Senator Orrin G. Hatch
Questions for the Record
U.S. Senate Committee on the Judiciary
"Examining the Federal Regulatory System to Improve Accountability, Transparency, and Integrity"
June 17, 2015

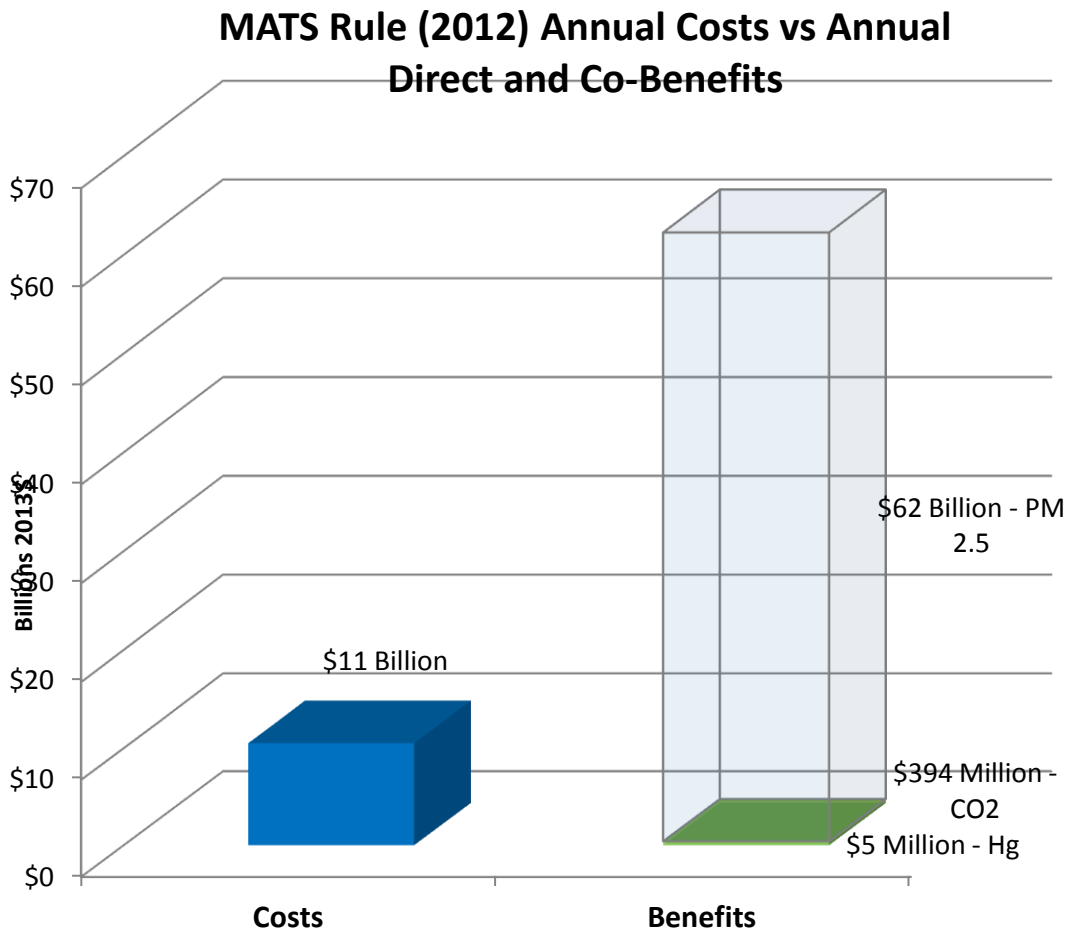
Questions for William Kovacs

1. **You testimony details what is arguably a troubling pattern of agency misconduct throughout numerous stages of the rulemaking process.**
    a. **Given this pattern of behavior, is this faith in the integrity of the regulatory process justified?**
    b. **If not, does the lack of integrity in the rulemaking process undermine the case for judicial deference?**

The regulatory process is broken and Americans should not have faith that the unelected bureaucrats responsible for making regulations at federal agencies are acting in a transparent, accountable manner. Rulemaking at the U.S. Environmental Protection Agency (EPA) is the best example of the of out-of-control regulatory process. The process for developing EPA rules, especially economically significant and high-impact rules, lacks transparency, accountability, and integrity.

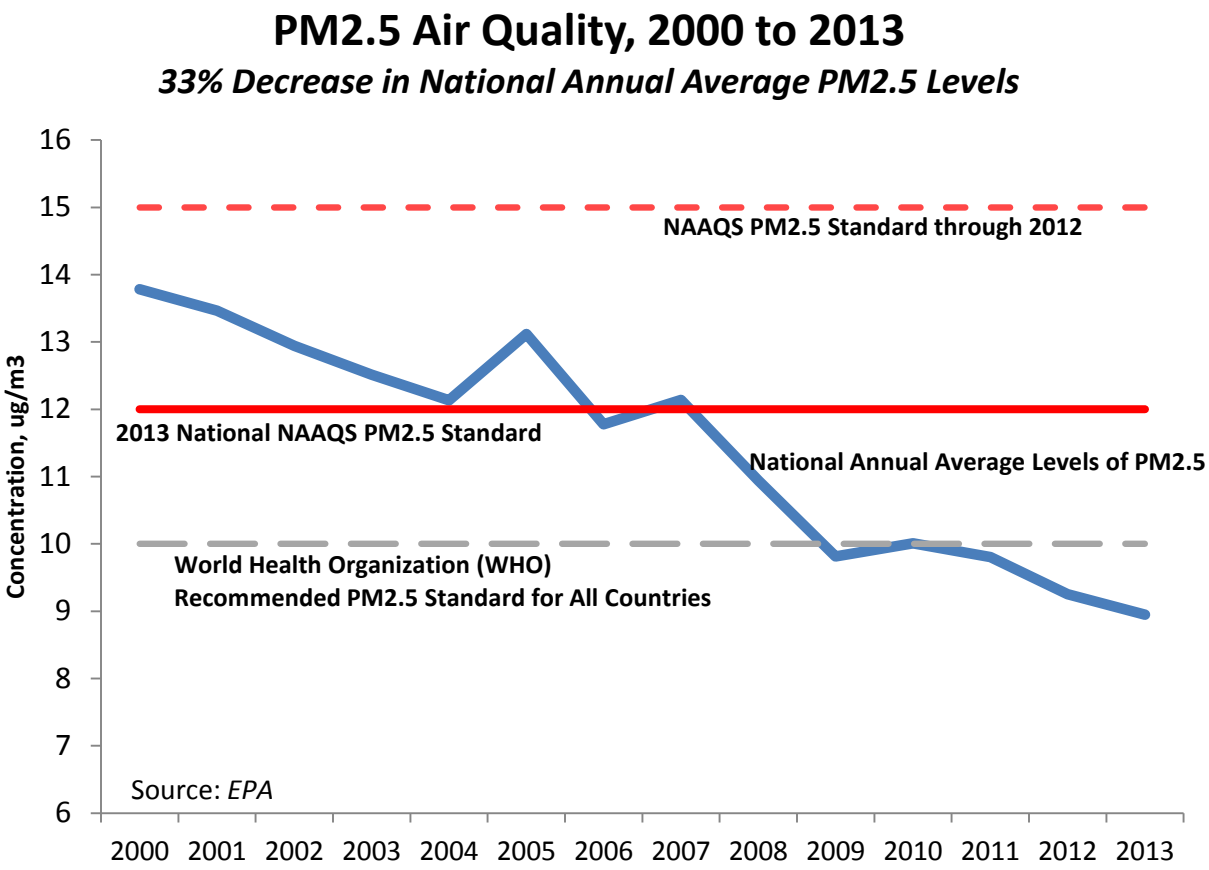
EPA routinely tells the public that it is regulating a targeted pollutant, i.e. mercury, as the agency did when it was conducting the Mercury and Air Toxics Standard (MATS) rulemaking in 2011 and 2012. In reality, EPA regulated a different pollutant, i.e. fine particulate matter (PM2.5). EPA insisted that the rule was crucial to protect children's brain development from mercury poisoning, and that while the rule's costs of nearly ten billion dollars each year were high, they were more than justified by annual benefits that ranged from thirty to eighty billion dollars. What EPA and green advocacy groups consistently hid from the public was that the rule only removed enough mercury from the air to produce six *million* dollars in measurable mercury benefits, or about 0.001% of the total benefits EPA trumpeted for the rule.

As it turned out, the rest of the benefits were all from reductions in fine particulate matter, a pollutant that is separately regulated by EPA and is subject to review and revision every five years under the Clean Air Act. In fact, even after EPA adjusted the standard for fine particulates downward from 15 micrograms per cubic meter to 12 in 2013, actual exposure levels for virtually all Americans were already more than thirty percent below the level that EPA set to protect human health and welfare with an adequate margin of safety. Yet, EPA claimed tens of billions of dollars in benefits for reducing those levels even further (despite the fact that nearly all Americans already have PM2.5 exposures well ***below*** the new (2013) standard. Moreover, PM2.5 levels will drop further once the MATS rule actually takes effect and begins producing results, which should be observable in the data by 2016).



The American public deserves a rulemaking process that is transparent and accountable, wherein agencies explain to the public exactly what they are regulating and demonstrate clearly the benefits of that control and its costs. Restoring integrity in the process will eliminate tactics like EPA's bait-and-switch with mercury pollution. This transparency will require EPA to convince the public that more fine particulate regulation is needed on its own terms. EPA would then find it difficult to conduct business as it does now. Since 2000, the EPA has used reductions in fine particulate matter to justify over 97% of all the benefits it has claimed for its rules protecting human health.[1]

[1] See U.S. Chamber of Commerce, Truth in Regulating, 2015.



Simply put, with fine particulates the EPA found a convenient pollutant that is ubiquitous, naturally occurring, and emitted by virtually every industrial process, which it can use to justify any action the agency wants to take by using the bait-and-switch benefit tactic. This is why particulate matter reductions are responsible for nearly all of the agency's claimed health improvement benefits. But the EPA did not simply stumble upon the fine particulates bonanza of health benefits that it now avails itself of in every major rulemaking, rather the EPA created the bonanza itself by formulating a scientific consensus that the public could never validate or challenge directly because the agency has kept the data and original research out of the hands of everyone except a select group of agency-funded insiders.[2]

EPA's hand has been strengthened because of the *Chevron* doctrine of judicial deference, which supports its rules and findings as long as they are merely a "permissible reading" of the statute.

[2] See, for example, the House Science Committee subpoena of EPA-funded science that forms the foundation for all of its PM2.5 benefits claims. All of the studies EPA cites in support of its health benefits calculations flow from two original studies, known as the Harvard Six Cities Study and the Cancer Prevention Study II. Only EPA and a small group of researchers funded by EPA have access to the data and analyses that underlie the published findings. Despite the force of the Congressional subpoena, EPA refused to divulge these data and analyses. House Science Committee Subpoena of EPA "Secret Science"

2. **Agencies' unique expertise and resources have been invoked by numerous jurists and scholars as a crucial predicate of judicial deference.**
    a. **Is the expertise provided by agencies always materially superior to the expertise supplied the regulated community?**

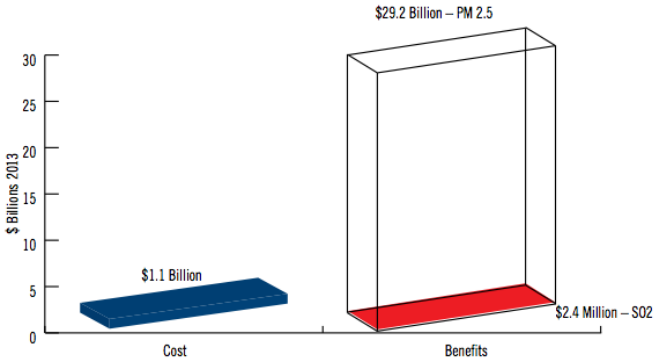
Making the argument that the federal agencies have a unique expertise meriting judicial deference is difficult considering agencies routinely withhold the information upon which they rely in rulemaking. For example, the House Committee on Science, Space, and Technology issued a subpoena for data maintained by Douglas W. Dockery and C. Arden Pope, III, which has been relied upon by EPA for decades to justify regulations on air pollution. Members of the Senate Environment and Public Works Committee raised concerns that studies such as those by Pope and Dockery calculated extraordinary high benefits for costly regulations. Pope and Dockery have refused to release the data based on privacy grounds. The privacy justification for refusing to turn over the data is specious because the U.S. Department of Health and Human Services issued guidelines for de-identifying personal data and has worked with institutions producing data upon which EPA has relied.[3]

An example of EPA's lack of transparency is its 2010 Primary Sulfur Dioxide (SO_2) NAAQS. In forming its SO_2 NAAQS, the EPA failed to fully justify reductions of SO_2 and relied almost exclusively on particulate matter ($PM_{2.5}$) benefits to justify the rule. $PM_{2.5}$ is itself covered by a NAAQS standard. The public deserves to be told how the agency can set a NAAQS standard as required by law and still rely on calculated benefits from $PM_{2.5}$ reductions to drive up the stringency of the SO_2 standards. 97.2% of all claimed EPA benefits, including for water, toxics, and all other regulatory programs, come from $PM_{2.5}$ reductions. From the perspective of a regulatory "consumer," it is impossible to know if each new EPA rule actually provides valuable benefits as claimed, or whether the agency is simply using $PM_{2.5}$ reductions to mask overly burdensome regulations that cannot be justified on their own merit. [4]

[3] UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, MINORITY STAFF REPORT, EPA'S PLAYBOOK UNVEILED: A STORY OF FRAUD, DECEIT, AND SECRET SCIENCE (2014) *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b90f742e-b797-4a82-a0a3-e6848467832a.

[4] U.S. Chamber of Commerce, *Truth in Regulating: Restoring Transparency to EPA Rulemaking* (Mar. 2015) *available at* https://www.uschamber.com/sites/default/files/021935_truthinregulating_opt.pdf.

Figure 6. 2010 Primary SO2 NAAQS Annual Costs vs. Benefits



As previously discussed, another example is the EPA's 2012 Mercury and Air Toxics (MATS) rule, with EPA informing the public that its $10.6 billion price tag was more than justified by approximately $60 billion (mid-point of range) in health benefits. What EPA did not clearly explain, however, is that the estimated benefits from reducing mercury under the rule total only about $6 million. Virtually all of the remaining calculated benefits of the rule (99.4%) come from incidental reductions in $PM_{2.5}$, with CO_2 reductions making up most of the remaining 0.6%. Mercury accounts for only 0.001% of quantified benefits.

Fine particulate matter in the United States has been steadily declining such that current average atmospheric levels for most Americans are well below the levels in virtually every other country. The question remains—***why is the EPA imposing massive regulations for mercury and sulfur dioxide yet the benefits derived come almost entirely from fine particulate matter which is already below both U.S. and World Health Organization standards?*** The answer is that our nation needs truth in regulating.

In an effort to bring more transparency to the rulemaking process and the underlying science beyond federal regulations, Congress enacted the Information Quality Act (IQA). The IQA mandates 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. Unfortunately, the federal bureaucracy has asserted that no private right of action exists which would provide the enforcement mechanism to ensure agencies are complying with the IQA.

The claims of agency expertise are currently unverifiable given the lack of disclosure of data used to justify rulemakings, judicial deference, and a lack of enforcement of the IQA. Enactment of the Regulatory Accountability Act, which provides a substantial evidence test and requires evidence which must be placed on the official record in major rulemakings, or at very least, provisions for a private right of action under the IQA, could significantly bring light to the claimed expertise by federal agencies.

3. **Given how the courts are one of the only effective avenues for the victims of regulatory overreach to seek relief, the ability to get in the courthouse door is absolutely critical. Nevertheless, there seems to be a trend developing in the case law in which regulated parties that are burdened by agency actions are finding it increasingly difficult to have their challenges heard, while advocacy groups pushing for more burdensome rules can get into court very easily—sometimes even based on a potential future minor risk of generalized injury.**
    a. **Do you agree with this characterization?**

The Chamber agrees with the assertion the regulated community disproportionately is denied standing to bring challenges to adverse rulemakings. In a 2011 article[5], Christopher Warshaw and Gregory Wannier analyzed every environmental law decision by an appellate court between 1976 and 2009, and found about 50% more business cases were dismissed for lack of standing than cases brought by environmental advocacy groups. In the D.C. Court of Appeals, business groups are frequently denied standing on the basis that (a) they cannot show a particularized injury different from that of other interests ("injury-in-fact"), (b) they cannot show that agency action caused their injury, or (c) they cannot show that their injury could be redressed through judicial action. Businesses are also denied standing for "prudential" standing reasons. Prudential standing requires that the claim fall within the "zone-of-interest" of the statute in question. Courts often find that purely economic injury claims fall outside the zone-of-interest protected by environmental statutes. The Sunshine for Regulatory Settlements and Decrees Act, for example, would afford affected parties at least a limited opportunity to intervene prior to the filing of a consent or settlement decree which goes toward making the playing field even for the regulated community to have a say in the settlement process.

    b. **If so, is this disparity hindering the judiciary's ability to hold the bureaucracy accountable for its overreach?**

Yes, the imbalance in standing requirements enables overreach by federal agencies. Businesses are discriminated against by having a higher standing requirement under *Lujan* and agencies receive court deference which allows agencies to legislate and interpret statutes rather than a court. Courts need to be the check on the legislative agencies.

4. **We tend to talk about judicial deference to agencies in the narrow context of specific court cases, but its effects are not limited to the courtroom.**
    a. **Can you describe how deference influences agency behavior throughout the regulatory process?**

The effects of *Chevron* deference extend far beyond the courtroom and into the policy rooms of federal agencies. When Congress passes broad and vague laws and courts extend judicial deference, agencies have a license to push the envelope of their authority without fear of reversal. As a result, agencies engage in making rules based upon questionable and opaque science while ignoring congressional mandates to analyze the effects on the states which

[5] *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 6 Harv. L. & Pol'y Rev. 289.

implement the vast majority of EPA regulations pursuant to the Unfunded Mandates Reform Act or conducting employment effects analyses under statutes such as Section 321(a) of the Clean Air Act.

To illustrate how *Chevron* deference has encouraged agencies to push the regulatory envelope, agencies are actually interpreting their own jurisdiction with court acquiescence. In the *City of Arlington v. Federal Communications Commission*, the United States Supreme Court applied *Chevron* deference to the FCC's interpretation of its own jurisdiction. The case arose from a dispute between local governments and the FCC about the agency's authority to regulate state and local land-use decisions regarding the placement of wireless communications facilities.

5. **Some commentators assert that our bureaucracy suffers from so-called "regulatory paralysis," the notion that agencies face too many obstacles to promulgating new rules.**
    a. **Do you think our regulatory bureaucracy is somehow doing too little too slowly?**

Under our Constitution, legislating is designed to be difficult. It requires House and Senate passage and a signature by the President to make a law. Complex laws can take years. Agencies, however, by interpreting broad and vague laws and relying on judicial deference, can enact sweeping national laws in months and it can be done by one or a few agency heads. Examples abound of massive new regulations that were developed and issued swiftly: OSHA's Ergonomics standard (12 months), EPA's Greenhouse Gases (GHG) endangerment finding (8 months), the Waters of the United States Rule (11 months), and the FCC's net neutrality rule (11 months).

Congress, in its current divided state, could not pass such laws in years or perhaps could never pass such laws, while agencies promulgate massive regulations within a period of months. Not only are the restraints on agency rulemaking too few; there is the deference awarded agency action by courts. Together these factors encourage fast-paced, large-scale agency action.

The business community would describe the regulatory environment today as a "Regulatory Onslaught" or a "Regulatory Tsunami." Agencies have promulgated approximately 4,000 regulations annually and about 190,000 in aggregate since 1976. Just this year alone, EPA is forcing 3 major regulations on the states (the Waters of the United States Rule, stricter ozone standards, and the Clean Power Plan) which implement 98% of delegated EPA programs. The states need to address these regulations impacting water, air, *and* energy. Many of the regulations overlap and following one of these regulations may conflict with the ability of states and business to follow others.

For example, Executive Order 12866 makes federal agencies responsible for ensuring that a new regulation with will not conflict with other requirements, "specifying that each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies."[6] EPA projects that the Clean Power Plan (CPP) will cause up to 49,000 megawatts of coal-fired electric generating capacity to retire by 2020. To

[6] Executive Order 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51,735 (Sept. 30, 1993), § 1(b)(10).

replace this generating capacity, utilities will need to construct fuel delivery infrastructure such as pipelines, storage, railroad track and improved roads—all of which will be subject to more extensive permitting and reviews under the new Waters of the United States (WOTUS) rule. EPA did not properly account for the increased costs and delays companies will incur under the WOTUS rule in order to also comply with the Clean Power Plan as required by Executive Order 12,866. Examples such as this illustrate that the real problem is *not* a regulatory paralysis inflicted on agencies but a regulatory onslaught which will act as an impediment to the business community.

b. Does "regulatory paralysis" accurately describe the environment facing businesses today?

Congress imposed various mandates on agencies to determine the impact of their rules on state and local governments, workers, small businesses, communities, and competitiveness. While some may view these requirements to provide information to Congress to be a cause of "regulatory paralysis," it is the information that Congress needs to effectively legislate. Congress was forced to impose these requirements because agencies routinely engage in non-transparent rulemakings. Congress enacted the Regulatory Flexibility Act (RFA) to ensure that agencies examine the effects of their rules on small businesses and small local governments. It enacted 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 costly rules. Congress enacted 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) to require the EPA to assess job loss and displacement from its rulemakings, a task the EPA has refused to undertake. Even after enacting these mandates for information and analysis, agencies still routinely ignore them and churn out rules asserting the rule has no impact on state and local governments, small businesses, and jobs.

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 (Water of the U.S.), to determine the allowable level of economic development (Ozone NAAQS), and to dictate the composition of the country's energy portfolio (Clean Power Plan).

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 enacted by

regulations are far more sweeping than Congress could enact in current circumstances, and these regulatory laws 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, gather more information, and provide Congress with the information requested. (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 rules.)

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	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	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 not

	mandates states to 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.	change applies 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.	consider impacts on small entities.)
E.O. 12866	Yes, 12,866 required. EPA's statement from preamble: "Consistent with EO 12866 and EO 13563, the EPA estimated the costs and benefits for illustrative	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	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

	compliance approaches of implementing the proposed guidelines. This proposal sets goals to reduce CO_2 emissions 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	inadequately estimates the increase in burden from the definitional change (see memo on issues with cost estimation due to sample inadequacy).	control 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 EO 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

	noted in various comment letters.		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 13,563 as for 12866.)	(See above, EPA issued the same statement for 13,563 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 compliance is difficult to judge as the order did not actually require any specific, new analysis of regulatory costs or benefits. It simply reaffirmed E.O. 12866 requirements with softer, less precise language. Most agencies have done what EPA does, simply rolling 13563 into 12866 analysis in rule preambles, but not actually changing the process of OMB review or cost-benefit analysis in any meaningful way.