duplicating state work with a federal NEPA review.
- Reduce the statute of limitations for legal challenges.
- Create an Office of Permit Efficiency within the administration that will:
  - Collect data on delayed projects, and make this data publicly available; identify trends and common obstacles in permit delays; analyze the scope and nature of lawsuits to stop projects, and whether abuse exists; and recommend solutions to address common permitting challenges and delays.
  - Oversee federal actions and process to ensure that they are organized to maximize the competitiveness of U.S. commercial activities. A Federal Project Coordinator office would coordinate issuance of all federal permits. It would be charged with shepherding projects through federal agencies, working with companies to understand what permits are needed and when they need to be issued in order to meet project deadlines. The Coordinator would work with federal agencies to develop project timelines for the issuance of permits and would stay in contact with key federal officials to ensure that deadlines are being met and that adequate resources are being applied. When it is determined that adequate resources for permitting/environmental work are not available, the Coordinator would have a list of approved third party contractors that could be immediately brought in to perform the necessary work. Another function of the coordinator would be to work to ensure that permits and environmental studies are not vulnerable to litigation. It would work with the Justice Department to assess the vulnerability of federal actions to litigation. It would then act to reduce that vulnerability.
  - The Office of Permit Efficiency would provide overall assessments of the abilities of federal agencies to determine if adequate resources are in place for the issuance of permits. It would analyze the jobs and economic growth creation capacity/potential of each federal agency and rate the agencies in terms of their achievements in jobs creation. It would look at the priorities of federal agencies and rate them in terms of jobs creation/jobs destruction. It would work to guide agencies toward

activities and process that grow the economy, collect data on delayed projects, and make this data publicly available; identify trends and common obstacles in permit delays; analyze the scope and nature of lawsuits to stop projects, and whether abuse exists; and recommend solutions to address common permitting challenges and delays. The Office of Permit Efficiency could also have an oversight role in NEPA reviews and issue a coordination plan or “road map” for agencies.

Several of these concepts can be found in existing legislation. Lawmakers may therefore want to model legislation off one or more effective and workable streamlining provisions already in place: SAFETEA-LU Section 6002, National Environmental Policy Act (NEPA) streamlining language in the American Recovery and Reinvestment Act, or the Federal Communications Commission’s “shot-clock.”

i. SAFETEA-LU Section 6002

Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) accelerates the environmental review process for federal highway projects. Section 6002 contains two key components: (1) process streamlining and (2) a statute of limitations. The process streamlining component does not in any way circumvent any NEPA requirement; rather, it designates a lead agency (in SAFETEA-LU’s case, DOT) and requires early participation among the lead agency and other participating agencies. The goal of the process is to facilitate interagency and public coordination so that the process moves faster. The second key element in Section 6002 is a 180-day statute of limitations to “use it or lose it” on judicial review. Without such a provision, the prevailing statute of limitations is the default six-year federal statute of limitations for civil suits.

Section 6002 is working, and working well. A September 2010 report by the Federal Highway Administration found that just the process streamlining component of Section 6002 has cut the time to complete a NEPA review in half, from 73 months down to 36.85 months. The 180-day statute of limitations is cutting back on a typical NIMBY practice of waiting until the very last day to file a lawsuit against a project. Because the only real motive is to exploit the law to delay projects, this tactic is particularly effective with a six-year statute of limitations. Even with the 180-day statute of limitations, groups still wait until the last week or last day to file, so that the project is delayed as long as possible. A good example of this happening is the Maryland InterCounty Connector<sup>4</sup> highway project.

ii. NEPA Streamlining in the Stimulus

During debate on the 2009 economic stimulus bill, the American Recovery and Reinvestment Act (“Recovery Act”), the Chamber called attention to the fact that the

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<sup>4</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/01/AR2006110103155.html>. The final Record of Decision was issued on May 29, 2006. Sierra Club and Environmental Defense gave notice of intent to sue on November 2, 2006, and filed the lawsuit on December 20, 2006.

flawed permitting process in effect ensures that no project will ever truly be “shovel-ready.” Senators Barrasso and Boxer worked together to secure an amendment to the bill requiring that the NEPA process be implemented “on an expeditious basis,” and that “the shortest existing applicable process” under NEPA must be used.

This amendment has made all the difference in getting Recovery Act projects underway. According to a February 2011 report to Congress by the White House Council on Environmental Quality, over 180,000 of the 272,000 Recovery Act projects covered by NEPA received the most expeditious form of compliance treatment possible—a categorical exemption—and work was able to begin and jobs were created.<sup>5</sup> Moreover, only 830 projects received an environmental impact statement, the longest available process under NEPA.<sup>6</sup> These circumstances confirm a recognition among some policymakers that the permitting process is harming our ability to grow our economy so we can compete with the world.

The Chamber is not asking that anyone’s rights be denied; rather we are suggesting that those opposing a project must exercise their rights in a defined period of time after a decision is made, and that all claims be immediately addressed. The developer of a project should at least be afforded a decision to begin construction in one or two or even three years, not ten or fifteen.

### iii. FCC Shot-Clock

Even cellular telephone towers are challenged by NIMBYs. At one point it was estimated that the construction of approximately 700 cell towers were being challenged. Without the new cell towers, the expansion of broadband was limited. To address this issue, the Federal Communications Commission (FCC) issued new regulations in November 2009 to speed up the siting and permitting of cellular telephone towers and antennas. Under the new rules, state and local governments have a 90-day deadline to process applications for co-located facilities where two or more providers share a tower, and 150 days to process applications for new towers. However, if the government authority has not acted on the application within the requisite time period, the applicant may file a claim in court. There is not enough data yet to judge the effectiveness of the rule, which is currently being challenged by several municipalities.

## **B. Enforce Existing Mandates**

Agencies can and should comply with the statutes that govern their operations. However, they frequently do not. Congress should demand that agencies fully comply with existing statutory mandates that impact job creation:

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<sup>5</sup> The Eighth Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, *available at* [http://ceq.hss.doe.gov/ceq\\_reports/reports\\_congress\\_feb2011.html](http://ceq.hss.doe.gov/ceq_reports/reports_congress_feb2011.html).

<sup>6</sup> *Id.*

- i. Existing laws that require EPA to consider jobs and economic impact. Section 312 of the Clean Air Act requires EPA to conduct a cost-benefit analysis for most major air rules.<sup>7</sup> Section 317 requires economic impact assessments for most major air rules.<sup>8</sup> And Section 321 requires the Administrator to do a continuing study of the effect of its regulations on employment or the threat of job loss.<sup>9</sup> Identical provisions to Section 321 exist in most other environmental statutes, such as the Clean Water Act, Toxic Substances Control Act, the Solid Waste Disposal Act, and CERCLA.<sup>10</sup> Yet EPA either flat-out ignores these requirements (as it did with Section 321 and its GHG rules), or it does such a poor job with the economic assessment and the underlying data that the result is misleading, usually overstating benefits and understating costs. The Chamber recommends suspending all EPA regulations issued in 2009 and 2010 that did not adequately comply with Sections 312, 317 and 321.
  
- ii. The Unfunded Mandates Reform Act of 1995 (UMRA).<sup>11</sup> UMRA was designed to restrain the imposition of unfunded federal mandates on state, local, and tribal governments and the private sector, primarily by providing more information and focusing more attention on potential federal mandates in legislation and regulations. Before promulgating a final rule, UMRA requires agencies to undertake a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including costs and benefits and future compliance costs, and estimates of the effect of the rule on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and services (if and to the extent that the agency determines accurate estimates are feasible). For rules of over \$100 million in economic impact, UMRA requires the agency to identify and consider a “reasonable number” of regulatory alternatives from which the agency shall select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. Alternatively, the head of the agency must publish with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the rule’s objectives was not chosen. GAO has recognized that, despite the goals of UMRA, “statutes and final rules containing what affected parties perceive as ‘unfunded mandates’ can be enacted or published without being identified as federal mandates with costs or expenditures at or above the thresholds established in UMRA,” and “many statutes and final rules with potentially significant financial effects on nonfederal

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<sup>7</sup> 42 U.S.C. § 7612.

<sup>8</sup> *Id.* at § 7617.

<sup>9</sup> *Id.* at § 7621.

<sup>10</sup> The provision can also be found in the Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971), Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).

<sup>11</sup> 2 U.S.C. §§ 658 and 1511, *et seq.*

parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds."<sup>12</sup>

iii. The Information Quality Act (IQA).<sup>13</sup> The IQA was designed to impose greater transparency and improve the quality of agency information, especially with respect to non-regulatory information disseminated by administrative agencies with respect to scientific and statistical matters. It requires:

- Compliance with OMB's information quality guidelines that mandate transparency, full disclosure of all data and reports used to justify or formulate an agency position on a given topic, and full disclosure of all uncertainties or error sources so that a member of the public may evaluate and reproduce the results of an agency analysis or study;
- Use of the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods;
- For claims, statements or policies regarding human health or environmental risks, the agency must specify (1) each population addressed by any estimate of public health effects; (2) the expected risk or central estimate of risk for the specific populations; (3) each appropriate upper-bound or lower-bound estimate of risk; (4) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and (5) peer-reviewed studies that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data; and
- A procedure to allow affected persons to "seek and obtain" correction or disclosure of information that fails OMB information quality requirements.

The IQA's drafters intended agency actions under the IQA to be subject to normative APA judicial review. However, the bureaucracy has taken the position that there is no judicial review or remedy for IQA violations and one Court of Appeals has adopted this view. In other words, the Executive Branch of the federal government and one Circuit hold Congress passed IQA without creating any rights for persons harmed by agency violations of its provisions. Consequently, agencies refuse to comply with the IQA.

If the agencies still fail to comply with these statutory mandates, Congress can condition appropriations on the agency's undertaking of these statutorily-required

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<sup>12</sup> General Accountability Office, "Unfunded Mandates: Analysis of Reform Act Coverage," GAO-04-637 (May 2004).

<sup>13</sup> 44 U.S.C. §§ 3504(d)(1), 3516.

analyses. Conversely, the administration, as part of its regulatory efficiency efforts being implemented by Executive Order 13563, could easily order agency compliance.

### **C. Strengthen Existing Statutes**

Because agencies have become so adept at circumventing existing statutory safeguards, Congress must put teeth in other well-crafted regulatory statutes that circumscribe agency discretion. Only then can these safeguards be enforced by citizens adversely impacted by agency actions. The Chamber recommends the following:

- i. Clarify that UMRA and IQA Violations are Judicially Reviewable. No judicial review is available for UMRA violations, and agencies take the position that IQA violations are not judicially reviewable. This undermines each statute's effectiveness and is contrary to controlling APA norms and original Congressional intent. Congress should confirm that IQA violations are judicially reviewable and that IQA quality standards apply to all studies, statistics, and other information used to support promulgation of rules and guidance. It should also amend UMRA to allow judicial review for aggrieved parties.
- ii. Codify Executive Order 12866 including Guidance Documents. President Clinton issued E.O. 12866 requiring agencies considering new rules to identify and assess alternative forms of regulation, adopt the least burdensome regulatory alternative, use the best reasonably obtainable science, and highlight economic impact concerns, among other things, and then to submit major rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review. OIRA, in turn, was authorized to return regulatory proposals that failed to comply with the E.O. to the relevant agency for revision. President Bush amended E.O. 12866 to include guidance documents and to require best estimates of cumulative regulatory costs and benefits. President Obama repealed the Bush amendments. However, the Chamber believes E.O. 12866, ideally including the Bush amendments, ought to be codified with a private right of action for persons affected by agency or OIRA non-compliance.
- iii. Amend the Regulatory Flexibility Act to Consider "Indirect" Impacts. The Regulatory Flexibility Act requires agencies to determine if a rule will have a "significant economic impact on a substantial number of small entities." If so, then the agency must explain why it has chosen this rule over other options. Due to a court decision, only the direct impact of a rule (i.e., cost of compliance) need be assessed. However, indirect costs such as litigation and enforcement risk and lost business opportunities ought to be accounted for as well. Therefore, the Chamber proposes amending the Act to include indirect impacts.

- iv. Amend the Regulatory Flexibility Act to Require Cost-Benefit Estimates and Science Reviews by an Independent Third Party not Agency Staff. Many current laws and Executive Orders already require agencies to conduct cost-benefit estimates and science reviews. However, these estimates and reviews likely would be more accurate and more credible if conducted by an independent third party and not agency staff. Requiring cost-benefit estimates and science reviews to be conducted entirely by an independent third party would be an important check and balance on agency power and improve regulatory quality.

#### **D. Reform the APA**

To make a real impact, however, Congress should focus on economically significant rules and significant guidance documents. These rules and guidance documents have historically been defined as those likely to result in an annual effect on the economy of over \$100 million; lead to a major increase in costs or prices; raise novel policy or legal issues; or have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises. These are also the rules and guidance most likely to raise compelling federalism and constitutional separation of powers concerns. As the chart on the Overview of Agency Rulemakings 2005-2010 illustrates, these economically significant regulations only comprise four percent of agency regulations but they impose both the vast majority of economic impact and job destruction and are the rules that most insert the agencies into the legislative process.

Currently, the same standard of agency justification and judicial review applies to both general regulations and the most economically significant regulations. This means that an agency only need establish the same level of support for the most minor of rules as for rules that have significant economic impact on many sectors of the economy. By allowing agencies to use this “one-size-fits-all” regulatory process, agencies are able to ignore the built-in statutory checks and balances. When coupled with the substantial deference provided during judicial review of agency action, agencies are able to ignore Congress. Moreover, a divided Congress has little to no ability to reclaim the powers it delegated to agencies over the past few decades. In this situation, agencies are free of Congressional control until Congress can get the votes to pass a law that restricts their discretion or limits their funding. To address this lack of constitutional checks and balances, Congress should place on agencies a responsibility that is commensurate with the costs the agency is imposing on the regulatory community, jobs and the nation’s competitiveness. The Chamber recommends the following measures to restore balance to the regulatory process:

- i. Pass the REINS Act. The Chamber supports H.R. 10 and S. 299, the “Regulations from the Executive In Need of Scrutiny (REINS) Act.” The REINS Act requires both houses of Congress to affirmatively approve, and the president to sign, any new “major rule”—i.e., a rule with a

projected impact to the economy of over \$100 million—before it could become effective. The Chamber believes the REINS Act is an effective regulatory reform, which would improve Congressional oversight, increase the quality of agency rulemakings, and better ensure all branches of the Federal government are accountable. It restores to Congress the duty and obligation to make balancing decisions with respect to regulations. This is what the Constitution provides, and this is how the system ought to work.

- ii. Require Formal Rulemaking for the economically significant “Super Rules”. Formal rulemaking under the APA means a quasi-judicial hearing with testimony under oath, depositions and cross-examination. The agency, as the rule’s proponent, carries the burden of proof by substantial evidence. “Substantial evidence” is enough relevant evidence for a reasonable person to conclude the record is adequate to support the proposed agency action. This is a more demanding test than the traditional “arbitrary and capricious” standard applied by courts to rules promulgated by informal rulemaking. Formal rulemaking is appropriate for the small category of “super rules” with significant economic impact on a major portion of the economy.
  
- iii. Use the OSHA Hybrid Rulemaking Model to Give Interested Parties a Chance to Question Agencies about Proposed Rules. The APA generally provides for notice and comment (“informal”) or adjudicatory (“formal”) rulemaking. However, Congress created a unique “hybrid” rulemaking model for OSHA, allowing the agency to propose rules and standards via notice and comment but requiring an informal hearing with cross-examination of the agency, on key issues, at a stakeholder’s request. Extending the OSHA hybrid approach to all rules and guidance that are not classified as “Super Rules”—which includes review under the substantial evidence test—will promote transparency and promote regulatory quality by ensuring more rigorous internal and external review of agency actions. Congress should extend the substantial evidence test to all rules and guidance, save for a subset of minor, non-controversial regulations that would retain the arbitrary and capricious standard.

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Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

**Committee on Energy and Commerce**

**U.S. House of Representatives**

Witness Disclosure Requirement - "Truth in Testimony"  
Required by House Rule XI, Clause 2(g)

1. Your Name: <i>William L. Kovacs</i>		
2. Are you testifying on behalf of the Federal, or a State or local government entity?	Yes	No <i>X</i>
3. Are you testifying on behalf of an entity that is not a government entity?	<i>X</i>	No
4. Other than yourself, please list which entity or entities you are representing:  <i>U.S. Chamber of Commerce</i>		
5. Please list any Federal grants or contracts (including subgrants or subcontracts) that you or the entity you represent have received on or after October 1, 2008: <i>11/10-3/31/13</i> <i>The U.S. Chamber is a subrecipient to the National Chamber Foundation under a grant from the Dept. of commerce Award # IT10MAS112004</i> <i>Project Title: Export Green: Growing SBE Exports to Brazil. \$194,440.00</i>		
6. If your answer to the question in item 3 in this form is "yes," please describe your position or representational capacity with the entity(ies) you are representing:  <i>Senior Vice President</i> <i>Environment Technology + Regulatory Affairs</i>		
7. If your answer to the question in item 3 is "yes," do any of the entities disclosed in item 4 have parent organizations, subsidiaries, or partnerships that you are not representing in your testimony?	Yes	No <i>X</i>
8. If the answer to the question in item 3 is "yes," please list any Federal grants or contracts (including subgrants or subcontracts) that were received by the entities listed under the question in item 4 on or after October 1, 2008, that exceed 10 percent of the revenue of the entities in the year received, including the source and amount of each grant or contract to be listed:  <i>none</i>		

Signature: *William L. Kovacs* Date: *7/12/11*