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Testimony

of Ross Eisenberg
Vice President
Energy and Resources Policy
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before the House Committee on Science, Space and Technology
on “EPA Regulatory Overreach: Impacts on American Competitiveness”

June 4, 2015



SUMMARY OF TESTIMONY

Manufacturers spend, on average, \$19,564 per employee per year on regulatory compliance, with \$10,497 of this amount attributable to environmental regulations. However, the smaller the manufacturer, the larger the burden: manufacturers with fewer than 50 employees must spend \$34,671 per employee per year, with \$20,361 of this attributable to environmental regulations. When the Environmental Protection Agency (EPA) issues a new regulation with new costs and burdens, manufacturers must pay these costs on top of the tens of thousands of dollars per employee we have already assumed. Manufacturers are not starting from zero; in some sectors, we are at or near capacity—meaning our plants are already equipped with the best available pollution control technologies, our facilities operate at peak efficiency, and we limit waste and recycle.

Manufacturers have taken an adversarial position to three recent EPA regulations: (1) ozone air quality standards, (2) greenhouse gas regulations for existing power plants and (3) the definition of “waters of the United States.” In each case, the National Association of Manufacturers takes issue not with the EPA’s decision to regulate but rather the manner in which the EPA has crafted each specific regulation.

Manufacturers are committed to reducing ozone levels and have been doing so for decades, reducing the emissions that cause ozone by more than half since 1980. We have urged the EPA not to tighten the current standard for ozone because doing so would result in the most expensive regulation ever (\$140 billion per year, 1.4 million jobs at risk), hundreds of counties will be plunged into nonattainment, a new standard is approaching background levels of ozone, and existing policies will continue to drive ozone precursor emissions down another 36 percent over the next decade.

Manufacturers have urged the EPA to re-propose its “Clean Power Plan” to develop a lawful and reasonable rule that will allow U.S. companies to remain competitive in the global marketplace. Manufacturers have reduced our greenhouse gas emissions 10 percent over the past decade while increasing our value to the economy by 19 percent. But our competitiveness is threatened by the Clean Power Plan as drafted, which dramatically reshapes the energy grid on unnecessarily strict timelines and could cause price increases and reliability concerns for manufacturers.

Finally, manufacturers were disappointed with the final “waters of the United States” regulation issued last week by the EPA and the U.S. Army Corps of Engineers. We would welcome a clear rule that resolves disagreement over the scope of the Clean Water Act. Despite months of productive dialogue between the agencies and manufacturers, farmers, small businesses and other stakeholders, we ended up with a final regulation that fails to clear up existing jurisdictional problems and may even create new ones.

TESTIMONY OF ROSS EISENBERG
BEFORE THE HOUSE COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY

Hearing on:
“EPA Regulatory Overreach: Impacts on American Competitiveness”

JUNE 4, 2015

Good morning, Chairman Smith, Ranking Member Johnson and members of the Committee on Science, Space and Technology. My name is Ross Eisenberg, and I am the vice president of energy and resources policy at the National Association of Manufacturers (NAM). The NAM is the nation’s largest industrial trade association, representing nearly 14,000 small, medium and large manufacturers in every industrial sector and in all 50 states. I am pleased to represent the NAM and its members at today’s hearing to discuss the impacts of recent Environmental Protection Agency (EPA) regulations on manufacturing competitiveness.

Manufacturers believe regulation is critical to the protection of worker safety, public health and our environment. We believe some critical objectives of government can only be achieved through regulation, but our regulatory system is in need of considerable improvement and reform. Manufacturing in the United States lost 2.3 million jobs in the last recession; since the end of 2009, we have gained back 843,000 manufacturing jobs. To maintain manufacturing momentum and encourage hiring, we need government policies that meet regulatory objectives yet minimize unnecessary burdens. We need smarter regulations.

It is with this background that manufacturers find ourselves in an adversarial position with respect to three recent EPA regulations: (1) National Ambient Air Quality Standards (NAAQS) for Ozone; (2) Section 111(d) New Source Performance Standards (NSPS) for existing power plants (also known as the “Clean Power Plan”); and (3) the Definition of “Waters of the United States” (also known as the “Clean Water Rule”). For each, the issue is not *whether* the EPA should be issuing regulations to protect air or water; rather, it is the manner in which the EPA has crafted these regulations, which we believe could be substantially improved.

Environmental Regulation as a Portion of Manufacturers’ Overall Burden

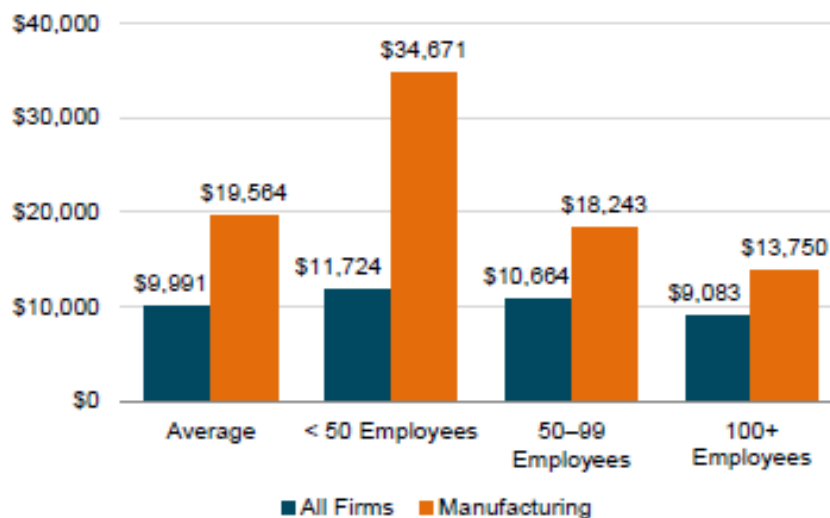
Last September, the NAM released *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*,¹ an update to a series of reports previously issued by the Small Business Administration (SBA) on the overall regulatory burden facing employers.² The NAM report found U.S. government regulations cost the economy \$2.028 trillion in 2012 (in 2014 dollars), an amount equal to 12 percent of gross domestic product (GDP). The average business spends \$9,991 per employee per year on regulations; however, the average manufacturer spends \$19,564 per employee per year, roughly double that amount. The smaller the firm, the greater the regulatory

¹ NAM, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (September 2014), available at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

² The SBA commissioned four studies to examine the distribution of federal regulatory costs in small versus larger firms: Hopkins (1995b); Crain and Hopkins (2001); Crain (2005); and Crain and Crain (2010).

burden: because many of these regulations are fixed costs, a 20-person firm incurs roughly the same expense as a 500-person firm, and larger firms are able to provide economies of scale, spreading the fixed costs over larger revenues, output or employee base. As a result, manufacturers with fewer than 50 employees must spend \$34,671 per employee per year on regulatory compliance—152 percent more than large manufacturing firms and 247 percent more than the cost borne by the average U.S. company.

Chart 1. Regulatory Cost per Employee, 2012 (in 2014 Dollars)



The NAM report also found that environmental regulations make up the dominant share of manufacturers' regulatory burden. The burden of compliance with environmental regulations disproportionately impacts the manufacturing sector (5.5 times greater than the average firm) and increases substantially the smaller the manufacturer (\$20,361 per employee per year for firms with fewer than 50 employees).

**Table 1. Regulatory Costs in Small, Medium-Sized and Large Firms, 2012*
(Cost per Employee per Year in 2014 Dollars)**

Type of Regulation	Cost per Employee for All Business Types			
	All Firms	< 50 Employees	50-99 Employees	100+ Employees
All Federal Regulations	\$ 9,991	\$ 11,724	\$ 10,864	\$ 9,083
Economic	\$ 6,381	\$ 5,862	\$ 7,464	\$ 6,728
Environmental	\$ 1,889	\$ 3,574	\$ 1,338	\$ 1,014
Tax Compliance	\$ 960	\$ 1,518	\$ 1,053	\$ 694
OSHHs**	\$ 781	\$ 970	\$ 809	\$ 647

Notes to Table 1:

- * The cost per employee for each firm-size category uses employment shares for the respective business sectors to compute the weighted averages.
- ** OSHHS stands for occupational safety and health and homeland security regulations.

**Table 2. Regulatory Costs in the Manufacturing Sector by Firm Size, 2012*
(Cost per Employee per Year in 2014 Dollars)**

Type of Regulation	Cost per Employee for Manufacturing			
	All Firms	< 50 Employees	50-99 Employees	100+ Employees
All Federal Regulations	\$ 19,564	\$ 34,671	\$ 18,243	\$ 13,750
Economic	\$ 7,958	\$ 12,885	\$ 9,399	\$ 6,544
Environmental	\$ 10,497	\$ 20,361	\$ 7,625	\$ 6,239
Tax Compliance	\$ 295	\$ 378	\$ 346	\$ 269
OSHHs**	\$ 813	\$ 1,048	\$ 873	\$ 698

Notes to Table 2:

- * The cost per employee for each firm-size category uses employment shares for the respective business sectors to compute the weighted averages.
- ** OSHHS stands for occupational safety and health and homeland security regulations.
- Columns might not total due to rounding.

Manufacturers believe in the mission of the EPA and support reasonable environmental regulation. However, we also bear an unmistakably high burden of compliance with the agency’s regulations. When the EPA issues a new regulation with new costs and burdens, manufacturers must pay these costs on top of the tens of thousands of dollars per employee we have already assumed. Manufacturers are not starting from zero; in some sectors, we are at or near capacity—meaning our plants are already equipped with the best available pollution control technologies, our facilities operate at or near peak energy efficiency, and we limit waste and recycle wherever possible. We do these things

because we are committed to ensuring a sustainable environment in the communities where we operate and live and because it's the smart business thing to do. Less waste and greater energy efficiency make us more competitive. While manufacturers will always strive for improvement, in some cases we are already pushing up against or beyond what technology can deliver. To strike the critical balance of environmental protection and economic stability, any new environmental regulation must contain certain elements. It must be grounded in the best possible science and data, its costs and benefits must be accurately assessed, its benefits must outweigh its costs, and it must be the least burdensome policy available that accomplishes the environmental goal.

Ultimately, it is this test that the Ozone NAAQS, Clean Power Plan and "Waters of the United States" regulations each fail. The costs and burdens placed on manufacturers as a result of these regulations are significant and could make us less competitive.

Ozone NAAQS

Ground-level ozone is formed through a chemical reaction when oxides of nitrogen (NO_x) and volatile organic compounds (VOCs) interact with sunlight. Emissions from power plants, industrial facilities, automobiles, gasoline vapors and solvents are all sources of NO_x and VOCs. Natural sources, such as plant life and fires, also contribute to the formation of ozone; today, given how much ozone levels in the United States have already been reduced, a significant portion of a given area's ozone concentration is made up of natural background

ozone and ozone that has traveled from other states and, increasingly, from overseas.

Under the Clean Air Act, the EPA is instructed to select a primary NAAQS for ground-level ozone that protects the nation's public health within an "adequate margin of safety." In March 2008, the EPA lowered the primary NAAQS for ground-level ozone from 84 parts per billion (ppb) to the current standard of 75 ppb. The Act requires the EPA to evaluate the NAAQS every five years; we are now at the tail end of one of these statutory five-year cycles. In December 2014, the EPA proposed to tighten the Ozone NAAQS to a new range of 65 to 70 ppb.

Manufacturers have demonstrated a commitment to protecting the environment and reducing ozone levels. We are building cleaner and more efficient automobiles: since 1990, highway vehicle emissions of the primary precursors of NO_x and VOCs are down 48 and 30 percent, respectively,³ while an additional 60 million vehicles have been added to U.S. roadways.⁴ We are operating cleaner and more efficient factories: since 1990, manufacturers' NO_x emissions are down 52 percent and VOC emissions have been reduced by 70 percent,⁵ while our value added to the economy has more than doubled.⁶ As a

³ EPA, National Emissions Inventory (NEI) Air Pollutant Emissions Trends Data, February 2014.

⁴ U.S. Department of Transportation, Office of the Assistant Secretary for Research and Technology, Bureau of Transportation Statistics, National Transportation Statistics, Table 1-11: Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances.

⁵ EPA, National Emissions Inventory (NEI) Air Pollutant Emissions Trends Data, February 2014.

⁶ U.S. Department of Commerce, Bureau of Economic Analysis, Value Added by Industry.

country, ozone levels are down nearly 25 percent since 1990⁷ and our economy has grown by 43 percent.⁸

However, the progress manufacturers have made also means that most of the existing technologies and controls needed to reduce ozone levels are already in place. In fact, according to the EPA's own regulatory impact analysis, the agency can only identify about 35 percent of the necessary technologies to achieve a 65 ppb standard. The EPA relies on so-called "unknown controls" for as much as 65 percent of its path to compliance.⁹

The NAM retained David Harrison, Jr., Ph.D., and Anne E. Smith, Ph.D., of NERA Economic Consulting to model the impacts of a new ozone regulation set at 65 ppb.¹⁰ Their analysis confirmed our worst fears: the EPA's proposed Ozone NAAQS would be the most expensive regulation ever, costing states tens of billions of dollars annually in potential compliance costs. Specifically, NERA found that a 65 ppb ozone standard could:

- Reduce U.S. GDP by about \$140 billion per year on average over the period from 2017 through 2040, and about \$1.7 trillion total over that period in present value terms;
 - Place 1.4 million jobs (i.e., job-equivalents) in jeopardy each year;
- and

⁷ EPA, Air Quality Trends, available at <http://www.epa.gov/airtrends/aqtrends.html#comparison>.

⁸ U.S. Department of Commerce, Bureau of Economic Analysis, Gross Domestic Product by Year.

⁹ NERA Economic Consulting, "Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone," February 2015, available at www.nam.org/ozone. Study and estimates based on data from the EPA's Regulatory Impact Analysis of the Proposed Revision to the National Ambient Air Quality Standards for Ground-Level Ozone, pp. ES-8, ES-9 (November 2014).

¹⁰ Study available at www.nam.org/ozone.

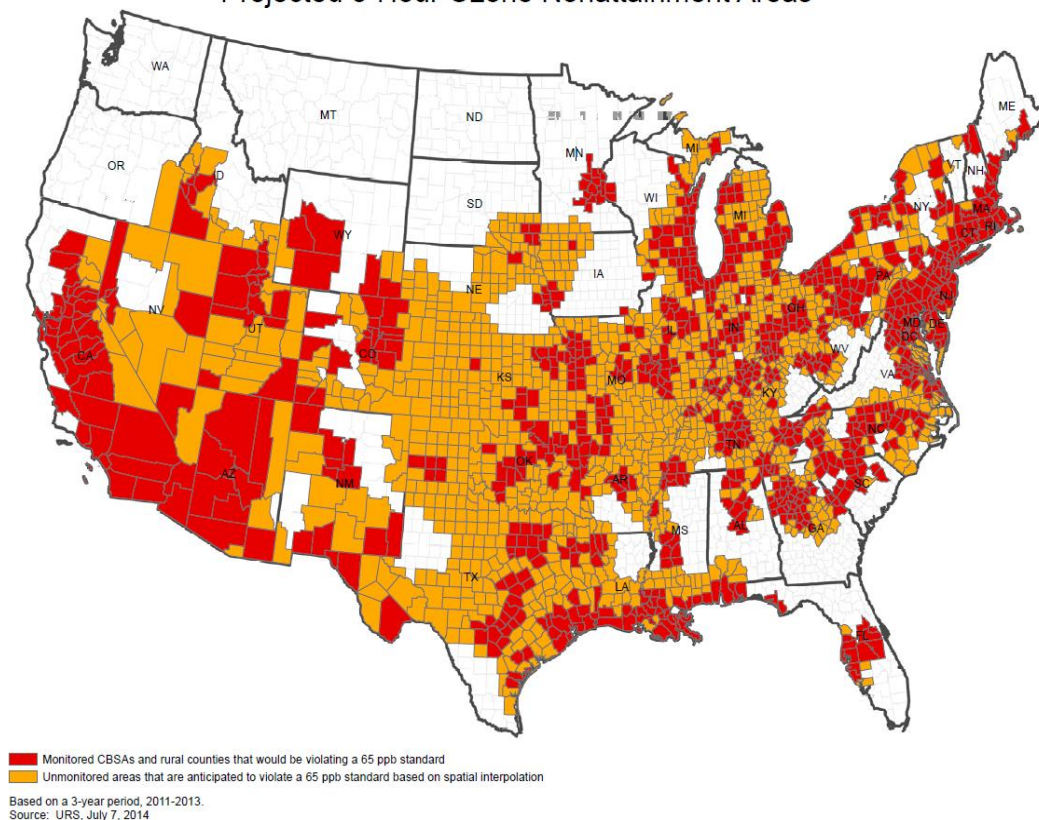
- Reduce annual household consumption by an average of \$830 per household per year.

These costs are extremely high for two key reasons: (1) the lack of known controls and (2) the severe costs and penalties from nonattainment. Attaining a tighter ozone standard will require large reductions in NO_x and VOC emissions from power plants, manufacturing facilities, mobile sources like cars, trucks and off-road vehicles and reformulation of products like paints, coatings and adhesives. These reductions come at a high cost per ton because significant investments have already been made to reduce emissions, leaving few low-cost control options as the ozone standard tightens.

As a result, if controls are not invented in time, businesses will be forced to consider scrapping existing plants and equipment. There is no forgiveness for technical infeasibility: once the EPA sets a NAAQS, ozone must be reduced to the new level regardless of the cost. If that means shutting down equipment because technologies do not exist, that is what will be required.

A new ozone standard means that, as soon as 2017, many new areas across the United States will be thrust into “nonattainment.”

Projected 8-Hour Ozone Nonattainment Areas



The map above, which assesses attainment of a 65 ppb standard, looks substantially different than the one the EPA produced when it rolled out the rule in December 2014. The differences are that the EPA's map is what the agency projects attainment to look like in 2025—ten years after the rule is finalized and eight years after initial attainment designations are made and only accounts for counties with monitored data. The map above was compiled using current monitored data as well as modeling projections of air quality and is a more accurate reflection of which counties are at risk for nonattainment designations should the EPA lower the standard to 65 ppb.

Why does this matter? Because nonattainment is a significant barrier to growth. Nonattainment is a significant deterrent to manufacturers to build or expand in an area because the permits are so difficult to obtain compared to those in an attainment area. Companies building or expanding facilities in nonattainment areas are required to install specific technologies regardless of cost, and projects cannot move forward unless ozone is reduced from other sources. These “offsets” are neither cheap nor easy to obtain. Currently, offset prices in the Houston-Galveston-Brazoria nonattainment area are close to \$175,000 per ton of NO_x and \$275,000 per ton of VOC. Offset prices in southern California nonattainment areas are approaching \$125,000 per ton of NO_x. Rural areas, which could become new nonattainment areas under a tighter standard, may lack offsets altogether, making the offset requirement a total barrier to new projects.

Even manufacturers not looking to expand will be subject to restrictive new regulations in nonattainment areas. For instance, in the Houston nonattainment area, existing facilities are subject to additional controls under the Highly Reactive VOC (HRVOC) rule, and combustion units, such as boilers and ethylene crackers, must install SCRs and low-NO_x burners. In the most severe cases, states with nonattainment areas could lose federal highway and transit funding.

The NAM has urged the EPA to retain the current ozone standard of 75 ppb. States have only now begun to implement the 75 ppb standard; even though the current standard of 75 ppb was finalized in 2008, the EPA stopped

implementing it from 2010 to 2012 while it pondered an out-of-cycle rulemaking to make it more stringent. The EPA did not restart implementation until early 2012, six months after the White House rejected the EPA's more stringent ozone standard. The EPA's delay put state implementation of the 2008 ozone standard well behind the normal schedule. States did not find out which of their counties would be designated nonattainment under the 2008 standard until April 2012. Implementing regulations from the 2008 standard—necessary for states to submit their State Implementation Plans—were only released by the EPA to states a few months ago.

The EPA's proposed standard is also approaching background ozone levels. The EPA's proposal is so stringent that the Grand Canyon would fail the proposed 70 ppb standard, and Yellowstone National Park would fail the proposed 65 ppb standard. The National Oceanic and Atmospheric Administration released a study showing that Las Vegas would exceed the EPA's proposed range of Ozone NAAQS almost entirely due to background ozone.¹¹ As the EPA notes in its proposed rule, "some locations in the U.S. can be substantially influenced by sources that may not be suited to domestic control measures. In particular, certain high-elevation sites in the western U.S. are impacted by a combination of non-local sources like international transport, stratospheric O₃ and O₃ originating from wildfire emissions."¹² The EPA also notes that analysis suggests that in some parts of the country and at certain

¹¹ Langford, A.O., et al., An overview of the 2013 Las Vegas Ozone Study: Impact of stratospheric intrusions and long-range transport on surface air quality, *Atmospheric Environment* (2014), <http://dx.doi.org/10.1016/j.atmosenv.2014.08.040>.

¹² EPA Proposed Rule, p. 33 (2014).

times, background concentrations of ozone approach, or even exceed, the current 75 ppb standard.¹³

Existing, on-the-books regulations will sufficiently reduce ozone levels, making a new standard unnecessary. In the proposed rule, the EPA identifies dozens of recent regulations on vehicles, industrial processes, consumer and commercial products and the electric power sector that will drive major reductions of the pollutants that cause ozone over the next decade—regulations like the Mercury and Air Toxics Standards, the Boiler MACT, fuel economy standards for cars and trucks, regional haze rules, the Cross-State Air Pollution Rule, Tier 3 tailpipe emissions standards, VOC emission standards for consumer products and many others. Even in the absence of new ozone regulations, ozone precursor emissions are projected to be roughly 36 percent lower in 2025 than they are today.

Manufacturers need regulations that are realistic. Executive Order 13563, issued by President Obama on January 18, 2011, requires each federal agency to “tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives.”¹⁴ The EPA’s regulatory objective of reducing ozone will happen by implementing the current standard of 75 ppb along with the dozens of other existing policies that will continue to drive ozone levels down over the next several years. A stricter Ozone NAAQS will obtain a similar regulatory objective, but it will also impose strict regulatory deadlines and permitting hurdles that result in massive costs and burdens to manufacturers.

¹³ EPA Proposed Rule, p. 33 (2014).

¹⁴ Executive Order 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

The NAM believes the current standard of 75 ppb should remain in place until it is fully implemented; the NAM also supports H.R. 1388, the Clean Air, Strong Economies Act, which would delay the implementation of a new Ozone NAAQS until 85 percent of U.S. counties come into attainment with the current standard.

The Clean Power Plan

Manufacturers are committed to addressing climate change through improved efficiency, greater sustainability and reductions in greenhouse gas (GHG) emissions. The United States has reduced more GHGs over the past decade than any other nation on earth. Manufacturers have done their part as well, reducing our emissions 10 percent over the past decade while increasing our value to the economy by 19 percent. We are the only sector of the U.S. economy with lower GHG emissions today than in 1990.¹⁵

Manufacturers know the United States cannot solve the climate change issue alone. The establishment of any climate change policies to reduce GHG emissions must be done in a thoughtful, deliberative and transparent process that ensures a competitive level playing field for U.S. companies in the global marketplace.

Therefore, climate change policies must be implemented in concert with all major emitting nations. Otherwise, we only make ourselves less competitive while doing little to address the global nature of the challenge. While adoption of a strong and fair international agreement is a priority, we must ensure that the

¹⁵ EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2013*, at ES-11 (April 2015).

rest of the world is serious about addressing this issue before we adopt policies that may only serve to send production and emissions overseas. In an effort to demonstrate good faith in the months leading up to the Paris climate negotiations, the EPA has proposed the so-called “Clean Power Plan,” the first-ever standards of performance for existing power plant GHG emissions under Clean Air Act Section 111(d). The Clean Power Plan would require the utility sector to reduce its GHG emissions 30 percent from 2005 levels by 2030.

Manufacturers are deeply troubled by the EPA’s proposed Clean Power Plan. The rule not only dramatically reshapes the energy grid by forcing retirements, redispatch and new electricity generation, but also introduces potential requirements on the end-users—in this case, manufacturers—to modify their operations as a means of compliance for the electric utility. The proposal indicates that manufacturers and other “outside the fence” third parties can be held liable by states in a legally enforceable manner to account for GHG reductions sought by the electric utility sector.

The EPA asserts that it is giving states ultimate flexibility with this rule, a concept manufacturers can support. However, the emissions targets and the timetables for those reductions are so strict that, in reality, there is little to no flexibility available. In many cases, states will only be able to comply with the rule by mandating the construction of the EPA’s preferred sources of electricity, in the EPA’s preferred dispatch order, without regard to costs.

The EPA estimates the rule will cost anywhere from \$5 billion to \$9 billion per year.¹⁶ However, this estimate appears to be conservative: a recent analysis by the U.S. Energy Information Administration, requested by this committee's chairman, predicts that the Clean Power Plan will force the retirement of 90 gigawatts (GW) of coal-fired power, more than double the EPA's estimate of 40 GW.¹⁷ Third-party analyses of the Clean Power Plan place total compliance costs as high as \$366 billion through 2031.¹⁸ Forty-three states could experience double-digit electricity price increases.

Not surprisingly, a majority of states have come out against the rule.¹⁹ Governors or attorneys general from 28 different states raised major concerns with the rule's legal foundations; a dozen have already filed suit. Thirty-four states complained about the rule's rushed regulatory timeline. Thirty-two states expressed concerns about the rule's impact on electric reliability. Thirty-three states disagreed with the EPA's use of 2012 as the baseline year, effectively penalizing states that acted early and took strong steps to reduce GHGs before 2012. Twenty-four states expressed concerns with the rule's treatment of nuclear generation, a carbon-free baseload energy source that states receive absolutely no credit for having in place. And 28 states worried about the rule's impact on electricity prices, jobs and the economy.

¹⁶ Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants, at ES-7.

¹⁷ <http://www.eia.gov/todayinenergy/detail.cfm?id=21372>.

¹⁸ NERA Economic Consulting, *Potential Energy Impacts of the EPA Proposed Clean Power Plan*, October 2014, available at <http://www.americaspower.org/issues-policy>.

¹⁹ *In Their Own Words: A guide to states' concerns regarding the Environmental Protection Agency's Proposed Greenhouse Gas Regulations for Existing Power Plants*, U.S. Chamber of Commerce Institute for 21st Century Energy, available at <http://www.energyxxi.org/their-own-words-guide-states-concerns-regarding-environmental-protection-agencys-proposed-greenhouse>.

Manufacturers use one-third of the energy consumed in this country. Many energy-intensive manufacturing sectors are also trade exposed. Any impact on the electric power sector's ability to deliver affordably priced, reliable energy to manufacturers will harm our competitiveness. Energy is one of the few areas in which manufacturers in the United States have an advantage over our international competitors; policies like the Clean Power Plan must be crafted to bolster this advantage, not take it away. Manufacturers are not only exposed as downstream energy users, but also because the Clean Power Plan is very likely the template for similar 111(d) regulations on other industrial sectors.

In comments filed with the EPA, the NAM and 16 other associations²⁰ raised significant concerns over the Clean Power Plan's ability to pass legal muster as currently drafted. We are concerned that the rule exceeds the scope of the EPA's authority under Section 111(d) of the Clean Air Act. We are concerned that the EPA is precluded from regulating electric-generating units under Section 111(d) because those sources are already subject to regulation under Section 112 of the act. We believe the law requires the EPA to make a source- and pollutant-specific endangerment determination and significance finding, which it did not do. We believe it is unlawful to base its analysis of what is the best system of emission reduction and emissions rate reduction targets on reductions that the EPA lacks authority to implement as part of a federal implementation

²⁰ Those associations are: the American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Brick Industry Association, Corn Refiners Association, Council of Industrial Boiler Owners, Electricity Consumers Resource Council, National Association of Home Builders, National Lime Association, National Oilseed Processors Association, Portland Cement Association, The Fertilizer Institute and the U.S. Chamber of Commerce.

plan. And we are concerned that the EPA has proposed a rule under Section 111(d) for existing units that differs sharply from the rule it proposed under Section 111(b) for new units.

For these reasons, the NAM has urged the EPA to withdraw the proposed rule and engage instead in a process with all interested stakeholders regarding the development of a lawful and reasonable rule that will allow U.S. companies to remain competitive in the global marketplace.

To the extent the EPA intends to issue a final rule, manufacturers have urged the agency to fix many of the flaws and shortcomings in the Clean Power Plan. Among other things, the EPA should:

- Set more reasonable compliance schedules, and eliminate the interim emission reduction target;
- Allow credit for early action;
- Be reasonable and technically achievable;
- Promote an “all of the above” energy strategy that avoids unnecessary retirements of any fuel source that would not happen absent regular market forces;
- Be supported by a thorough, accurate and realistic cost-benefit analysis;
- Set a standard for state implementation plans containing only what the EPA would have the authority to implement in a federal implementation plan; and

- Be cost-effective, attainable and protect American jobs and the economy.

A rule that meets the above-cited criteria will likely require re-proposal. Manufacturers are concerned that the Administration's desire to "lead" heading into international climate negotiations in Paris will tie the EPA's hands on the Clean Power Plan, and will result in a final rule that is rushed, unworkable and potentially vulnerable to legal challenges. If that is the case, we hope Congress will step in and require the EPA to fix the rule. Manufacturers support H.R. 2042, the Ratepayer Protection Act of 2015, which would delay implementation of the Clean Power Plan until all lawsuits challenging the rule have been resolved, and would allow states to opt out of compliance with the rule if the governor determines compliance would have a significant adverse effect on ratepayers or the reliability of the state's electricity system.

Waters of the United States

Last year, the EPA and the Army Corps of Engineers (Corps) proposed to redefine the words in the Clean Water Act (CWA) that decide what is regulated by the federal government. By law, the CWA applies to "navigable waters," which is in turn defined as "the waters of the United States, including the territorial seas."²¹ However, in the four decades since enactment of the CWA, stakeholders have grappled with what that phrase actually means.

²¹ 33 U.S.C. § 1362(7).

For example, there have been times when some tried to call isolated gravel pits “waters of the United States.”²² In other instances, the application of CWA jurisdiction prevented landowners from preparing their land to build a home.²³ Fortunately, the judicial system has operated as an effective buffer to these sorts of misinterpretations of the law. It has not, however, resolved the need for clarity.

Manufacturers therefore would welcome a clear rule that resolves disagreement over the scope of the CWA. The official policy of the NAM is that the term “waters of the United States” should be interpreted to mean waters that are navigable in fact or that have a relatively permanent surface connection to a water that is navigable in fact.

The “waters of the U.S.” rule proposed in 2014, charitably, needed a great deal of work. To the agencies’ credit, they spent a great deal of time with manufacturers, farmers, small businesses and other stakeholders to clarify the proposal and improve it. Heading into last week’s final rule, we were hopeful that the “Waters of the U.S.” story would have a happy ending.

Unfortunately, it did not. The final “Waters of the United States” regulation released last week by the EPA and the Corps fails to clear up existing jurisdictional problems and may even create new ones. The regulation expands the scope of the CWA to areas that are not always wet, but also fails to provide clear exclusions to determine specifically which waters qualify. Manufacturers will

²² *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

²³ *Sackett v. United States Environmental Protection Agency*, 132 S. Ct. 1367 (2012).

face increased regulatory uncertainty, permitting costs, and supply and customer chain disruptions. Ambiguities in the new regulation will give rise to third-party lawsuits, even in cases where the EPA decides a water is *not* a water of the U.S.

The EPA and the Corps claim the final rule does not expand CWA jurisdiction. Consider the following, however:

- Relatively minor activities such as clearing sediment from stormwater basins or moving stormwater drains now require additional reviews or permitting. This increases time and money required to complete work;
- Ditches, including roadside ditches that have perennial flow, are regulated. The rule includes exemptions for certain ditches, but there are many other types of ditches that are now regulated as tributaries. Even dry ditches that are either a relocated tributary or were excavated in a tributary are now regulated by the EPA. It is up to landowner to prove that their ditches do not excavate or relocate a historic tributary. This allows the federal government to assert jurisdiction based on past conditions, not present;
- Increased stream numbers and tributary lengths could prevent fast-track nationwide permits in some cases. This stalls transmission line maintenance, infrastructure expansion, and other projects that currently rely on nationwide permits;
- At a minimum, oil and gas exploration and production companies expect the number of permits required to double. Managing the nine-to-eighteen-month individual permitting process is difficult and could lead to loss of leases and associated product sales. For the increases in permitting, site

- delineations, and modified construction practices, one NAM member informs us that costs could increase in the range of 100 to 750 percent.
- Breweries worry about how this rule will impact their ability to get the grains they need to make beer. When homebuilders face increased site costs, homeowners could be forced to sacrifice other items to stay within budget;
 - If a manufacturer needs to install a larger loading dock and some additional space to manufacture products, the new rule could force the manufacturer to seek permits and potentially put major systems in place to treat stormwater unless certain exemptions are met; and
 - A heavy equipment manufacturer's site for testing equipment and moving dirt has rain flow, and as a result may now be covered. Even if the agencies say it is not a problem, citizen suits could hamper operations and maintenance work or prevent clearing out ponds and holes used for testing.

The final "Waters of the U.S." regulation substitutes the new definition into all CWA programs and regulations across the entire country, which in turn changes the jurisdictional application of all other CWA rules. Implementation will be difficult: in the past, typically only CWA Section 404 dredge-and-fill permits sought jurisdictional determinations, but now other programs will start seeing the need for more determinations. An influx of new requests will mean more delay. And applicants with pending permits will have to start over based on the new rule.

Ultimately, this translates into greater legal costs and fewer profits to reinvest into communities. It means consumers pay more, but get less. For manufacturers, more money will be spent on permitting instead of innovation, and projects that create jobs in communities could be delayed or shelved.

Conclusion

The NAM thanks the Committee for its interest in manufacturers' competitiveness and the critical balance that must be achieved in the regulatory space to ensure both environmental protection and economic growth. We will continue to work with Congress and the Administration to achieve these important dual goals.