"Examining the Federal Regulatory System
to Improve Accountability, Transparency and Integrity"
Written Questions for the Record Submitted by Chairman Charles E. Grassley of Iowa
June 17, 2015

Questions for Mr. Kovacs

1. **In January, the GAO issued a report concluding that "[t]he effect of settlements in deadline suits on EPA's rulemaking priorities is limited."**
    a. **Do you agree or disagree with the report's conclusion? Why or why not?**

The Chamber disagrees with the assertion that settlement agreements in deadline suits have a limited effect on EPA's rulemaking priorities. The December 2014 Government Accountability Office (GAO) report that evaluated seven consent agreements that EPA entered into between May 31, 2008 and June 1, 2013 suffers from several fatal flaws and cannot be relied upon.

The report acknowledges that GAO relied exclusively on statements and materials provided by EPA and DOJ personnel and that GAO made no attempt to conduct any independent research of its own. Accordingly, the report only parrots the positions on the "sue and settle" issue stated by EPA and DOJ. Moreover, while the report notes that "[w]e relied on EPA because neither EPA nor DOJ maintain a database that links settlements to rules, and there is no comprehensive public source of such information," GAO apparently does not consider this lack of transparency to be a problem. For years, Congress and the public have asked EPA to release more information about sue-and-settle negotiations and agreements, which the agency has refused to provide. The report simply accepts EPA's lack of transparency as fact, rather than considering its adverse impact on the rulemaking process.

The report notes that all of the settlement agreements studied came out of just one EPA office, the Office of Air and Radiation (OAR). While this implies that settlement agreements are an isolated, perhaps unimportant phenomenon at EPA, the report ignores the fact that Clean Air Act rules issued by OAR represented **96.6% of total annual costs of <u>all</u> EPA regulations issued between 2008 and 2013.**[1]

Significantly, the report only considers 7 settlement agreements. Based on *Federal Register* notices of proposed Clean Air Act agreements lodged with courts, at least **60** such agreements were reached between 2009 and 2012.[2] Why were the vast majority of these agreements ignored?

The title of the report gives the impression that GAO's research found that settlement agreements in deadline suits have no impact on rules issued by EPA or on the public's ability to participate in agency decision-making. The report itself clearly contradicts this impression, however. The report states that with respect to the recurring reviews of hazardous air pollutant standards for specific industries under the NESHAP program, "most of the resources available to complete [the recurring reviews] are focused on a 2011 settlement… and they have been unable to meet all of the time frames contained in the 2011 settlement…. Officials said that they intended to complete all of the overdue [reviews] but are focused on fulfilling the terms of the 2011 settlement and several other settlements[.]" In other words, the 2011 settlement and other settlements have forced EPA to redirect its resources into meeting agreed-upon deadlines to the detriment of all other scheduled reviews, which themselves are overdue.

[1] Source: EPA Regulatory Impact Analyses for the individual rules. With a 7% discount rate, these rules totaled $56.9 billion in estimated compliance costs.
[2] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) at 14.

EPA often agrees to bind itself to deadlines for regulatory action that it cannot meet. The agency subsequently uses the deadline it agreed to as justification for requiring shorter comment periods, relying on incomplete or questionable technical data, and cutting corners on regulatory reviews. The resulting rulemakings are rushed, sloppy, and often require years of litigation to fix.

b. Is there any evidence that these tactics do, in fact, impact regulatory agendas at federal agencies?

Sue-and-settle tactics do in fact impact regulatory agendas at federal agencies. The GAO's report itself acknowledges that agencies cannot meet compliance obligations under previous settlement agreements, let alone new ones, and the settlement agreements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled regulatory actions, which themselves are overdue. EPA in fact misses, according to various sources, between 86 % and 98 % of its statutorily-imposed deadlines.[3] When an agency misses nearly all of its deadlines, each citizen suits sets a priority over other regulations causing agencies to lose discretion.

Agency resource diversion is illustrated by the sue-and-settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA. Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated $ 20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation ($15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation. In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

2. Some critics of the Sunshine for Regulatory Decrees and Settlements Act argue that it's a "solution in search of a problem" and that it would effectively prevent citizens from holding the government accountable.

a. Do you agree or disagree with what critics have said? Why or why not?

The Chamber strongly disagrees. The Sunshine for Regulatory Decrees and Settlements Act would simply require that agencies are more transparent about settlements that bind the federal government to pursue a specified course of regulatory action. Increased transparency is clearly needed to increase government accountability. When an agency like EPA fails to meet 84% to 98% of its statutory deadlines, the various citizen suit provisions invite special interest groups to set regulatory priorities through sue-and-settle agreements. Sue and settle agreements lead to: (1) diversion of agency resources to

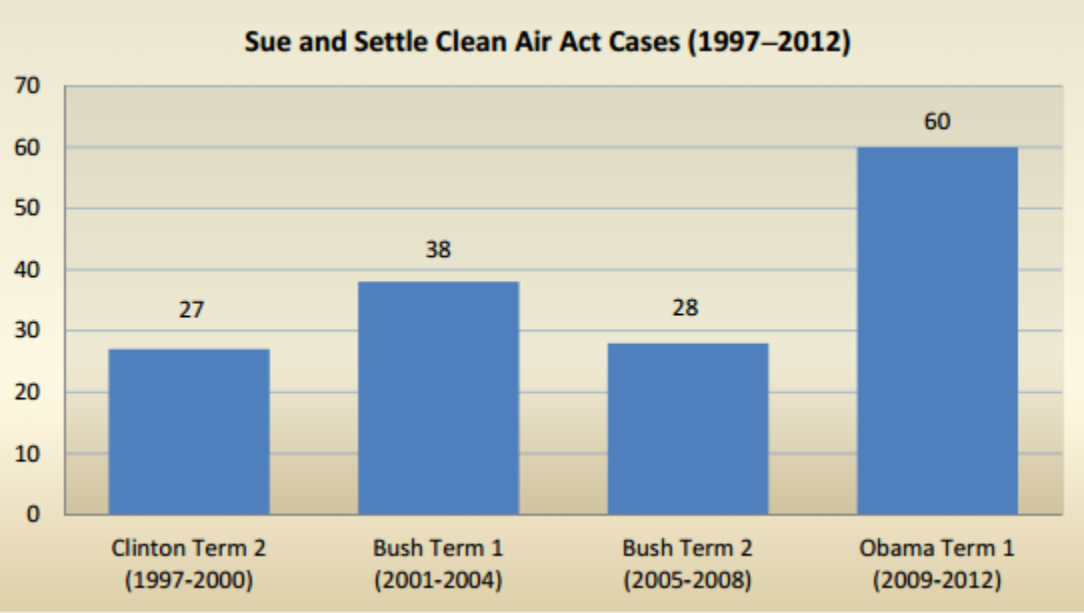
[3] Henry N. Butler and Nathaniel J. Harris, Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 37, No. 2 at 599 (2014) (available at http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf) (citing Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub). According to Lazarus, "the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA." Id. at 324 (citing Statutory Deadlines In Environmental Legislation: Necessary But Need Improvement 13-14 (ENVIR. & ENERGY STUDY INST. AND ENVIR. L. INST., 1985)); William Yeatman, EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle" (July 10, 2013) (available at https://cei.org/web-memo/epas-woefuldeadline-performance-raises-questions-about-agency-competence-climate-change-re).

address court-ordered settlements; (2) rushed and sloppy rulemaking to meet court ordered deadlines leading to technical and court-ordered remands for agency improvement; and (3) insufficient time to comply with congressionally-mandated analysis.

The Sunshine for Regulatory Decrees and Settlements Act would provide notice to the public that private parties and federal agencies are settling public policy issues in private, and allow affected parties a limited ability to intervene when their interests are not being protected by the parties to the consent decree. This approach is a good way to ensure that critical decisions are not made behind closed doors and that affected parties can participate.

3. **In 2004, Professor Parenteau published an article criticizing the George W. Bush Administration for entering into "sweetheart deals to settle lawsuits brought by favored interests," and its use of "closed-door negotiations" in the process. He acknowledged that "environmentalists have benefitted from these in the past," but asserted that the Bush Administration used the technique "routinely to make major policy decisions without public participation or Congressional review." It's clear, therefore, that allegations of sue-and-settle tactics are not limited to just one administration or one political party.**
    a. **Do you agree that it's time Congress takes action to address the issue? Should combatting sue-and-settle tactics be an effort supported by folks on both sides of the aisle?**

Congress should take action to address the abuse of citizen suits through sue-and-settle agreements. The Chamber conducted an analysis comparing the use of Sue and Settle in Clean Air Act cases over a 15 year period between 1997 and 2012. The following chart compares Clean Air Act sue-and-settle settlement agreements and consent decrees finalized during that period.



The results show that the sue and settle tactic has been used during both Democratic and Republican administrations.[4] The sue-and-settle problem requires a bipartisan solution which can be addressed

[4] The sue-and-settle problem dates back to at least the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice memorandum, referred to as the "Meese Memo," addressing the problematic use of consent

through the Sunshine for Regulatory Settlements and Decrees Act and by consolidating citizen suit provisions under Title 28 to provide greater congressional oversight of the issue. This oversight does not now occur because jurisdiction over citizen suits rests with many committees and none of them have undertaken oversight of the provisions in their jurisdiction. Finally, consent decrees are about policymaking and the public should be involved.

4. In his written testimony, Mr. Weissman asserts that the rulemaking process "gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account."

a. Do you agree with this observation? Why or why not?

The Chamber disagrees strongly with Mr. Weissman's assertion, and believes he misconstrues the point on the issue of industry concerns with rulemaking. Mr. Weissman seems to be stating that the only concern industry has with agency rulemaking is how the agency estimates costs. This is incorrect. The Chamber's concerns are with the entirety of the regulatory process, which now allows agencies to complete rulemaking after rulemaking that lack transparency and accountability across the board. Industry supports a robust, transparent, and accountable regulatory process that ensures the best information available is used to inform agencies of the impact of a regulation, including its impact on jobs, competitiveness, and communities, and that the information is weighed appropriately. However, the rulemaking process often does not work this way, leading to regulatory failure.

The Environmental Protection Agency (EPA) provides the most salient example of regulatory failure in this respect. In the past year the agency has concurrently undertaken three massive new rulemakings that vastly expand the agency's reach: the Clean Power Plan (CPP), Waters of the U.S. (WOTUS), and Ozone NAAQS. Mr. Weissman asserts that the notice and comment process, as currently practiced by the EPA, provides ample opportunity for industry to voice concerns over costs. However, each of these rules represents an expansion of EPA authority that creates significant uncertainty by asking states and the regulated community to implement three rules that have the potential to conflict with one another.

For example, the CPP may force the closure of a coal-fired plant in a non-attainment area for Ozone, but because of natural gas access needs, a replacement plant might need to be built in a current attainment area and need a natural gas pipeline to provide it a supply of gas for operations. The newly built natural gas facility may affect ozone levels in that area sufficiently that further actions need to be taken to remain in attainment. Further, that new gas plant might require new pipeline construction to ensure gas supply, which will likely raise Clean Water Act permitting issues that would not have existed prior to WOTUS. The bottom line is that planning becomes impossible when all parts of the system are moving at once.

Moreover, for each new rule the agency has failed to properly perform important, statutorily required analyses that provide information to the public and information that Congress demanded through multiple statutes. Congress passed the Regulatory Flexibility Act (RFA) to ensure that agencies examine the effects of their rules on small businesses and small local governments; it passed the Unfunded Mandates Reform Act (UMRA) to make certain that agencies were not simply passing the buck to states by requiring the states to bear the administrative costs of implementing and enforcing complicated and

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decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).

costly rules; and Congress passed the Information Quality Act (IQA) to make certain that the EPA and other agencies were not using faulty scientific studies to promote their preferred policies and instead used the best information available.

Congress also included § 321(a) in the Clean Air Act (CAA), which requires the EPA to evaluate the employment impacts from its rulemakings. EPA has never complied with this requirement. It is simply not possible for businesses to have ample opportunity to voice concerns over a rulemaking when the agency fails to provide all of the relevant information in a transparent manner. (See attachment for an analysis of EPA's compliance with all of the above-referenced statutory analytical requirements, as well as its compliance with EO 12866 and 13563, in the three recent major rulemakings discussed here.)

5. In his written testimony, Mr. Weissman discusses unreasonable delays in the rulemaking process. He says "the source of the problem is not inept government officials and workers, but a thicket of legislatively mandated process and multiple analyses, along with inappropriate influence exerted by and for regulated parties."

a. Do you agree with this observation? Why or why not?

In direct terms, what Mr. Weissman finds to be a "thicket of legislatively mandated process and multiple analyses" are mandates Congress imposed on agencies to determine the impact of their rules on state and local governments, workers, small businesses, communities, and competitiveness. While Mr. Weissman may view this information to be a "thicket" of requirements, it is the information that Congress needs to effectively legislate, and which Congress was forced to mandate because agencies routinely engaged in non-transparent rulemakings. Even after enacting these mandates requiring information needed to evaluate the impacts of a rule, agencies still routinely ignore them and publish rules claiming that their regulation imposes little cost and great benefits. Congress has requested agencies provide certain data on the impacts of a regulation. It needs this data for decision making.

The problem, however, with the federal regulatory process is that Congress has enacted vague laws which delegate significant, poorly defined authority to federal agencies. That authority is then used by unelected bureaucrats to craft massive, costly, intrusive regulations that Congress never attended, and which the courts approve by granting court-created deference to the agency. In recent years, agencies like the EPA have continued to formulate ever more intrusive and costly regulations, even though our air and water are already far cleaner than even the EPA mandates in many cases. The EPA is currently in the process of proposing and finalizing three of the most massive, and expansive rules in American history, effectively expanding its authority not only to protect the environment, but also to establish national land use policies, to determine the allowable level of economic development, and to dictate the composition of the country's energy portfolio.

These high impact, high cost rules are laws due to the fact that Congress delegated lawmaking authority to the agencies. But what is most unfortunate is that these laws are far more sweeping than Congress could enact in current circumstances and these rules are enacted at the discretion of one or a few unelected bureaucrats. This situation at the very least demands greater scrutiny over what these unelected bureaucrats do and how they do it. These high impact rulemakings should require that the agency slow down its process and gather more information, updating Congress and allowing it to provide the necessary oversight, not speed things up and push these rules out at a faster pace. (Once again, see the attachment for an analysis of how the EPA has circumvented the statutorily mandated provision of information to Congress and the public for the Clean Power Plan, Waters of the U.S., and Ozone NAAQS.)

6. In his written testimony, Mr. Weissman asserts that high regulatory compliance costs do not necessarily have negative job impacts but that "firm expenditures on regulatory compliance typically create new jobs…."

a. Do you think your members would agree that government regulation is a productive means of job creation?

The Chamber's members do not consider new regulations to be a job creation mechanism. On the contrary, while regulatory compliance may create some new jobs, the jobs lost due to regulation, when fully measured by whole economy modeling, will almost always outweigh those gained. In 2013 the Chamber released a study on regulatory job loss analysis conducted by the EPA.[5] First, it is important to note that EPA rarely performs a more comprehensive analysis using a whole economy model of jobs impacts in its rulemakings, doing so on only 2 out of 56 cases examined (see chart on next page). In all other cases EPA performed job loss analysis using only a limited model and a job creation formula clearly inappropriate for most of the rules where EPA used it. Congress tasked the agency to perform ongoing analyses of job displacement in § 321(a) of the Clean Air Act (CAA) and provide that information to Congress. To date, the agency has never performed its duties under § 321(a).

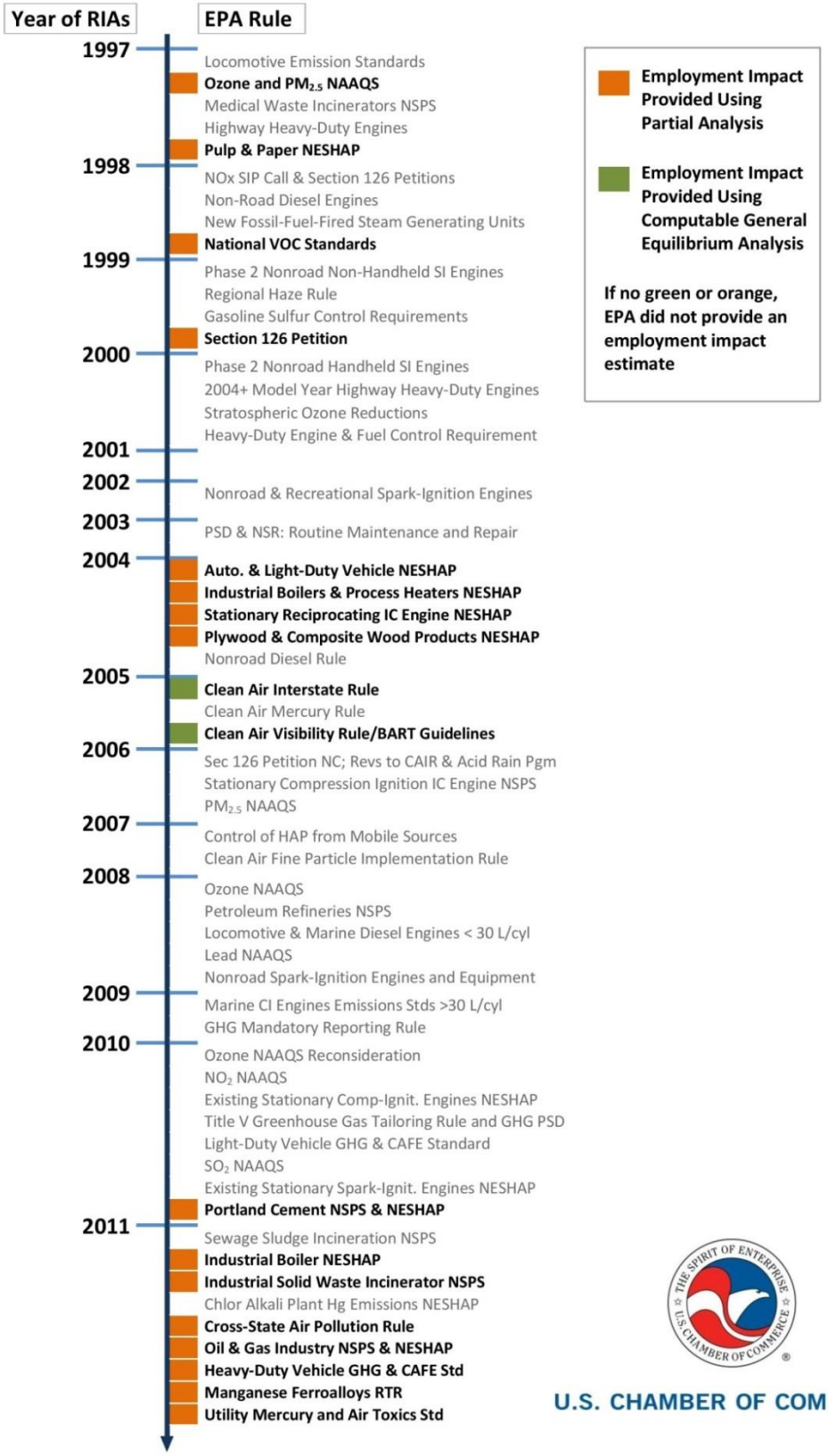
Secondly, the Chamber study of job impact analyses demonstrated exactly why EPA's claims that regulations create jobs are incorrect. In performing job impact analyses the few times it did, EPA used an inappropriate modeling framework, looking only at a limited sample of impacts and ignoring impacts on other sectors of the economy. This type of model is referred to as a "partial economy model", in contrast with a whole economy model, which attempts to model the entire economy and account for impacts across all industries, such as electric power utilities, the mining of fuel for electricity generation, manufacturing, transportation, and retail and wholesale sales. The benchmark case that the report uses to demonstrate how different the job impact results can be when a more comprehensive and appropriate whole economy model is used estimates job losses from the Mercury and Air Toxics Standard (MATS). EPA estimated that the costly, $10 billion per year rule would create a net 8,000 jobs in 2015, while estimation using a whole economy model that examines all of the impacts of the regulation showed that compliance with the rule would cause 180,000 job losses in 2015.[6]

In light of the vast differences in estimates of regulatory impacts based on which type of model is used, it becomes even more imperative that agency regulatory analysis be held to high standards. All data used in analyses of costs and benefits should be made available to the public for review so that if need be the quality of the data and analysis can be challenged under the provisions of the Information Quality Act.

[5] U.S. Chamber of Commerce, *Impacts of Regulations on Employment: Examining EPA's Oft-Repeated Claims that Regulations Create Jobs*, 2013. *See* https://www.uschamber.com/report/impacts-regulations-employment-examining-epa-s-oft-repeated-claims-regulations-create-jobs.

[6] *Id.* at 29.

Timeline of Air Regulatory Impact Analyses Found to Contain Employment Impact Estimates



U.S. CHAMBER OF COMMERCE

ATTACHMENT:

EPA Compliance with Statutory and E.O. Requirements on Recent Major Rulemakings

	Clean Power Plan (Proposed)	**WOTUS (Final)**	**Ozone (Proposed)**
UMRA	EPA states that the rule contains no unfunded mandates on state or local governments. NAAQS rules also have never been covered by UMRA, as the burden to set up plan is on state agency but ultimately the costs are borne by the private sector (note that for NAAQS rules, EPA cites cost consideration under *ATA* case as justification for ignoring UMRA, but that does not necessarily apply here, so ultimately as stated below for the RFA, applicability will rely upon broader issues of this rule's legality under EPA's authority in § 111(d) of the CAA.)	EPA states that the rule does not impose any mandate on states or local governments – EPA's reason: definitional only and "applies broadly" to CWA programs. Because many of the requirements of CWA programs that will be affected by the expansion of covered waters are managed by state and local governments, the new rule does expand the responsibilities of those entities and increase their burden.	EPA has not ever considered the requirements on states to implement NAAQS standards as covered by UMRA, and always states that NAAQS rules produce no unfunded mandates. EPA cites *American Trucking Assoc.* v. *EPA,* 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) "(noting that because the EPA is precluded from considering costs of implementation in establishing NAAQS, preparation of a Regulatory Impact Analysis (RIA) pursuant to the Unfunded Mandates Reform Act would not furnish any information which the court could consider in reviewing the NAAQS)."
RFA	RFA applies and EPA should have done an Initial Reg Flex Analysis to estimate small business impacts. EPA certifies that the rule does not have a significant impact on small entities because the rule only mandates states to	EPA certified that the rule had no significant impact under the RFA – EPA's reason: 1) the rule actually narrows the scope of waters covered by CWA, and 2) no small entities are actually made "subject" to any new requirements because the definitional change applies	RFA does not apply to NAAQS under *American Trucking Assoc.* v. *EPA,* 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) and *Mid-Tex Electric Cooperative v. FERC* (agency does not impose costs directly on small entities by setting NAAQS, therefore agency need

	comply with emissions limits, and that the states will determine how by submitting SIPs similar to the NAAQS process. EPA cites *American Trucking Assoc.* v. *EPA,* 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities). Obviously, the courts will determine if EPA's decision to model this rule on NAAQS requirements, despite the fact that it covers a non-criteria pollutant and was promulgated under an unrelated section of the CAA, is authorized under the CAA.	broadly to CWA programs. According to SBA Advocacy, EPA incorrectly certified. On 1) above, EPA contradicts itself as its EA states that covered waters needing permits will expand between 2.84% and 3.65%, an expansion the agency estimates will cost a minimum of $158.6 million annually. On 2) above, EPA incorrectly states that the rule does not subject any small entities to new requirements, but again, the agency's EA states that the rule will cost a minimum of $158 million annually as the result of newly required permits, which clearly impose a burden on any small entities that need a permit under the new definition and did not previously.	not consider impacts on small entities.)
E.O. 12866	Yes, 12866 required. EPA's statement from preamble: "Consistent with EO 12866 and EO 13563, the EPA estimated the costs and benefits for illustrative compliance	Yes, 12866 required. EPA states that the rule is "economically significant" and refers to the EA in its preamble. The EA produced by EPA and the Corps inadequately	Yes, 12866 required. EPA states that the rule is "economically significant" under 12866, refers to the RIA produced as showing "illustrative examples" of a limited number of potential emission control

	approaches of implementing the proposed guidelines. This proposal sets goals to reduce CO_2emissions from the electric power industry. Actions taken to comply with the proposed guidelines will also reduce the emissions of directly emitted $PM_{2.5}$, sulfur dioxide (SO_2) and nitrogen oxides (NO_X). The benefits associated with these PM, SO_2 and NO_X reductions are referred to as co-benefits, as these reductions are not the primary objective of this rule. The EPA has used the social cost of carbon estimates presented in the 2013 *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (2013 SCC TSD) to analyze CO_2 climate impacts of this rulemaking." Issues with the EPA's RIA of the CPP and with SCC in general have been noted in various comment letters.	estimates the increase in burden from the definitional change (see memo on issues with cost estimation due to sample inadequacy).	scenarios that states might implement, but also adds its usual NAAQS caveat: "[T]he CAA and judicial decisions make clear that the economic and technical feasibility of attaining ambient standards are not to be considered in setting or revising NAAQS, although such factors may be considered in the development of state plans to implement the standards. Accordingly, although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule." All NAAQS standards are examples of a long-running disconnect between what 12866 requires regarding analysis and policy choices among various alternatives and what the CAA states. EPA generally does RIAs for NAAQS but frequently discounts its own analysis with respect to policy choices. It is difficult to reconcile EPA's insistence that only the science matters for NAAQS decisions AND that under the LNT assumption for

			toxicity benefits go all the way to zero with setting any standard above zero, unless some other factor (i.e. cost and feasibility, which are ultimately the same thing) is actually used to make the de facto determination.
E.O. 13563[7]	(See above, EPA issued the same statement for 13563 as for 12866.)	(See above, EPA issued the same statement for 13563 as for 12866.)	(See above, EPA issued the same statement for 13563 as for 12866.)
IQA	The primary IQA issue with the CPP is the use of the SCC benefits estimates used to justify the rule. Note, however, that under some compliance scenarios EPA modeled in the RIA, the "co-benefits" of PM and Ozone reduction discussed above are sufficient to offset the estimated compliance costs.	EPA used a sample of "jurisdictional determinations" from the Army Corps database that is likely not representative of the universe of covered waters under the expanded scope of the new rule (see memo). However, it is uncertain whether this data inadequacy constitutes an IQA violation.	The major data adequacy issue with the ozone rule is whether there was sufficient new scientific evidence to justify lowering the standard beyond the 2008 determination. However, EPA hides behind the CASAC report stating that there is to produce its own staff risk assessment document. (See Chamber Ozone coalition letter and Gradient review of science for critique of EPA's decision.)

[7] In general, E.O. 13563 reaffirms the requirements of E.O. 12866, but asks agencies to consider the cumulative impact its rulemaking will have.