GREEN ISN'T ALWAYS GOLD: ARE EPA REGULATIONS HARMING SMALL BUSINESSES?

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT, INVESTIGATIONS AND REGULATIONS

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

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HEARING: GREEN ISN'T ALWAYS GOLD: ARE EPA REGULATIONS HARMING SMALL BUSINESSES?

THURSDAY, MAY 12, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON OVERSIGHT,
INVESTIGATIONS AND REGULATIONS,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2360, Rayburn House Office Building. Hon. Mike Coffman (chairman of the Subcommittee) presiding.

Present: Representatives Coffman, West, Landry, Altmire.

Chairman COFFMAN. Good morning, everyone. And thank you for joining us. The hearing will now come to order.

I thank all of you for joining us today for this hearing on EPA regulations and whether they are harming the ability of small businesses to compete, particularly in today's difficult economic climate.

I would like to extend special thanks to our witnesses for making the trip to the Capitol and taking time out of their schedules to discuss this issue with us here today.

Our Subcommittee will hear directly from small business owners about how existing and proposed EPA regulations are affecting their industry and hindering their ability to remain profitable and grow their businesses. According to a 2010 report by the Office of Chief Counsel for Advocacy at the Small Business Administration, small businesses bear a significantly greater burden as a result of federal regulations than larger businesses. This report indicates that federal regulatory costs to small businesses per employee are $10,585, an amount that is 36 percent higher than the cost borne by larger employers.

Under the leadership of Administrator Lisa Jackson, the EPA is in the process of developing and finalizing some 30 regulations and instituting new policy rules. The EPA has adopted a rigorous environmental agenda that gives little consideration to the impact on businesses in general and small businesses in particular. The actions of the EPA under Administrator Jackson are especially troubling due to their disregard for the Regulatory Flexibility Act, which seeks to reduce the undue burden of federal regulations on small businesses by requiring analysis of compliance costs and consideration of less onerous alternatives.

Not only has EPA overlooked Federal law, but it has indicated a willingness to sidestep the president's wishes as well. This has

been made especially evident in testimony received from Assistant Administrator Mathy Stanislaus at a House Energy and Commerce Subcommittee hearing on April 14th when he indicated that the EPA did not take into account job losses as the result of their rulemaking. This directly contradicts Executive Order 13563, which orders all federal entities to "impose the least burden on society," taking into account "the cost of cumulative regulations" as well as requiring that agencies should "analyze any rules that are excessively burdensome," speaking directly about small businesses which have accounted for about 70 percent of all new jobs in the United States. The EPA has also disregarded a January 18th presidential memorandum that solidifies the commitment of the Executive Branch to promote the importance of the Regulatory Flexibility Act to protect small businesses from onerous regulations.

We owe it to our constituents to critically analyze the need for these regulations and the impact they will have on businesses in our districts, states, and country overall. It is paramount that regulations or rules that purport to protect the environment are balanced and do not turn a blind eye to the economic concerns of our nation's small businesses. These businesses are the engine that drives our economy, without which no true recovery will be possible.

I look forward to hearing from our witnesses on the real world effect of these EPA regulations and the implications for business growth and job creation.

I now recognize Ranking Member Altmire for his opening statement.

Mr. ALTMIRE. Thank you, Mr. Chairman.

The mission of the Environmental Protection Agency is undisputed—protecting the public health and our natural resources. Every community in every congressional district depends on clear air and drinking water for their well-being and quality of life. Protecting natural resources and the health of every citizen through conservation and sensible regulation makes good business sense as a clean environment leads to a thriving community. However, in pursuing these goals, the federal government must do so carefully, making sure that we balance the benefits with the costs of the environmental regulations. Unfortunately, it has been small businesses which create two-thirds of all new jobs which have been most negatively impacted by EPA's recent rules.

For small businesses, the cost of complying with EPA regulations is substantial. For firms with fewer than 20 employees, they spend more than $4,000 per employee annually, which is double the amount spent by larger companies, to comply with federal regulations. As a result, some entrepreneurs are spending more on regulatory requirements than they are on expanding their businesses.

In order to limit this burden, Congress enacted the Regulatory Flexibility Act in 1980 and the Small Business Regulatory Enforcement Act of 1986. Together these laws require the EPA to take into account the impact its regulations will have on small businesses. In some cases they have been successful at reducing compliance costs for small businesses, particularly with rules related to stormwater discharge from construction sites and emissions from diesel engines.

Unfortunately, such positive outcomes have been the exception rather than the rule. In too many instances, the EPA has not used the tools it has had at its disposal to write sensible rules that take into account the unique nature of small businesses. When promulgating its series of landmark greenhouse gas rules, the Agency failed to convene a small business advocacy review panel, excluding small firms from being heard on the wide-ranging rule.

The EPA rationalized its disregard for the panel by limiting the rules research reach on small business through a tailoring rule that lessened the impact of the greenhouse gas regulations on smaller firms. Despite the EPA's efforts, the SBA's Office of Advocacy estimates that 1,200 businesses would still be subject to the new regulations. This effect and the overall cost on small firms could become even more significant when the tailoring rule expires. Instead of neglecting small businesses' concerns, the EPA should have conducted meaningful outreach. More has to be done to ensure the Agency does not simply excuse itself from its obligations under the Regulatory Flexibility Act, particularly the review panel process. By strengthening these protections, we can strike an appropriate balance between regulations that protect the well-being of our communities but also limit costs they impose on small businesses.

During today's hearing we will be able to hear from small businesses and learn about their experiences with the EPA, ensuring that the concerns of small firms are heard is critical, and it is my hope, Mr. Chairman, that the EPA will follow our lead and increase its outreach to these job creators. In my home state of Pennsylvania, small businesses account for more than 98 percent of employer firms. They remain the backbone of the U.S. economy and are absolutely critical to job creation. It is essential that the federal government carefully balance the costs and benefits of environmental regulations so that these businesses are not harmed and our nation's economic progress is not slowed.

I want to thank all of our witnesses in advance for taking the time to travel here, giving up your time to be here. And I look forward to hearing your testimony. I yield back my time.

Chairman COFFMAN. Thank you, Ranking Member Altmire.

If Committee members have an opening statement prepared, I ask that they be submitted for the record.

I would like to take a moment to explain the timing lights for those testifying today. You will each have five minutes to deliver your testimony. The light will start out as green. When you have one minute remaining, the light will turn yellow. And finally, it will turn red at the end of your five minutes. And I will ask that you try to keep to the time limit but I will be a little lenient as you finish.

STATEMENTS OF JOHN WARD, CHAIRMAN, CITIZENS FOR RECYCLING FIRST, BROOMFIELD, CO; GLENN JOHNSTON, VICE PRESIDENT OF REGULATORY AFFAIRS, GEVO INC., ENGLEWOOD, CO; BRADFORD MULLER, VICE PRESIDENT OF MARKETING AND CORPORATE COMMUNICATIONS, CHARLOTTE PIPE AND FOUNDRY COMPANY, CHARLOTTE, NC

Chairman COFFMAN. It is my pleasure to introduce our first witness and my constituent, Glenn Johnston.

Mr. Johnston is the Vice President of Regulatory Affairs at Gevo, Incorporated. Gevo is in the process of developing renewable alternatives to petroleum-based products that can be used in cars, airplanes, and even in synthetic rubber and plastics. We appreciate your testimony, Mr. Johnston.

STATEMENT OF GLENN JOHNSTON

Mr. JOHNSTON. Chairman Coffman, members of the Committee. I am honored to be with you this morning and discuss the great potential for isobutanol as an alternative transportation fuel in America and the current challenges we have with U.S. EPA regulations.

Gevo is a leading renewable chemicals and advanced biofuels company. We are developing bio-based alternatives to petroleum-based products using a combination of synthetic biology and chemistry. We plan to produce isobutanol, a versatile chemical platform for liquid fuels and the petrochemical markets.

Isobutanol has a broad market application as a solvent and a gasoline blend stock and can help refiners meet their renewable fuel and cleaner obligations. It can also be further processed using well known chemical processes used today into jet fuel and feed stocks for the production of synthetic rubber, plastics, and polyesters. Gevo's technology is designed to retrofit existing ethanol plants and we are currently in the process of retrofitting an ethanol plant in southern Minnesota, which will come on line in the first half of 2012.

Isobutanol is an important platform chemical with broad applications in large chemicals and fuel markets. As a drop-in product, isobutanol should allow customers to replace petroleum-derived raw materials with isobutanol-derived raw materials without modification to their equipment or production processes. Since isobutanol can be dropped into existing infrastructure, it provides for an easy integration into existing refining and petrochemical production processes. This type of technology is business born in America and is creating new jobs today to build the next generation of biofuels and make contributions towards reducing our dependence on foreign oil.

We support the manner in which EPA has allowed the renewable fuel standard and advanced fuel mandates to continue despite shortfalls in some categories under the statute. This will help drive more gallons in the short term using technologies such as Gevo that is economically competitive with current oil prices. However, legacy EPA policies are creating supply chain challenges with second generation biofuels such as ourselves. Gevo and the advanced biofuels industry in general believe that EPA should review its regulatory regime and to the extent possible, should assure that

biofuels other than ethanol have equal and unfettered market access.

The EPA's one-pound waiver rule implementation is a regulatory obstacle to the development of second generation advanced biofuels. There is a relatively straightforward change that can be made to EPA's testing regime that would eliminate this hurdle. Under the Clean Air Act and 40 CFR, gasoline containing between 9 and 10 percent ethanol may exceed the revapor pressure, the RVP limit, for straight-line gasoline by one pound per square inch. EPA currently tests the RVP of gasoline by obtaining samples at retail outlets.

Under current testing procedures, EPA protocol does not account for the presence of alcohol additives other than ethanol. Thus, if E10 is mixed with gasoline containing isobutanol or another drop-in fuel, the resulting mixture would be found noncompliant because ethanol would be diluted below the 9 to 10 percent ratio required under the Clean Air Act for the RVP waiver.

Due to the fact that testing occurs in the field, there currently is no way to determine the E10 prior to mixing with another alcohol-blended fuel. We would have to meet the RVP limit. A direct linear relationship exists between ethanol and isobutanol and RVP, allowing the extrapolation of the ethanol content of the fuel before it was mixed and thus determining its compliance. Through guidance or a simple revision in EPA regulations, EPA could require ASTM tests used to determine the ethanol content of a fuel to also determine the amount of isobutanol and other alcohols. In the event that isobutanol and/or other alcohols were present, the revised regulation or guidance with direct laboratory to extrapolate the RVP of the fuel or that the fuel had not been mixed with isobutanol in the first place. Revising the test regulations provides for a noncontroversial, easily implemented solution to a major barrier.

In conclusion, significant amounts of progress have been made over the last three years by Gevo with isobutanol and its potential in the advanced biofuels sector. Isobutanol can make a significant contribution towards diversifying America's world transportation fuels.

Thank you for the opportunity to be with you today and I look forward to your questions.

[The statement of Mr. Johnston follows:]

Subcommittee on Oversight, Investigations and Regulations
Committee on Small Business
US House of Representatives

Green Isn't Always Gold: Are EPA Regulations Harming Small Businesses

Testimony
Glenn Johnston
Vice President of Regulatory Affairs
Gevo Inc.

May 12, 2011

Chairman Coffman, members of the committee, I am honored to be with you this morning to discuss the great potential for isobutanol as an alternative transportation fuel in America and current challenges we have with US EPA regulations.

Gevo is a leading renewable chemicals and advanced biofuels company. We are developing biobased alternatives to petroleum-based products using a combination of synthetic biology and chemistry. We plan to produce isobutanol, a versatile platform chemical for the liquid fuels and petrochemical markets. Isobutanol has broad market applications as a solvent and a gasoline blendstock that can help refiners meet their renewable fuel and clean air obligations. It can also be further processed using well-known chemical processes into jet fuel and feedstocks for the production of synthetic rubber, plastics, and polyesters. Gevo's technology is designed to retrofit existing ethanol plants of all kinds.

Isobutanol is an important platform chemical with broad applications in large chemicals and fuels markets. As a "drop-in" product isobutanol should allow customers to replace petroleum-derived raw materials with isobutanol-derived raw materials without modification to their equipment or production processes. Since isobutanol can be dropped into an existing

infrastructure, it provides for easy integration into existing refining and petrochemical production processes. This type of technology is a business born in America and is creating new jobs today to build the next generation of biofuels and make contributions towards reducing our dependence on foreign oil.

We support the manner in which the EPA has allowed the Renewable Fuel Standard (RFS2) advanced pool mandates to continue despite shortfalls in some categories under their statute. This will help to drive more gallons in the short term using technologies such as Gevo that is economically competitive with current oil prices. However, legacy EPA policies are creating supply chain challenges with 2nd generation biofuels. Gevo and the Advanced Biofuels industry in general believe that the EPA should review its regulatory regime and to the extent possible should assure that biofuels other than ethanol have equal and unfettered access to the market.

The EPA's one pound waiver rule implementation is a regulatory obstacle to the development of advanced biofuels. There is a relatively straightforward change that could be made to EPA's testing regime that would eliminate this hurdle.

Under the Clean Air Act (CAA) §211 (h)(4) and 40 CFR § 80.27 (d)(2), gasoline containing between nine and ten percent ethanol may exceed the reed vapor pressure (RVP) limit for straight gasoline by 1.0 pounds per square inch (psi). EPA currently tests the RVP of gasoline by obtaining samples at retail outlets.

Under current testing procedures, EPA protocol does not account for the presence of alcohol additives other than ethanol. Thus, if E10 is mixed with gasoline containing isobutanol or another drop in alcohol, the resulting mix would be found to be non-compliant because the ethanol would be diluted below the nine and ten percent ratio required for the RVP waiver. Due

to the fact that testing occurs in the field, there is currently no way to determine if the E10, prior to mixing with another alcohol blend fuel, would have met the RVP limit. A direct linear relationship exists between ethanol content, isobutanol content, and RVP, allowing the extrapolation of the ethanol content of the fuel before it is mixed with an isobutanol blend.

Through guidance (or a simple revision of EPA regulations), EPA could require the ASTM test, used to determine the ethanol content of a fuel, to also determine the amount of isobutanol (and other alcohols) present in the fuel. In the event that isobutanol and/or other alcohols were present, the revised regulation would direct the laboratory to extrapolate the RVP of the fuel as if the fuel had not been mixed with an isobutanol blend (or another alcohol blend). Revising the test regulations provides a non-controversial, easily-implemented solution to a major barrier to the production and sale of 2nd generation biofuels.

In conclusion significant amount of progress has been made over the last three years by Gevo with isobutanol and its potential in the advanced biofuels sector. Isobutanol can make significant contributions towards diversifying America's world's transportation fuels. Thank you for the opportunity to be with you today. I look forward to your questions.

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Regulatory History of RVP Waiver for 10 Percent Ethanol Blends

In contrast to methanol blend fuels, EPA did not issue a waiver for ethanol blends, called gasohol by the agency beginning in the 1970s. Rather, the agency did not act within the statutory deadline after receiving a request for a waiver and according to CAA Section 211(f)(4), as in effect at the time, the waiver automatically was granted after 180 days.[1] Thus, until the late 1980s, ethanol blend fuels were not required to meet specific RVP limits, in contrast to methanol blends that were subject to RVP limits as part of their waiver conditions.

In 1987, EPA proposed to establish RVP limits for gasoline as part of an overall mobile source evaporative emission control strategy aimed at reducing ambient ozone levels.[2] CAA Section 172 required compliance with the National Ambient Air Quality Standard (NAAQS) for ozone beginning on December 31, 1982, with the deadline for compliance extended to December 31, 1987 for areas with particularly severe ozone problems.[3] Because many areas were expected to remain in violation of the ozone NAAQS by the end of 1987, EPA sought to establish additional controls to limit emissions of ozone precursors.[4]

In the proposed volatility rule, EPA noted that the practice of splash blending ethanol and base gasoline results in an RVP increase of about 1.0 psi over the RVP of the straight gasoline.[5] The agency further noted that additional volatility increases result in the field when alcohol blend fuels and straight gasoline are mixed, either in vehicle fuel tanks or in service station storage tanks.[6] EPA found that this practice increases the in-use RVP of gasohol by up to 0.2 psi.[7]

To reduce emissions associated with gasohol use, EPA proposed three control options: 1) continue to exempt gasohol from RVP limits, 2) establish a 1.0 psi allowance for ethanol blends, or 3) require gasohol to meet RVP limits for base gasoline.[8] The agency considered three additional permutations of the third option: a) applying the same limit nationwide, b) applying the same limit only in ozone non-attainment areas and establishing a 1.0 psi allowance in other areas, or c) delaying the requirement to meet the straight gasoline RVP limit until 1993 and providing a 1.0 psi allowance in the meantime.[9] EPA did not propose to adopt Option 1,

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[1] 42 U.S.C. § 7545(f)(4). This section was revised by Section 251 of the Energy Independence and Security Act (EISA) of 2007 and now requires EPA to act on a petition for a fuel waiver within 270 days of receipt. If the agency does not act, however, the waiver is no longer granted automatically.

[2] *Regulation of Fuels and Fuel Additives: Volatility Regulations for Gasoline and Alcohol Blends Sold in 1989 and Later Calendar Years and Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Evaporative Emissions Regulations for 1990 and Later Model Year Gasoline-Fueled Light-Duty Vehicles, Light-Duty Trucks, and Heavy-Duty Vehicles*, 52 Fed. Reg. 31,274 (Aug. 19, 1987).

[3] *Id.* at 31,275.

[4] *Id.*

[5] 52 Fed. Reg. at 31,292.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 31,294.

[9] *Id.*

exempting ethanol blends from any RVP limits, due to concerns over making the fuel a "dumping ground" for gasoline that already had high RVP levels, further increasing emissions of ozone precursors. The agency also did not propose to adopt Option 3b because it was not expected to reduce the economic impacts on the gasohol industry.[10]

In the final rule, EPA adopted the second proposed option, establishing a 1.0 psi allowance for blends containing at least 9 percent ethanol and not exceeding the ethanol content allowable by any applicable waiver under CAA Section 211(f)(4).[11] EPA also established labeling and documentation requirements with which an ethanol blend fuel must comply in order to qualify for the 1.0 psi allowance.[12] The agency did not provide a lengthy overview of comments received on the proposed RVP limit for ethanol blends but noted that even the ethanol industry did not support the continued non-regulation of gasohol RVP.[13] The main concern, which EPA stated was supported in comments, was that high-RVP gasoline would be blended with ethanol in order to circumvent the RVP limits for gasoline.[14] EPA determined that the 1.0 psi allowance for ethanol blends would continue to allow splash blending while preventing the production and sale of high-RVP gasoline as a blend stock.[15]

EPA did not intend the 1.0 psi allowance established in the 1989 final rule to be the agency's final decision on the RVP limit for ethanol blend fuels. EPA stated that it planned to "address how to treat alcohol blend RVP in a final fashion with our analysis of the second phase of RVP control."[16] As discussed further below, however, Congress enacted CAA Section 211(h)(4) as part of the 1990 CAAA, precluding EPA from revising the ethanol blend RVP limit.

The EPA regulation currently in place requires gasoline to contain at least 9 percent and no more than 10 percent ethanol by volume in order to be allowed to exceed by 1.0 psi the RVP limits established for other gasolines.[17] The specification that the gasoline must not exceed 10 percent ethanol was added as part of the 2002 final rule on reformulated gasoline.[18] In addition, each invoice, loading ticket, bill of lading, delivery ticket, and other shipment documents must clearly state the ethanol content.[19]

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[10] *Id.* at 31,295.
[11] *Volatility Regulations for Gasoline and Alcohol Blends Sold in Calendar Years 1989 and Beyond*, 54 Fed. Reg. 11,868, 11879 (March 22, 1989).
[12] *Id.* at 11,879.
[13] *Id.* at 11,881.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 40 C.F.R. § 80.27(d)(2).
[18] *Regulation of Fuel and Fuel Additives: Reformulated Gasoline Transition*, 67 Fed. Reg. 8729, 8736 (Feb. 26, 2002).
[19] 40 C.F.R. § 80.27(d)(3).

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Legislative History of Section 211(h)(4)

Clean Air Act Amendments of 1990

Congress took up the issue of ethanol blend RVP levels concurrently with the EPA regulatory effort, beginning with the proposed 1987 Clean Air Act Amendments. The Committee Report accompanying the original Senate bill, S.1894, included a discussion of a 1.0 psi volatility waiver for gasoline/ethanol blends. The language in the proposed bill closely resembled the language ultimately adopted three years later as part of the 1990 CAAA.[20]

Identical language resurfaced as part of the 1989 proposed amendments to the CAA. The discussion of the provision from the Report of the Committee on Environment and Public Works accompanying S.1630 stated:

> The reported bill includes a one pound volatility waiver for ethanol/gasoline blends containing 10 percent denatured anhydrous ethanol. This provision was included in recognition that gasoline and ethanol are mixed after the refining process has been completed. It was recognized that to require ethanol to meet a 9 pound RVP would require the creation of a production and distribution network for sub-nine pound RVP gasoline. The cost of producing and distributing this type of fuel would be prohibitive to the petroleum industry and would likely result in the termination of the availability of ethanol in the marketplace... This provision would impose RVP controls on ethanol blends for the first time and would forego regulation of a very small percentage of the total nationwide volatile organic compounds emissions inventory. This provision will allow ethanol blending to continue to be a viable alternative fuel, with its beneficial environmental, economic, agricultural, energy security and foreign policy implications. Finally, this provision will remove the possibility that ethanol blends would be used to circumvent the proposed volatility restrictions.[21]

The floor debates over ethanol centered on the bill's oxygen mandate, which required that fuels with at least 3.1 percent oxygen content be sold in all areas classified as nonattainment for ozone from October 1st to March 31st. The Senators disagreed about whether adding ethanol to gasoline would, in fact, contribute further to ozone pollution. Sen. Bob Kasten (R-WI) raised this issue during the Senate debates of January 25, 1990. He was concerned that ethanol's greater potential to volatilize would contribute significant to ozone pollution, especially in the summer. Sen. Kasten proposed an amendment to CAA Section 211(h) that stated: "(5) A State which contains an ozone nonattainment area shall not be prohibited from adopting a lower Reid vapor pressure than that established under par. (4) for fuel blends containing gasoline and 10 per centum denatured anhydrous ethanol if the State demonstrates that the higher Reid vapor

[20] S. Rep. No. 100-231, at 147-50 (1987), 1990 CAA Leg. Hist. 9436, 9585-89.
[21] S. Rep. 101-228, at 109-10 (1989), 1990 CAA Leg. Hist. 8338, 8450.

pressure established under par. (4) is contrary to the ozone control strategy in the State's implementation plan."[22] This amendment was not adopted.

During the March 7, 1990 Senate Debate on S. 1630, Sen. Tom Harkin (D-IA) disagreed with Sen. Kasten, citing a study from Systems Application, Inc: "If regular 87-octane gasoline with 10 psi Reid vapor pressure is given a rating of 1 in terms of ozone-forming capacity, then a 91 octane, 9 psi gasoline, splash blended with 10 percent ethanol, would have an ozone forming rating of 0.79. That is, ethanol-blended gasoline would form 21 percent less ozone than regular gasoline."[23] And in the March 29, 1990 Senate debate on S. 1630, Sen. Tom Daschle (DE-SD) stated that several studies had disproved the theory that ethanol blends with higher vapor pressures gave more evaporative emissions in summer conditions.[24]

CAA Section 211(h), including the RVP waiver for fuels between 9 and 10 percent ethanol, was added to the Clean Air Act as Section 216 of Pub. L. 101-549, 101 Stat. 2488, on November 15, 1990.

Energy Policy Act of 2005

Under the Energy Policy Act (EPAct) of 2005, the language to 211(h)(4) was not amended, but a new Section 211(h)(5) was added. This section allows governors to exclude 10% ethanol blends from the RVP waiver in section (h)(4) if the governor decides that the higher vapor pressure limit would contribute to increased ambient ozone levels.

In the years preceding the enactment of EPAct 2005, Sen. Bob Smith (R-NH) introduced S. 950, a bill that would have rescinded entirely the 1.0 psi RVP waiver for ethanol blends. The Federal Reformulated Fuels Act of 2001 had seven cosponsors, including Sen. Lincoln Chafee (R-RI), Sen. Jon Corzine (D-NJ), Sen. Dianne Feinstein (D-CA), Sen. Jack Reed (D-RI), Sen. Harry Reid (D-NV), Sen. Charles Schumer (D-NY), and Sen. Olympia Snowe (R-ME). S.950 was presented to the Senate Committee on Environment and Public Work on May 24, 2001, along a draft EPA staff analysis entitled, "Supply Analysis of S. 950--The Federal Reformulated Fuels Act of 2001." The staff report noted that it was possible to produce a sub-RVP grade of gasoline for blending with ethanol to offset the RVP increase, and that some refiners produced such a grade of gasoline for downstream blending. However, the report noted that requiring all gasoline blendstock destined for ethanol blending to be distributed separately would place an additional challenge for the distribution system. The report determined that lowering the RVP by 1.0 psi RVP would require the removal of 1.5% of the gasoline in the form of butane, and that it would cost "about 0.4 cents per gallon of gasoline to eliminate enough butane to lower the RVP of ethanol-blended gasoline to 9 pounds per square inch."[25] The expected cost of "replacing butane

[22] 136 Cong. Rec. S35, 405 (daily ed. Jan. 25, 1990).
[23] 136 Cong. Rec. 6, S2293-94 (1990).
[24] 136 Cong. Red. 6, S3512 (1990).
[25] 148 Cong. Rec. 9, S485 (2002).

and other evaporative blendstocks in the 0.4 million barrels of ethanol-blended gasolines that are sold each day would be about $65 million annually."[26]

S.950 was approved by the Environment and Public Works Committee in 2001, but it did not reach the full Senate floor in its original form. The Daschle-Bingaman substitute amendment, also known as the Energy Policy Act of 2002, included portions of S. 950, but not the provision that would have rescinded the ethanol waiver. Instead, it included a provision similar to the one that was eventually approved as part of EPAct 2005. Section 810(c) of EPAct 2002 allowed governors to require ethanol blends to meet the 9 psi RVP in order to address air quality problems that might arise through the use of ethanol. This seemed widely acceptable.

Sen. Jim Jeffords did remark that he "would have preferred a bill that, in addition to eliminating the oxygen content requirement, simply eliminated the existing one-pound waiver of Reid vapor pressure requirements for ethanol blends and allowed all Governors to opt-in easily to the RFG program for their whole States. But, at least this language expedites Governors' access to that RVP waiver's elimination and provides accelerated opt-in authority to the entire States in the ozone transport region, where the ozone problems are quite serious."[27] He thought that S. 950's original language went further toward providing even greater air quality benefits.

The 2002 Energy Policy Act was a precursor to the EPAct of 2005, Pub. L. 109-58, which Congress enacted on July 29, 2005 and President George Bush signed on August 8, 2005. The ethanol waiver provision of the CAA has not been amended since that time. In its current form, Section 211(h)(1) requires all gasoline sold during the high ozone season to have an RVP of less than 9.0 psi. The only exemption from this limit is for ethanol blends between 9 and 10 percent, as specified in Section 211(h)(4), and state governors can opt out of this RVP allowance pursuant to Section 211(h)(5).

Revising the 1.0 psi RVP Testing Location for Ethanol

Changing the Location where Testing for Ethanol Content is Conducted

A option to eliminate the compliance problems posed by RVP and other changes resulting from the commingling of gasoline with 10 percent ethanol and gasoline containing other alcohols would be amending the fuel testing process. EPA inspectors currently test gasoline RVP in the field, at service stations. If the sample does not meet the RVP limit using field assessment methods, it is sent for further testing. The RVP testing is conducted pursuant to ASTM D 5191-01, according to EPA regulations,[28] and the ethanol content is determined by using ASTM D 5599-00[29] or ASTM D 4815-03 if the only oxygenates present are MTBE, ETBE, TAME, DIPE tertiary-amyl alcohol, and C_1 to C_4 alcohols.[30] EPA regulations provide that a violation of the

[26] *Id.*
[27] 148 Cong. Rec. 9, S2320 (2002).
[28] 40 C.F.R. § 80.46(c).
[29] 40 C.F.R. § 80.46(g)(1).
[30] 40 C.F.R. § 80.46(g)(2)(i).

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gasoline volatility requirements can be found at refineries or importer facilities, branded or unbranded distributor, reseller, or ethanol blending facilities, and branded or unbranded retail outlets or wholesale purchaser-consumer facilities.[31] The EPA regulations also provide defenses for each type of facility.[32]

Revising the EPA fuel test regulations and provisions on liability for violations would be relatively simple, procedurally speaking, as EPA would simply have to delete the provisions on liability for violations at retail outlets or wholesale facilities. To detect isobutanol (and some other alcohols), no change in testing methods would be required because ASTM D 4815-03 could be used to detect the presence and level of isobutanol

[31] 40 C.F.R. § 80.28.
[32] 40 C.F.R. § 80.28(g).

Chairman COFFMAN. Thank you, Mr. Johnston.

Our next witness is Mr. John Ward, chairman of Citizens for Recycling First. Mr. Ward has vast experience in issues affecting the coal industry, previously serving as President of the American Coal Council and was a member of the National Coal Council. Today he will be speaking about EPA regulations affecting coal ash recycling. We look forward to hearing your testimony, Mr. Ward.

STATEMENT OF JOHN WARD

Mr. WARD. Thank you, Mr. Chairman, members of the Committee. Thank you for the opportunity to testify on this issue today.

Citizens for Recycling First is comprised of about 1,500 individuals, most of whom are small businesses, and they are specifically interested in preserving and enhancing recycling opportunities for coal ash.

In the decade from 1999 to 2009, our nation successfully recycled 519 million tons of coal ash, about 38 percent of the coal ash that was produced in generating electricity. The businesses responsible for achieving this remarkable environmental success story are overwhelmingly small businesses. The utilities are not the recyclers. There is a network of small businesses who provide marketing services. There are companies who provide innovative technologies for using the coal ash. And the users themselves are overwhelmingly small businesses. For instance, 85 percent of the ready mix concrete producers in the United States have revenues under $30 million.

I appreciate the Committee's topic, Green Isn't Always Gold. In the case of EPA's current coal ash regulatory process, the Agency's actions are not only not gold; they are not even very green. In the Agency's single-minded quest to gain more enforcement authority over the disposal of coal ash, EPA appears resolved to ignore the negative impacts of its actions on an entire recycling industry and the small businesses that comprise it. If EPA succeeds in getting the regulations it wants, our nation will end up putting hundreds of millions of tons more material into landfills rather than safely recycling it. And that is hardly a green result.

Furthermore, EPA appears content to create regulatory uncertainty that is already harming the recycling industry, even though formal regulations have not been finalized.

A year ago EPA proposed labeling coal ash as hazardous waste when it is disposed. When that idea was confronted by a wall of opposition from other government agencies, academicians, recyclers, coal ash users and more, EPA responded by simply slowing the process down. EPA officials have recently been quoted as saying it may be 2013 before the Agency gets around to proposing a final rule. In the meantime, the coal ash recycling industry is twisting in the wind with the unresolved question will coal ash be a hazardous waste or not?

Now, a couple of things about coal ash. First of all, it does not qualify as a hazardous waste based on its toxicity. That is not an opinion; that is a scientific fact. The level of metals that are in coal ash are similar to the levels of metals in the materials that it replaces when it is recycled.

Secondly, EPA's proposals for regulating coal ash disposal basically boil down to a regulatory turf grab. The EPA has proposed both a hazardous and nonhazardous regulatory approach. The landfill standards that they are proposing under both approaches are essentially the same. You do not get a better landfill by designating the material hazardous waste.

So why are they doing it? Because by designating it hazardous waste they are able to take enforcement authority away from the states and take it for themselves. Now, we have talked to EPA and told them the devastating effects this has on recycling. And even in advance of the rule being finished, we are already seeing users of coal ash taking it out of their specifications because they are worried about potential legal liability or the health issues if it is really hazardous. We are seeing manufacturers of products that compete with recycled coal ash run ads with skulls and crossbones, talking about how coal ash may be a hazardous waste if EPA goes forward with this. We are now beginning to see commercial liability insurance policy exclusions for products that contain coal ash.

Now, all of these concerns have been conveyed to EPA over the last two years in meetings and formal written testimony; in all eight of the EPA's public hearings that were conducted last year. EPA's response has been twofold. Number one, they have refused to evaluate the impacts on small businesses in the recycling sector. Their excuse is we are only regulating utilities. You people are an indirect effect; we do not have to look at it. Their second response has been a hazardous waste designation will actually be good for you. People are going to want to use more coal ash if it is designated a hazardous waste. I see you raising your eyebrows. It is a nonsensical proposition. My written testimony spells out exactly why it is. But the bottom line is, this is not about coal ash. This is about coal. And EPA is waging a war on coal and coal ash is another way for them to get at it.

We need Congress's help. Representative David McKinley has introduced a bill, H.R. 1391, which would prohibit EPA from regulating coal ash as a hazardous waste. It would not prohibit EPA from moving forward with improving landfill disposal standards. Remember, the landfill disposal standards under their nonhazardous approach are the same. But it would remove this regulatory uncertainty that is hanging over the heads of coal ash recyclers today and is already harming a tremendously environmentally beneficial business in our nation.

Thank you very much for the opportunity to testify.

[The statement of Mr. Ward follows:]

Testimony of John N. Ward, Chairman
Citizens for Recycling First
before the
U. S. House of Representatives
Committee on Small Business
Subcommittee on Oversight, Investigations and Regulations

May 12, 2011

About Citizens for Recycling First

Citizens for Recycling First was formed in February 2010 specifically to address coal ash recycling issues. More than 1,500 individuals have registered as supporters on the Citizens for Recycling First web page and almost 3,000 are followers on Facebook. Well over 3,000 individuals sent comments to the U.S. Environmental Protection Agency regarding its proposed coal ash disposal rules through the www.recyclingfirst.org web site, as well.

It is important to remember that these individuals are specifically interested in preserving and enhancing recycling opportunities for coal ash. This is not a "grassroots network" that has been established by spending millions of dollars in advertising to attract people who subsequently send letters to EPA on all manner of topics. Citizens for Recycling First is comprised largely of citizens with firsthand knowledge of coal ash recycling issues.

I serve as chairman and the sole staff member of the organization. Outside of Citizens for Recycling First, I also serve as the volunteer chairman of the Government Relations Committee of the American Coal Ash Association. I am a former board member and president of the American Coal Council and a former member of the National Coal Council as appointed by the U.S. Secretary of Energy. I have nearly two decades experience in coal ash recycling and have participated in numerous industry associations concerned with the manufacturing and marketing of construction materials in which recycled coal ash can be beneficially used.

About the Coal Ash Recycling "Industry"

Almost half of America's electricity is generated by burning coal. That figure is not likely to change much in the future. Because Americans continue to consume more electricity every year, renewable energy sources will do well just to keep up with increases in demand. The U.S. Department of Energy predicts that in 2030, we will actually generate 19 percent more electricity from coal than we did in 2007.

Generating that much electricity produces large volumes of coal ash — solid materials left over from the combustion process. According to the American Coal Ash Association, about 135 million tons of this material was produced in 2009. The good news is that over 41 percent of it was recycled rather than disposed.

There are many good reasons to view coal ash as a resource, rather than a waste. Recycling it conserves natural resources and saves energy. In some cases, products made with coal ash perform better than products made without it. For instance, coal ash makes concrete stronger and more durable. It also reduces the need to manufacture cement, resulting in significant reductions in greenhouse gas emissions.

In the decade from 1999 to 2009, our nation successfully recycled 519 million tons of coal ash – some 38 percent of the 1.35 billion tons of coal ash produced. We decreased greenhouse gas emissions by more than 138 million tons during that period through the use of coal fly ash in concrete products.

The businesses responsible for achieving this remarkable environmental success are overwhelmingly small businesses. The coal ash recycling industry is separate and distinct from electric utilities that produce coal ash and is comprised of several segments:

- Most utilities engage the services of third party marketers that are responsible for developing customers, providing infrastructure and logistics for delivering ash to users, providing technical support, and managing all business functions related to the sale and use of coal ash. Many of these coal ash marketers are small businesses.

- Additionally, the coal ash recycling industry includes companies that develop and deploy technologies for improving the quality of coal ash in order to ensure it meets industry standards and user specifications. Most of these innovative coal ash technology developers are small businesses.

- Finally, thousands of companies rely on coal ash as an ingredient in the products they manufacture. In some cases, such as the production of concrete, coal ash is a key ingredient used to improve concrete quality while reducing costs. (The National Ready Mixed Concrete Association notes that 85 percent of its 1,500 member companies are small businesses.) In other cases, such as the manufacturing of coal ash bricks or agricultural soil amendments, coal ash is the primary ingredient. (All of these are small businesses that were created specifically to recycle coal ash.)

In all three categories – marketers, technology providers, and manufacturers – the majority of companies are small businesses with little or no resources to weather prolonged regulatory challenges. And a prolonged regulatory challenge is exactly what the U.S. Environmental Protection Agency is subjecting them to now.

Green Isn't Always Gold: Are EPA Regulations Harming Small Businesses?

Thank you for the opportunity to testify on the topic: "Green isn't always gold..." In the case of EPA's coal ash regulations, the Agency's actions are not only "not gold," they are not very "green" either. In the Agency's single-minded quest to gain more enforcement authority over the disposal of coal ash, EPA appears resolved to ignore the negative impacts of its actions on an entire recycling industry and the small businesses that comprise it. If EPA succeeds in getting the regulations it wants, our nation will end up putting hundreds of millions of tons more material into landfills rather than safely recycling it – hardly a "green" result.

Furthermore, EPA appears content to create regulatory uncertainty that is already harming the recycling industry even though formal regulations have not been finalized. A year ago, EPA formally proposed labeling coal ash as "hazardous waste" when it is disposed. When the idea was confronted by a wall of opposition from all manner of other government agencies, academicians, recyclers, coal ash users and more, the EPA responded by simply slowing the process down. EPA officials have been quoted as saying it may now be 2013 before the Agency gets around to proposing a final rule. In the meantime, the coal ash recycling industry is twisting in the wind with the unresolved question: "Will it be hazardous waste or not?"

How We Got to This Point

On December 22, 2008, a containment dike at a Tennessee Valley Authority coal ash disposal pond failed, spilling about a billion gallons of sludge over 300 acres and into a nearby river. Calls for tougher regulation of coal ash disposal immediately followed. Then the ironies started piling up.

First, the federal government decided that the best way to respond to an engineering failure at a power plant owned by a unit of the federal government (TVA) would be to place all power plants under regulation by a unit of the federal government (Environmental Protection Agency).

Next, EPA concluded that the only legal way to get federal jurisdiction over power plant ash disposal would be to declare the material a "hazardous waste" – despite the fact that two previous EPA Reports to Congress and two formal EPA Regulatory Determinations in 1993 and 2000 had concluded that no such designation was warranted.

Next, EPA began supervising the clean-up of the TVA disaster. The agency's solution: Transport the material EPA is preparing to label as "hazardous" to a non-hazardous landfill in the next state and to stabilize large amounts of the material in place.

Meanwhile, what should have been a discussion about engineering standards for coal ash disposal morphed into a debate about the coal ash itself. That is both misguided and unfortunate. If a billion gallons of skim milk had spilled into a river, that also would constitute

an environmental disaster. But wouldn't the focus be placed on ensuring the safety of milk tanks rather than demonizing the milk?

Misuse of the Term "Toxic" is a Tragic Byproduct of EPA's Rulemaking

Since the failure of the Tennessee coal ash disposal pond in 2008, the phrase "toxic coal ash" has become a favorite of anti-coal environmental groups and environmental news reporters everywhere. Too bad most of them have never bothered to consider what "toxic" really means.

Some people seem to think a material must be toxic if it has heavy metals such as mercury or arsenic in it. But testing data from the Electric Power Research Institute clearly shows that trace elements collectively comprise less than 1 percent of coal ash volume. Furthermore, the levels of these metals in coal ash are similar to the levels found in other everyday materials. More important than whether metals are present in a given material is whether the metals can get out of the material and into you. Once again, Electric Power Research Institute data shows that the leaching potential of metals in coal ash is well below acceptable limits.

A material is "toxic" when a toxin (or poison) escapes from the material and affects a person or organism. Toxins present in coal ash are metals that are also present in most everyday materials. The levels of metals in coal ash are similar to the levels of the same metals in materials coal ash replaces when it is recycled (i.e. portland cement and aggregates.) Many of the metals of concern are ubiquitous in other products (i.e. mercury in light bulbs and dental fillings; arsenic in treated lumber; selenium in your multivitamin tablet, etc.)

The standard test used by EPA to establish whether any material is "toxic" and qualifies as a "hazardous waste" is the Toxicity Characteristic Leaching Procedure (TCLP). Coal ash does **not** qualify as a "toxic" hazardous waste based on this procedure.

EPA's current coal ash disposal rulemaking does **not** claim that coal ash qualifies as hazardous waste based on its toxicity. EPA's proposed justification for a hazardous waste regulatory approach is based on "damage cases" related to alleged failures of disposal impoundments -- not on the toxicity of the material itself. Furthermore, the actual landfill engineering standards being proposed by EPA are essentially the same under **both** the hazardous and non-hazardous proposed approaches. (Both approaches call for single liner systems with groundwater monitoring and effective phase-out of wet impoundments. A truly "toxic" material would be subjected to double liner and leachate collection systems that EPA is not proposing even under its "hazardous" proposal.)

So just how toxic is "toxic coal ash?" It falls well short of the levels defined by the U.S. Environmental Protection Agency to qualify as a hazardous waste. Coal ash is also far more benign than municipal solid waste – a material regulated by states and safely handled by communities big and small. (More than 250 million tons of household waste is disposed in

more than 1,600 landfills around the United States every year.) Municipal solid waste leachate is more noxious than ash leachate, is biologically active, emits explosive gases, contains sewage sludge ash as a component, attracts rodents and birds, and so on. None of these conditions can be found in coal ash.

EPA's "Hazardous Waste" Designation Proposal Boils Down to a Regulatory Turf Grab

New engineering standards for coal ash landfills would be essentially the same under two scenarios presented by the U.S. Environmental Protection Agency. So why does one of the scenarios risk damaging coal ash recycling by labeling ash as hazardous? Because the federal EPA wants to take regulatory enforcement authority away from individual states.

On June 21, 2010, EPA released a "proposed rule" that outlines two broad approaches to strengthening coal ash disposal regulation. Both approaches are under the Resource Conservation and Recovery Act (RCRA). Subtitle D of RCRA allows EPA to set standards that get enforced by the states. Subtitle C of RCRA is enforced by federal EPA.

The June 21 EPA proposal contains both Subtitle D and C approaches, but the guidelines for how landfills would be constructed and monitored is essentially the same under both approaches. (See EPA's own comparison of the approaches on pages 19 and 20 of this summary presented by EPA to state solid waste management regulators: http://www.recyclingfirst.org/pdfs/14.pdf)

Subtitle C is the section of RCRA that pertains to hazardous wastes. EPA's proposal does not claim that coal ash qualifies as a hazardous waste based on its toxicity characteristics. By suggesting a Subtitle C approach, EPA is simply trying to gain broad enforcement authority while risking permanent damage to coal ash recycling from the "hazardous" stigma that would be created.

Even under Subtitle D, which is primarily enforced by the states, the federal EPA can step in to directly regulate any site that poses an imminent danger to public health or the environment. So EPA's proposal for broad Subtitle C enforcement authority is more about empire building for federal regulators than for actually improving protections for the environment.

Not only are landfill engineering standards essentially the same under EPA's hazardous and non-hazardous approaches, EPA has recognized that non-hazardous landfill standards would be protective of human health and the environment in the clean-up it has supervised at the site of the TVA ash spill. That material was largely stabilized on site, with other materials being transported to a non-hazardous landfill.

Landfills won't be any stronger or better under EPA's Subtitle C proposal – nor do they need to be. But coal ash recyclers will be saddled with a hazardous waste stigma that will make continued recycling of this resource difficult or impossible.

Personal Injury Lawyers Would Win Big with EPA's Proposal

Anti-coal environmental activists are eager to label coal ash as "hazardous," but there is another group that would be happy to see that take place: personal injury lawyers.

Personal injury lawyer web sites with names like "aboutlawsuits.com" are already following coal ash in the wake of the December 2008 Kingston impoundment failure. Anyone who has ever watched late night television can figure out what their interest is. Consider this excerpt from a web site entitled "injuryboard.com":

"The chemicals found in coal ash can cause serious health problems, and in some instances of high exposure, death. See your doctor if you suspect that your drinking water may be contaminated with chemicals from a nearby coal ash depository. In addition, it may be important to contact an attorney who can help you protect your legal rights. Please keep in mind that there may be time limits within which you must commence suit."

So what happens if EPA succeeds in overturning two of its previous regulatory determinations and designating coal ash as "hazardous waste" when disposed? Ash that goes into a landfill would be "hazardous," but ash that gets used in the construction of homes, schools, roads and more would not.

Think about it. If coal ash spills out of a truck on the way to a concrete production plant, does it require a hazardous waste clean-up? Can workers file claims for being exposed to a hazardous waste? Can homeowners? Will trucks carrying coal ash require hazardous waste placards? The lawyers can have a field day.

Environmental activists counter that we use hazardous materials every day – like gasoline. But if you drive a car, you can't choose whether or not to use gasoline. If you build things, you can choose whether or not to use recycled materials containing coal ash and even if lawsuits are frivolous, you will probably choose to avoid the time and expense of defending them.

Coal Ash Recycling is Already Being Affected by EPA's Proposal

Consumers of recycled coal ash are already beginning to remove the materials from their specifications because of uncertainty regarding the safety of the material or because of concern over potential legal liability from using it. Let me give you one example of each. The Los Angeles Unified School District has prohibited the use of coal fly ash in its concrete, and I quote: "until the EPA confirms fly ash to be a non-hazardous toxic waste." A Member of Congress, Rep. David McKinley of West Virginia – who is a civil engineer by trade – has indicated that before being elected he removed coal fly ash from his concrete specifications because of liability concerns. It is important to remember that it doesn't matter whether health or legal liability concerns are scientifically or legally justified. What matters is that

people do not want to take the risks created by the potential "hazardous" designation and they can choose not to use coal ash to avoid those risks. It takes time and money to defend even unjustified lawsuits.

Manufacturers of products that compete with recycled coal ash have been fanning the stigma flames by citing the potential EPA "hazardous waste" designation. This has already occurred in markets for blasting grit, brick manufacturing, lightweight aggregate production, and concrete block manufacturing. One particularly egregious magazine advertisement featured a skull and crossbones for an illustration.

We are now beginning to see commercial liability insurance policies that contain exclusions for companies using products that contain fly ash. Examples of this disturbing development – as well as more examples of the other forms of stigma mentioned above – are being collected by Citizens for Recycling First) at this website:
http://www.recyclingfirst.org/pdfs.php?cat=9

EPA's Response to Small Business Concerns

All of these concerns have been conveyed to the Environmental Protection Agency over the past two years in meetings, formal written comments, and appearances in all eight of the Agency's public hearings on its proposed coal ash disposal rules. The Agency's response to the coal ash recycling industry has focused on two points:

1. EPA has simply refused to evaluate the potential impacts of its proposed rule on small recycling businesses.

2. EPA says a "hazardous waste" designation for coal ash that is disposed will actually ***increase*** recycling of the resource.

The EPA has refused formal requests to evaluate the impacts on small business of its proposed coal ash disposal rulemaking. The Agency's explanation was that because beneficial use was technically exempt from the rulemaking, the agency was under no obligation to evaluate impacts of the regulation on the beneficial use industry, which is predominantly comprised of small businesses.

EPA Deputy Administrator Lisa Feldt testified on July 22, 2010, before another subcommittee of this House Small Business Committee. Her explanation of why no small business impact analysis was done came under questioning from the subcommittee chairman and can be seen on this YouTube video from the hearing:
http://www.youtube.com/watch?v=3y52nJ7t5pQ&p=460C37F620EC8972. Ms. Feldt admits that EPA's "extensive economic analysis" completely omitted any consideration of economic impacts on recycling.

Despite the Agency's admitted failure to formally analyze impacts on coal ash recycling, EPA does assert that recycling rates will actually increase under a "hazardous waste" designation. EPA supports this position by citing the experience of a handful of other industrial byproducts and theorizing that utilities will have a greater economic incentive to recycle if disposal costs go up.

The other industrial materials cited by EPA include electric arc furnace dust, electroplating wastewater sludge, chat from lead and zinc mining, used oil, spent etchants and spent solvents. The problem is that none of these materials are anything like coal ash. Most of them actually qualify as a hazardous waste based on their toxicity. (Coal ash does not.) Almost all of them are reprocessed prior to recycling. (Coal ash is not.) Most of them get recycled in industrial processes, often by the same companies that produced the materials in the first place. (Coal ash is distributed for recycling by thousands of other companies in tens of thousands of public and residential locations all over the country.) Many of them are produced and recycled very small quantities. (Coal ash recycling is measured in the millions of tons.)

As for the position that higher disposal costs will automatically lead to greater recycling rates, please consider history: In 2000, the recycling rate for coal ash was 30 percent. In 2008, it had increased to 44 percent – a nearly 50 percent increase in less than a decade. Did the cost of disposal increase during that time? No. So what was responsible for this dramatic increase in recycling rates? Answer: In 2000, the Environmental Protection Agency provided regulatory certainty by issuing its Final Regulatory Determination that concluded coal ash does **not** warrant regulation as a hazardous waste. That sent a clear signal to producers, marketers and users of coal ash who began to invest more in the infrastructure necessary to support recycling. In 2002, the Environmental Protection Agency accelerated this effort by creating the Coal Combustion Products Partnership, or C^2P^2 program, to actively promote recycling as a preferred alternative to disposal.

Sadly, EPA has now completely reversed this trend by creating a new era of regulatory uncertainty and by stepping back from its visible support for recycling. (The Coal Combustion Products Partnership has been killed over criticism that EPA did not conduct detailed risk assessments of the recycling applications it supported, despite the fact that many of those recycling applications have been conducted for decades with no allegations of any environmental damage.)

As a result of EPA's recent actions, investments in the infrastructure necessary to support recycling have stalled and recycling rates have already begun to drop.

For those who continue to deny the existence of a "hazardous waste" stigma, just two questions should be asked: First, if the EPA is right and a hazardous waste designation would motivate people to recycle more ash, then why are the people who make their livings as recyclers unanimously opposed to it? Wouldn't they be in favor of something that would help them make more money? Perhaps it is because the people who recycle ash every day are well

aware of the response you and your neighbors would give to the second question: Would you want something that is classified as a hazardous waste in your home, school or workplace?

Coal Ash Regulations are Part of a Larger EPA Agenda

Perhaps the reason EPA has turned a deaf ear to the concerns of small business recyclers of coal ash is that this debate is not about coal ash at all. It may be all about coal.

EPA has launched a multi-pronged attack against every level of coal production and use. The Agency is aggressively pursuing new regulations on mining, increased standards for emissions, entirely new regulations on greenhouse gases and more. Draconian coal ash disposal regulations fit within that overall picture.

EPA denies that it is waging a war on coal. An EPA spokesman, Brendan Gilfillan, was quoted in *The New York Times* on October 29, 2010, as saying: "E.P.A. does not have a problem with coal, or any other industry. E.P.A. is committed to doing its job, which is to minimize the pollution that might come from these industries... E.P.A.'s actions are firmly grounded in both the best available science and the law — in fact, in many cases E.P.A. is operating under legal deadlines after rules from the previous administration were thrown out by the courts."

Applying Mr. Gilfillan's standards to the coal ash issue gives us a different picture, however. The science concludes that coal ash does not qualify as a hazardous waste based on its toxicity, yet EPA continues to pursue a "hazardous waste" regulation. The law has established through two prior EPA regulatory determinations that coal ash does not warrant regulation as a hazardous waste, yet EPA continues to try to overturn those determinations (which were made, by the way, under another Democratic Administration.) Finally, EPA has no deadlines from either Congress or the courts to do anything with coal ash regulation.

What Congress Can Do to Help

Since EPA appears content to consider the small businesses in the coal ash recycling industry as collateral damage in its larger fight against coal, help from Congress is needed as soon as possible to resolve the regulatory uncertainty surrounding a potential "hazardous waste" designation.

Citizens for Recycling First strongly endorses two House bills that were recently filed to prohibit EPA from regulating coal ash as a "hazardous waste." HR 1391, authored by Representative David McKinley and HR 1405, authored by Representative Bob Latta, would resolve the regulatory uncertainty that is damaging coal ash recycling today.

These bills would not prevent EPA from moving forward with improving coal ash disposal regulations. Under the "non-hazardous" regulatory approach also proposed by EPA, the engineering standards for coal ash disposal facilities would be essentially the same as under the "hazardous" approach. Wet impoundments would still effectively be phased out and dry

landfill standards would be improved. Ironically, the improvements would also get implemented much sooner under the non-hazardous approach.

These bills are supported by a wide array of people. The EPA's extensive public comment process during 2010 showed that those who are actually involved in recycling coal ash – from producers to marketers to specifiers to users – are unanimous in the opinion that a "hazardous" designation for coal ash would be disastrous for recycling. Proponents of the "hazardous waste" designation are essentially telling these people that they don't understand their own industry – a recycling industry they have been painstakingly building for the past four decades. (With regard to the unanimous opposition to EPA's Subtitle C "hazardous waste" approach by anyone who actually makes, sells, specifies, uses, or researches coal ash, please look at this web site: http://www.uswag.org/ccbletters.htm.)

An Appeal for Common Sense

In announcing the Agency's proposed coal ash disposal rule on May 4, 2010, EPA Administrator Lisa Jackson said: "The time has come for common-sense national protections to ensure the safe disposal of coal ash." Citizens for Recycling First agrees with the Administrator.

Common sense tells us that utilities will be reluctant to allow a material classified as "hazardous waste" on their own property to be distributed for recycling at literally thousands of locations around the countryside.

Common sense tells us that architects and engineers who are sworn to put human health and safety first will be reluctant to require use of a material that is classified as "hazardous waste" in another location.

Common sense tells us that users of coal ash will be reluctant to take on the potential liabilities and additional operational requirements that may come with using a material that is classified as "hazardous waste" in another location.

Common sense tells us that everyday citizens will be greatly alarmed if they find out that a building material used in their homes, schools, offices and roadways is classified as a "hazardous waste" on the property of the people who made it.

Common sense says that risking an entire recycling industry over a regulatory turf battle is a bad idea. Common sense says that new coal ash disposal regulations should be enacted under Subtitle D and EPA should work to promote safe and environmentally beneficial recycling as a preferred alternative to disposal.

Citizens for Recycling First supports recycling coal ash as a safe, environmentally preferable alternative to disposal. We believe that the best solution to coal ash disposal problems is to stop throwing coal ash away.

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Chairman COFFMAN. Thank you, Mr. Ward.

I would like now to introduce Mr. Bradford Muller, Vice President of Marketing for Charlotte Pipe and Foundry Company, a 110-year-old family-owned business located in Charlotte, North Carolina. The Subcommittee appreciates you taking the time to speak to us today, Mr. Muller.

STATEMENT OF BRADFORD MULLER

Mr. MULLER. Thank you, Chairman Coffman, Ranking Member Altmire, and members of the Subcommittee. Thank you for the opportunity to testify before you today on the question of whether EPA regulations are harming small business, in particular the metal casting industry. And the answer is unequivocally, yes.

Charlotte Pipe and Foundry is a family-owned, fourth generation company. We have been manufacturing cast iron pipe and fittings for plumbing systems for 110 years. Charlotte Pipe is one of only three U.S. foundries left that make these products with dozens of competing foundries having closed their doors over the last two decades.

Charlotte Pipe and the entire metal casting industry has been hard hit by this recession. The manufacturing sector has lost 2.2 million jobs since the recession began and more than 150 metal casters have closed their doors, forcing thousands to lose their jobs. In our case, commercial construction, the primary market for our products, was down 64 percent from its peak in 2006 before rebounding slightly this year. Despite such a massive loss of volume, we have not laid off any of our 450 associates, sacrificing our profitability to give our people as many hours as possible while keeping their benefits and health insurance intact. In fact, we have not had a layoff in our cast iron division since the early 1950s when we mechanized the plant, despite several significant recessions since that time.

I also serve as a member of the American Foundry Society, and I am pleased to testify on their behalf today. Headquartered in Schaumberg, Illinois, AFS is the major trade association for the North American metal casting industry, which comprises more than 2,000 casting facilities, many of which are in your districts.

The metal casting industry is critical to the U.S. economy. More than 90 percent of all manufactured goods use metal castings as engineered components. The U.S. Military depends on metal castings for jet fighters, ships, tanks, trucks, and weapon systems. Without castings, we would not be able to draw oil, propel aircraft or space vehicles, or economically plant and harvest crops that feed the world's population.

Metal casting is the sixth largest industry in America, shipping products valued at $20 billion and directly employing 200,000 people. Over 80 percent of U.S. metal casters employ 100 workers or less and these are green jobs. Foundries recycle millions of tons of scrap metal as a raw material each year. Unfortunately, some of the most economically threatening regulatory proposals to our industry are coming from EPA. Appropriate regulations that improve health, safety, and the environment are a necessary part of doing business. However, when the regulatory process can advance 29 major rules and 173 others with little or no regard to the cost or

their implications, the system is broken. I could regale you with countless examples but I will bring your attention to one situation that has directly cost North Carolina hundreds of jobs.

A few years ago, Charlotte Pipe bought land in rural North Carolina with the hopes of building a new state-of-the-art foundry. Not only would the new facility allow us to operate more efficiently, it would remove a large stationary source of emissions from downtown Charlotte. After we drew up plans for the new facility, we submitted our air permit. A year and a half later the permit sat unapproved. Our state regulators eventually told us that while the previous air dispersion models only had to account for filterable particulate, new air permits now require condensables to be included in the total particulate matter 2.5 models. The state also came back to us and said since we would be relocating our plant to a poorer area, in the name of environmental justice we would have to look at how any additional pollution would impact the local community. They never asked us how creating hundreds of new construction jobs and ancillary small business jobs would have impacted the local community.

Finally, the PM 2.5 standards are under review by EPA. Limits are currently set at 15 parts per billion. The new levels being considered are between 12 and 14 parts per billion. The naturally occurring levels on the land we bought in North Carolina is 12.8 parts per billion, higher than the low end of the range that EPA is proposing. Knowing the standards which were changed and changing in midstream, knowing we would not be able to meet these, we pulled our permit and suspended the project, killing all those construction jobs.

Based on our recent experience, I can only conclude that our current government looks at manufacturers not as partners that would alleviate unemployment and generate tax revenues but as targets to regulate and intimidate to justify the ever-expanding reach of the federal bureaucracy.

Thank you for the opportunity to appear today and I welcome your questions.

[The statement of Mr. Muller follows:]

Testimony of

Brad Muller, Vice President of Marketing,
Charlotte Pipe and Foundry Company

On behalf of the American Foundry Society

Before the

Committee on Small Business, Subcommittee on Oversight, Investigations and Regulations, U.S. House of Representatives
Green Isn't Always Gold: Are EPA Regulations Harming Small Businesses?

May 12, 2011

Chairman Coffman, Ranking Member Altmire, and Members of the Subcommittee, thank you for the opportunity to testify before you today on the question of whether the U.S. Environmental Protection Agency (EPA) Regulations are harming small businesses, in particular U.S. manufacturers and the metalcasting industry. The answer is unequivocally yes.

My name is Brad Muller, and I am Vice President of Marketing for Charlotte Pipe and Foundry Company of Charlotte, North Carolina. Since 1901, this family-owned fourth generation business has been manufacturing cast iron pipe and fittings for plumbing systems. Charlotte Pipe is one of only three U.S. foundries left in America that makes these products, with dozens of competing foundries having closed their doors over the last two decades.

We employ 450 associates at our foundry, many have 20, 30, even 40 plus years of service. In recent years, Charlotte Pipe and the entire metalcasting industry has been hard hit by the recession. The manufacturing sector lost 2.2 million jobs since the recession began in December 2007. Unfortunately, 150 metalcasters have shut their doors since then forcing thousands to lose their jobs. In fact, today in America there are nearly twice as many people working for the government (22.5 million) than in all of manufacturing (11.5 million). According to the April job numbers released by the U.S. Department of Labor, unemployment in Florida, Nevada, Colorado and my home state of North Carolina all remain above the 9 percent mark.

Charlotte Pipe has had a very difficult two years. Commercial construction – the primary market for our cast iron pipe and fittings – was down 64% from its peak in 2006, before beginning a slight rebound this year. Despite such a massive loss of volume, we have not laid off any associates, sacrificing our profitability to keep our people working as many hours as possible while keeping their

benefits and health insurance intact. In fact, we have not had a lay-off in our Cast Iron Division since the early 1950s when we mechanized the plant, despite several significant recessions since that time.

I also serve as a member of the American Foundry Society (AFS) and am pleased to testify on their behalf today. Headquarted in Schaumburg, Illinois, AFS is the major trade and technical association for the North American metalcasting industry. It is comprised of more than 8,500 members in every state in the country. The U.S. industry consists of 2,040 operating casting facilities, of which approximately 700 produce ferrous castings and 1,400 produce nonferrous castings.

Background on Metalcasting Industry

The metalcasting industry is critical to the U.S. economy. More than 90% of all manufactured goods and capital equipment use metal castings as engineered components or rely on castings for their manufacture. From critical components for aircrafts and automobiles to home appliances and surgical equipment, cast metal products are integral to our economy and our way of life.

The U.S. metalcasting industry is the sixth largest industry in America and is the second largest supplier of castings in world, after China. U.S. metalcasters ship cast products valued at more than $20 billion annually and directly employs over 200,000 people. Our industry is dominated by small businesses, with over eighty percent of U.S. metalcasters employing 100 workers or less. In fact, many are still family-owned. We offer good-paying, blue-collar jobs with benefits that have allowed our employees to support their families and send their children to college. The industry is widely dispersed throughout the country with the highest geographic concentration of facilities is in Alabama, Ohio, Pennsylvania, Indiana, Illinois, Michigan, California, Texas, and Wisconsin.

However, today the U.S. metal casting industry is facing unprecedented challenges - the most intense global competition in its history and by the increasing costs associated with regulations and other actions by the government, energy prices and health care. Imported castings comprise of over 23% of the marketplace. Many of the competitors to the American metalcasting industry are free from complex regulations, high labor costs, and enjoy subsidies and government trade protections. Manufacturers need a level playing field.

Our industry is diverse, employing a variety of casting processes and alloys to make a wide range of products. Metalcasters produce both simple and complex components of infinite variety. We produce more than 600 lbs of cast metal (aluminum, iron, steel, zinc and/or magnesium) for every vehicle on the road. Automobiles and other transportation equipment utilize 31% of all castings produced in the U.S. - including engine blocks, crankshafts, camshafts, cylinder heads, brake drums or calipers, intake manifolds, transmission housings, differential casings, U-joints, suspension parts,

flywheels, engine mount brackets, front-wheel steering knuckles, hydraulic valves, and a multitude of other castings.

We are the mainstay of national defense. All sectors of the U.S. military are reliant on metal castings for jet fighters, ships, tanks, trucks, weapon systems and other vital components. In fact, the U.S. Department of Defense has established formal programs to convert fabricated components to single-piece castings, improving our military's ability to cost-effectively produce such equipment in the least amount of time.

Without castings, society would not be able to draw oil, propel aircrafts and space vehicles or economically plant and harvest crops to feed the world's population.

Impact of Regulations on Metalcasting Industry

Overregulation is stifling our industry and the economy. A staggering 3,503 final rules were promulgated alone in 2009. Excessive regulations cost the U.S. trillions of dollars and over a million jobs in the past few years. In fact, federal regulation is estimated to cost the economy more than $1.75 trillion annually, according to a recent report by the Small Business Administration[1]. The study found that U.S. manufacturing shouldered $193 billion of the $907 billion burden of environmental, economic, workplace and tax-compliance regulation. The average regulatory cost for each employee of a mid-size manufacturer now exceeds $13,000 per year.

Some of the most economically threatening regulatory proposals are coming from EPA. Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it creates more environmental and safety issues than other businesses. Thus, environmental and workplace health and safety regulations have a disparate impact on metalcasters, especially our small shops, because the compliance costs are not affected by economies of scale.

Even our smallest member companies require one or two staff dedicated full-time to regulatory compliance, especially for environmental regulations. Many must hire additional expensive consultants to help stay abreast of all the new and changing requirements.

U.S. metalcasters need a regulatory system that works. Charlotte Pipe and the metalcasting industry prides themselves on providing well-paying jobs in their communities and ensuring that they are in compliance with all necessary health, safety and environmental regulations. Charlotte Pipe has an environmental engineer on staff and employs consultants and environmental attorneys in order to ensure our compliance. We spend several million dollars a year in staff, equipment and programs to

[1] "The Impact of Regulatory Costs on Small Firms," by Nicole and W. Mark Crain – Lafayette College – Easton, PA – September 2010 - http://archive.sba.gov/advo/research/rs371tot.pdf.

remain compliant with state and federal environmental regulations.

Appropriate regulations that improve health, safety and the environment are a necessary part of doing business. However, when the regulatory process produces new regulations that do not provide additional benefits and far outweigh their costs, and the manufacturing supply chain has little to no opportunity to participate in that process, the system is broken.

Impact of EPA Regulations on Metalcasting Industry

Unfortunately, over the last two years, there are numerous specific examples of regulations and proposed rules by EPA that have a particularly burdensome impact on our industry, with little regard for their impact on job creation and the manufacturing supply chain. There also seems to be no recognition of the cumulative impact of these regulations. Currently, the agency is advancing 29 major rules and 173 others.

Here are some specific examples of current and proposed regulations that we believe will negatively impact our company's and our industry's ability to compete in the U.S.

EPA Regulation of GHG Emissions

EPA has been embarked on a decades-long process to implement the Clean Air Act and its amendments. There is no doubt that important benefits have been brought to our nation from efforts to improve air quality. But the continued ratcheting down of emission limits produces diminishing returns at far higher marginal costs. This means that each new air rule will have a greater impact on job creation than those in the past.

At the beginning of this year, the EPA began regulating greenhouse gas (GHG) emissions from stationary sources under the Clean Air Act. While only the largest facilities will be regulated at first, this action sets the stage for future regulation of much smaller sources. While the GHG Tailoring rule will not directly affect the foundry industry right away; it will affect it indirectly through increased utility costs. This in turn will drive up the costs to produce our raw material inputs when combined with higher electric rates will only hurt our competitiveness. When jobs are sent overseas to less efficient foundries; the cost is more GHGs per ton of product produced.

We are also concerned that states are unprepared for the new permitting requirements, which will cause significant delays. This permitting gridlock will discourage manufacturers from building new facilities or expanding their current facilities, hurting competitiveness and discouraging job creation. Furthermore, additional facilities – including foundries – will be phased into the onerous permitting requirements in the near future.

So, while on one hand the Administration and others proclaim the need for increased use of

alternative energy sources, agency regulatory proposals would make the very U.S. manufacturers necessary to build those alternative sources less competitive. Similarly, regulations aimed at the oil and gas industry or the automotive industries are often proposed, without regard to the potentially destructive downstream effects on their suppliers.

We cannot produce castings without adequate and affordable supplies of natural gas and electricity. For many metalcasters energy is a huge expense, only behind raw materials and labor in terms of costs of doing business. Melting is the most energy-intensive operation in metal casting operations, accounting for about 55% of the total energy use. Energy costs are highest in iron foundries such as Charlotte Pipe.

In addition, we are concerned that the rules will create winners and losers within our industry in different states. For example, two competing companies in two different states could have different state imposed GHG regulations with different costs directly impacting their competitiveness and jobs.

EPA has not done an analysis on what this regulation will cost industry. This is not the time to implement never-before used regulations for which we have no idea what they cost. EPA is now in charge of US energy policy. EPA's GHG regulation has the latitude to mandate industrial and electric utility fuel switching from coal, a low cost and low volatile energy source to natural gas, an energy source with high price volatility. Higher natural gas demand means higher natural gas and electricity prices. All of the higher energy and compliance costs placed on the electric utility industry, by State law, will be automatically passed on to ratepayers.

The EPA could even mandate use of combined heat and power or waste heat recovery when it is not cost effective. At the end of the day, the EPA regulations would have a direct impact on metalcasters – they would squeeze already thin profit margins, drive metalcasters out of the country, and out of business altogether. We appreciate the lawmakers on the Committee that voted in April to block EPA's regulation of GHGs by supporting the Energy Tax Prevention Act (HR 910).

National Ambient Air Quality Standards (NAAQS) for Ozone

EPA is expected to further tighten its ozone standard by this summer (July 2011). We remain very concerned about proposed new regulations that will set the ozone standard in a range between 60 and 70 parts per billion (ppb). The agency just tightened the NAAQS standards in 2008 from 84 to 75 ppb.

Any point in the EPA's proposed range will cause the number of "non-attainment areas" to dramatically increase across the country where metalcasters are located. Even before EPA revised the ozone standard in 2008, 442 U.S. counties were "non-attainment" for the previous standard. If EPA promulgates a standard in the proposed ozone range of 0.60 to 0.70 ppm, few, if any, counties

would be able attain the new levels, essentially shutting down economic development across the country.

This despite EPA's own studies show that ozone levels have dropped by 14% since 1990 (EPA's report, Our Nation's Air — Status and Trends Through 2008). Because the implementation of NAAQS standards is done through the regulation and approval of state implementation plans, there are said to be NO direct effects on small entities because states are not small entities. This is clearly contrary to what Congress intended when it passed the Regulatory Flexibility Act.

And the Administration's reconsideration of the Ozone Standard will be very significant to local communities and their small business economies. One study by the Manufacturers Allliance/MAPI estimated the agency's most stringent proposal would result in the loss of 7.3 million jobs by 2020 and add $1 trillion in new regulatory costs per year between 2020 and 2030.

These costs would include increased capital expenditures for new emissions controls and higher electricity prices, making it more costly for metalcasters to operate. Furthermore, it will likely put many more counties into non-attainment areas – thus, triggering restrictions on expansions and/or building of new manufacturing facilities or at worst plant closures.

Congress must work with the EPA to maintain the current NAAQS standards stop the EPA from making a $1 trillion mistake.

Particulate Matter (PM 2.5)

PM 2.5 standards are also under review by the EPA. PM 2.5 limits are currently set at 15 parts per billion (ppb). The new levels being considered are between 12 to 14 ppb, which are approaching naturally occurring background levels.

A few years ago, Charlotte Pipe and Foundry bought a significant amount of land in rural North Carolina with the hopes of some day building a new, state-of-the-art, high efficiency foundry. Not only would the new foundry allow us to operate more efficiently, it would remove a large stationary source of emissions from downtown Charlotte (where our current foundry is located), along with auto emissions from our workers commuting into the city (many of our associates live in the rural counties surrounding Charlotte).

After we drew up plans for the new facility, we submitted our air permit and paid an extra fee to have it fast tracked in 9 months. A year and a half later, the permit sat unapproved. Our state regulators eventually told us that while previous air dispersion models only had to account for filterable particulate, new air permits now require condensables to be included in the total PM 2.5 emissions, making the standard that much more difficult to meet. Rather than model for the new requirement, changed in mid-stream, we pulled the air permit application and suspended the

project. We could not pass the model – not even close when adding in condensables. The state also came back to us and said since we would be relocating our plant to a poorer area-we would have to include environmental justice. This means we would have to look at how we would have impacted the local community, with the added pollution, when in reality we were bringing new jobs to their area. Not to mention the ripple effect of other businesses that would have surrounded us.

If lower standards are implemented, it will be difficult for metalcaters to expand and/or build new operations. In our example, naturally occurring levels in rural North Carolina, where we were considering building our new state-of-art foundry, are at 12.8 ppb. Clearly we cannot locate a plant on the area of real estate we own and meet these naturally-occurring background levels. Even if the standards remain unchanged, we have a window of 2.2 ppb to work with. Instead of 450 acres we would need 4,500 acres to comply with the proposed PM 2.5 regulation. There isn't that much land to purchase and the cost would be prohibitive. In addition, all of the city streets would have to be abandoned for the property line to be considered contiguous for modeling.

Boiler MACT Rule

On March 21, EPA published the final Boiler MACT rule setting very strict emission standards from industrial boilers and process heaters, as well as three related rules – the Commercial *and Industrial Solid Waste Incinerator* (CISWI) *rule* (setting limits for non-hazardous solid waste incinerators); the *definition of Non-Hazardous Secondary Materials* (a Resource Conservation Recovery Act rule determining which materials are wastes and thus covered under the CISWI rule when burned); and *Boiler GACT* (Generally Achievable Control Technology for boilers at smaller sites).

The new Boiler MACT regulation is a replacement for an earlier regulation that was vacated in 2007 when a court determined that elements of the rule were flawed. Although there were some improvements from the proposed rules, the final rules are still a long way from being achievable or affordable for our industry. Although most boilers already are well controlled for key pollutants, the Boiler MACT rule will require more than 90% of boilers to make significant changes. Furthermore, MACT rules require EPA to use the top 12% of environmental control performers in a particular industry when setting the new standards. EPA used the top 6 individual performers which is just plain wrong.

Thousands of power plants and facilities depend on affordable energy from boilers. Literally millions of jobs rely on affordable energy from these facilities, and those jobs are put at risk if those boilers can no longer be installed and run in a cost effective manner.

As part of the Boiler MACT rules, the EPA promulgated definitions for non-hazardous secondary materials for the first time. This rule has the potential to significantly alter the energy sources many facilities count on. This will have the effect of forcing facilities to switch to more traditional fuels,

avoid alternative fuels and generate more solid waste. These potential impacts appear to be in direct conflict with stated energy goals within other parts of the Administration.

Our industry has a serious problem with the rules that came out on March 21 from the Boiler MACT – the thermal reclamation units some foundries use to reuse sand would now have to be classified thus permitted as incinerators. This is a complete about face from the current policy.

This broad-reaching proposal could cost manufacturers, including the metalcasting industry, more than $20 billion in compliance costs and place hundreds of thousands of jobs in jeopardy. We urge this Congress to legislatively stay the Boiler MACT and the three related rulemakings and give EPA the time they themselves said was necessary to properly develop the rules.

Draft Guidance Defining Waters Subject to Clean Water Jurisdiction

In April, the EPA and the Army Corps of Engineers (Army Corps) released a draft version of legally nonbinding guidance that is intended to clarify what bodies of water are subject to the jurisdiction of EPA and the Army Corps under the Clean Water Act (CWA).

The guidance will affect the scope of all programs in the CWA that apply to "waters of the United States," including EPA's recently proposed section 316(b) standards for cooling water intake structures and pollution discharge permits for point sources (such as power plants and manufacturing facilities). According to the guidance, the agencies propose to exert CWA jurisdiction over interstate waters, non-navigable tributaries leading to navigable waters or interstate waters, and wetlands adjacent to jurisdictional waters.

The EPA and the Army Corps can expect to receive tens of thousands of additional jurisdictional determination requests and permit applications, with the potential to create significant permitting delays, impose billions of dollars in costs and endanger job growth opportunities. The draft guidance is not a rule, and therefore it is not binding and lacks the force of law. However, its use by EPA and the Corps in enforcement actions, permitting decisions, and jurisdictional determinations will give the guidance legal effect. EPA and the Corps have estimated approximately $79 to $151 million per year in indirect mitigation costs.

Conclusion

Charlotte Pipe and AFS member companies understand and support the need for reasonable regulations to protect the environment, worker safety and health, and a host of other workplace issues. But we also recognize that our industry and the entire manufacturing sector are facing unprecedented pressures in their efforts to remain competitive in the global economy. To regain manufacturing momentum and encourage hiring, the United States needs not just improved

economic conditions but also government policies more attuned to the realities of global competition.

The key is to find the balance between ensuring a safe and healthy workplace and allowing that workplace to compete in order to be able to continue to provide employment. That is where the current U.S. regulatory process is lacking. I believe that our current government looks upon manufacturers not as partners that would alleviate unemployment and generate tax revenues, but as targets to regulate, intimidate and chastise to justify the expanding government regulatory work force.

The cumulative burden of these new and costly EPA regulations is nearing a tipping point. The 112th Congress has the ability to recognize the dangerous course we are on and to change it before it is too late for our economy and the American worker. More than ever, it is critically important that we regulate only that which requires regulation, and only after a thorough vetting of potential benefits, impacts and costs of that regulation on small businesses and the manufacturing supply chain.

In this current economy, it is clear that unnecessary or cost-ineffective EPA regulations dampen economic growth and will continue to hold down job creation. For some foundries, it will be the final straw that destroys their whole business.

Thank you again for the opportunity to appear before you today to provide information on the U.S. metalcasting industry, and our views on the cumulative impact of EPA regulations on our sector. I would be happy to respond to any questions.

Chairman COFFMAN. Thank you, Mr. Muller. Let me ask a few questions of the panel and then I will defer to the ranking member and then to the other members present.

My first question, and it is to all the members of the panel, how difficult is it for your businesses to deal with the regulatory uncertainty posed by the EPA. Mr. Johnston, if we can start with you.

Mr. JOHNSTON. Regulatory certainly would allow us to gain more funding through the public sector for projects as we go forward. And anytime you introduce regulatory certainty it is the number one and has been reviewed by investment firms as the number one risk that advanced biofuel corporations face today—is that regulatory uncertainty. It would be very helpful to maintain that thorugh the RFS and vehicles like that through the future so that things can develop and that we do not have to run into the high interest rates and the risk comes down for our investments.

Chairman COFFMAN. Mr. Ward.

Mr. WARD. As the coal ash recycling industry, we thought we had regulatory certainty at one point. EPA in two previous reports to Congress and two previous regulatory determinations, one in 1993 and a 2000 final regulatory determination, concluded that coal ash did not warrant regulation as a hazardous waste. When that happened in 2000 and we got regulatory certainty with a final regulatory determination, the recycling rate for coal ash in this country increased from 30 percent in 2000 to 44 percent in 2008. That is almost a 50 percent increase in less than a decade by having that regulatory uncertainty. Today's EPA is talking about withdrawing their final regulatory determination and all of that benefit is gone.

So I will answer the question that way. Regulatory certainty helped our business enormously but that is now all being taken away by reinjecting uncertainty.

Chairman COFFMAN. Mr. Muller.

Mr. MULLER. Similar response. Regulatory certainty would allow us to determine whether we can build this new plant in North Carolina or not. It would be a much more energy efficient plant, state-of-the-art, straight-line foundry and it would remove a large source of emissions from downtown Charlotte. Not only do we have the particulate matter 2.5 issue, the National Ambient Air Quality standards are under review, ozone. And certainly, cap-and-trade or greenhouse gas regulation from EPA would most likely kill that foundry project as well.

So these regulations that are hanging over our head are holding this project up and frankly we are not sure it would ever get permitted in the first place.

Chairman COFFMAN. Mr. Johnston, in your opinion, what EPA regulatory changes could be made to allow for biofuels such as isobutanol to have equal access to the market?

Mr. JOHNSTON. We have spoken to the EPA about this and it is a very simple either guidance or an internal policy change that they need to make that would allow isobutanol to be mixed in a service station underground storage tank with E10. It is a very straightforward change that we feel if they move forward on right now would really assist us in the future.

Chairman COFFMAN. Are there any differences environmentally in terms of emissions?

Mr. JOHNSTON. No. Our emissions, we have had testing done, a part of the EPA standards and submitted it to them. And our emissions from a burning of our fuel does not create any greenhouse gas issues.

Chairman COFFMAN. Okay. Mr. Ward, our Subcommittee is especially concerned with the impacts of regulations on small businesses. Can you give me a couple of examples where EPA's proposed coal ash rule has created unwarranted challenges for small businesses or stifled their innovation?

Mr. WARD. We have numerous examples and I am happy to share as many as we like with the Committee. For the purposes of a brief answer I will give you a big one and a small one. A big one, there are a number of small businesses who are developing innovative processes for improving the quality of coal ash so that it can be used in more recycling applications. For instance, in concrete which improves the durability of the concrete, makes our roads and bridges last longer. Those technologies are essentially dead in the water right now because nobody wants to invest 20 or 30 million dollars in a technology facility to clean up a source of ash that they do not know if they are going to be able to sell it after EPA declares it a hazardous waste. So there is an example of a larger industry that is already dead.

Let me give you one that may sound humorous as a small one, but coal ash gets recycled in a lot of different areas. I know a producer down in the south who is looking at using coal ash to make clay pigeons for a shooting range. When this EPA thing started they stopped the project entirely. Now, this is a business that is spraying lead all over the field but they were afraid of having coal ash in the clay pigeons that were going to get shot as they were flying out in the field.

It runs the gamut. We have literally dozens of examples like this going on right now.

Chairman COFFMAN. Okay. Thank you.

Mr. Muller, should EPA continue to place stricter environmental standards on businesses in the future, do you believe that small businesses such as Charlotte Pipe will be able to maintain or increase current staffing levels?

Mr. MULLER. No, I do not. You know, we have not contributed to the unemployment problem but we are also not in a position to help solve the unemployment problem by hiring new associates. So the continued hanging over our heads of greenhouse in particular, even the boiler MACT which we have not discussed, while it does not directly affect Charlotte Pipe and Foundry, anything that hurts a utility is going to drive up our energy costs. And we are a very energy-intensive industry, the foundry industry. So this constant uncertainty and constant attack that we feel that manufacturers are under in America will not help us solve the employment problem.

Chairman COFFMAN. Okay. Thank you. At this time I would like to defer to Ranking Member Altmire.

Mr. ALTMIRE. Thank you, Mr. Chairman. Mr. Johnston, in promulgating its greenhouse gas rules, the EPA chose not to convene a small business advocacy review panel but it attempted to provide relief through the tailoring rule. The EPA instead, if it had held

small business advocacy panels, do you believe the rules' impact on small firms could have been mitigated more appropriately or it would have made a positive difference?

Mr. JOHNSTON. I think so. With the tailoring rule, the greenhouse gas, I mean, we are in the midst of permitting a plant in southern Minnesota. And part of that permitting process was looking at what the effect of the new regulations were going to cost us to comply with. And when the tailoring rule came out and also the exemption of biogenic carbon from some of the greenhouse gas, it allowed us to look at the plant as an economic alternative. If they had kept it where it was and they had gotten that feedback earlier in the process it would have much more streamlined the regulation and given regulatory certainty to projects like ours.

Mr. ALTMIRE. Okay. Mr. Muller, do you have a comment on that?

Mr. MULLER. I am sorry, sir. Can you repeat what the question is?

Mr. ALTMIRE. Let me ask you something similar.

Mr. MULLER. Okay.

Mr. ALTMIRE. The EPA's greenhouse gas tailoring rule exempts smaller businesses from most of the requirements of the rule. Does this exemption ensure that small businesses like yours will not be affected by the rule?

Mr. MULLER. No, for the same reason that I gave the Chairman, that anytime you impact the utilities and the coal industry frankly. Coal is a major raw material for us, so anything that impacts the coal industry and the utility industry is going to drive our energy costs and our raw material costs up. So to claim that they are only targeting large sources of emissions does not hold water because everyone will be affected by this. Even homeowners' rates will—utility rates will increase.

Mr. ALTMIRE. Mr. Ward, I wonder if you could discuss the distinction between landfill for coal ash that you mentioned in your testimony versus the regulation that we are talking about today.

Mr. WARD. The regulation we are talking about today is a direct outcome of an incident that occurred in December 2008 when a large disposal pond in Tennessee failed, operated by the Tennessee Valley Authority. And EPA said we are going to regulate coal ash disposal now. Over the debate, however, the debate has shifted from regulating coal ash disposal methods to demonizing coal ash itself. If we had spilled a billion gallons of skim milk in the Clinch River, we would have had an environmental disaster but we would have been talking about improving standards for milk containment facilities, not about the milk.

But now we have this parade of things about coal ash. What EPA is saying, this is supposed to be a coal ash disposal rulemaking in which they are improving standards for coal ash landfills and ponds where coal ash is disposed. We agreed with that. Those standards should be improved. But the way they are going about it by designating it a hazardous waste so that they can get more enforcement authority, they are creating a stigma that is seriously damaging a recycling market.

And I saw your eyebrows all go up when I said, you know, they think that a hazardous waste designation will make people want to recycle more. I ask you. Would you want a material in your

home, your school, or your business that is called a hazardous waste on the property of the person who made it but is not when you put it in your home? That is the problem. EPA will tell you they are not trying to regulate us, that the beneficial use industry is exempt, but the way they are trying to regulate disposal is killing us.

Mr. ALTMIRE. So you do not have a problem with the landfill regulations as they currently stand or the appropriateness of having those regulations.

Mr. WARD. No.

Mr. ALTMIRE. It is that designation.

Mr. WARD. The coal ash recycling industry, and by the way, the utility industry as well, is on record supporting new and better landfill and coal ash disposal regulations. Absolutely that is an appropriate thing. We should never, ever have another incident like the thing that happened at the TVA facility in 2008. That has to be done away with. But we can do it without creating an unjustified and unwarranted stigma on coal ash that is threatening to undo one of the largest and greatest recycling success stories in our nation's history.

Mr. ALTMIRE. Great. Thank you. One more, Mr. Chairman, for Mr. Muller.

In your testimony, you discuss new greenhouse gas permitting requirements would cause bureaucratic gridlock creating another hurdle a company seeking to expand or rebuild would have to face. How do you see such administrative delays affecting investment in new facilities?

Mr. MULLER. Well, that is a great question. We, part of the decision we have to make if we were able to build our new foundry is whether to have a cupola melt or an electric melt. And the implications of either are dependent on what the greenhouse regulations are. Electric melt would be much more efficient way to operate the foundry but with electricity rates necessarily skyrocketing under such a regime then we would probably have to revoke—continue to do copula melt which would use coke and is far less efficient. So these are the types of decisions that hang in the balance when we are waiting for the final rules.

Mr. ALTMIRE. What about the decision to locate a plant operation overseas rather than domestic?

Mr. MULLER. Well, we are committed to manufacturing in the United States. Our management is fourth generation and they would not relocate overseas but some of our competitors have and a lot of our competitors have gone out of business. So it is absolutely understandable that a foundry could be built over in China and they can buy scrap metal here, ship it to China, melt it, ship it back here, and still sell at 25 percent below our market. So it is a very attractive alternative.

Mr. ALTMIRE. Thank you, Mr. Chairman.

Chairman COFFMAN. Thank you, Mr. Altmire.

Mr. West.

Mr. WEST. Thank you, Mr. Chairman.

We have kind of run into some difficulties down in Florida with the EPA and this thing called the numeric nutrient criteria which is really affecting our farmers and also some of our local munici-

palities as far as stormwater runoff. And one of the things that they have been asking is, you know, how do you determine the formulas for this numeric nutrient criteria regulation that they are coming down with.

So when I was listening to you speak, Mr. Johnston, you know, obviously, you know, from being down south I cannot articulate all those highly technical things, but are there certain formulas that, you know, that you are developing with this conversion of the fuels or what have you that the EPA is not consulting with you on or, you know, are they coming down and showing you some type of calculation that they are using to bring this regulatory environment on you?

Mr. JOHNSTON. Mr. Congressman, interesting question. We have—there is obviously through the regulatory schemes there are many different formulas that work into our decision-making regarding regulatory compliance as well as listing our products. And a lot of them are based on historical data that in today's regime does not always necessarily apply. And what we would do with EPA is look at, for example, the isobutanol in the underground storage tank. When these regulations were made there really was only one biofuel. And calculations for our biofuel is really straightforward. It is really a simple calculation and EPA being able to take that and say, okay, there is more biofuels, there is more progress in the United States. I mean, small businesses are creating newer and newer materials. Being able to do that and move that forward would really help provide the American jobs and pull out foreign oil that is needed so desperately.

Mr. WEST. Next question then, and this can be across the board, you know, obviously, in a regulatory environment that is on steroids there are increased costs to your businesses. So, you know, how do you contend with these, you know, rising costs? And we have not even talked about some of the other things like health care.

Mr. JOHNSTON. I will take the first shot at that, Mr. Congressman. When we put together our budgets, we put together a pretty big amount of money for the regulatory compliance. And that money could be used elsewhere in the business to provide more development, more jobs, where we are using that to simply file paperwork and comply. And it gets to be a pretty big percentage of any new project where you have to meet all these government regulations and be able to file all the paperwork required. Anything to streamline that and provide regulatory certainty would provide benefit to the overall company and reduce our costs.

Mr. WARD. For a number of the companies in the coal ash recycling business, they are looking at not how to budget for the costs but whether they are going to stay in business. If coal ash is declared a hazardous waste when it is disposed and that stigma causes people not to want to use it for recycling applications, most of the businesses in our area, the folks who actually market coal ash and technologies for improving it, they are just going out of business.

The users, the small businesses that rely on this material as a strategic building material—and they do—in many cases coal ash actually improves the quality of the products it is used in—they

will just choose not to use it and they will go to other materials that have higher embodied energies and lower performance but they will just switch to other materials in order to avoid the potential liability risks instead of using this material.

Mr. MULLER. Congressman West, we spend millions of dollars every year on environmental compliance. We have full-time environmental engineers on staff. We employ environmental consultants to ensure our compliance and environmental lawyers.

This is a good example of how this costs us money. We received a notice of violation a couple of years ago and it was a paperwork violation. We had not violated any EPA rules but our paperwork was not exactly correct. So that cost a fine. And then our lawyers and engineers have to work on that. And then the next time we submitted our paperwork we failed to note the NOV that they gave us and we got another notice of violation for failing to note the notice of violation that they had already given us. It is just silly and it is all paperwork. We were operating well within our permits. So it just costs money chasing our tails.

Mr. WEST. If I could ask one last question, Mr. Chairman.

So if there was one golden nugget recommendation that you could give to us to press forward on, what would that golden nugget recommendation be from each one of you?

Mr. JOHNSTON. From Gevo's standpoint, it is to be able to provide regulatory certainty in this complex world we live in and also to be able to talk to EPA and say these are easy solutions that we are providing as a company. These are not. We want to change the Clean Air Act. We do not have to change the 40 CFR. These are simple interior pieces in EPA that can be done that will assist a small business to be able to commercialize their product.

Mr. WARD. I would agree with Mr. Johnston's plea for regulatory certainty and add to that that as a small business committee it would be wonderful if EPA could be encouraged to follow their already existing guidance for evaluating impacts on small businesses. And not just direct impacts to the regulations but the indirect impacts on small businesses. If we could just get EPA to use their small business advisory review panel authority and follow the executive orders that they have already been given to properly assess the impacts on small businesses, I think we would see a tremendous change. But they spend most of their time telling us why they do not have to look at our issues.

Mr. MULLER. I would say the rules in place, the standards on air quality on ozone, on particulate, are already extremely stringent and protect the air and water. Constantly lowering these standards to points where they cannot even be met economically and for very little health benefit in return, that would be the golden nugget. We just need to keep things where they are and people can operate and they can hire again and we will be well in compliance of our permits.

Mr. WEST. Thank you very much, gentlemen. I yield back.

Chairman COFFMAN. Mr. Altmire, any further questions?

Mr. ALTMIRE. No.

Chairman COFFMAN. Mr. West, any further questions?

Mr. WEST. No, sir.

Chairman COFFMAN. I would like to thank all of our witnesses once again for testifying before our Subcommittee. You have given our members a better perspective of how EPA's rigorous regulatory agenda is endangering your businesses. It is alarming to me that this government agency continues to propose increasingly stringent regulations when small businesses are already paying environmental costs per employee at a rate that is 364 percent higher than large businesses, adding insult to injury. Make no mistake, when EPA and other agencies effectively over-regulate small business, they also prevent job creation at a time when our country needs it most. Today's hearing marks the first step in a long journey of congressional oversight in matters affecting small businesses. This Subcommittee, along with the full Committee, will remain dedicated and vigilant in exposing these and other governmental hurdles to American prosperity.

I ask unanimous consent that members have five legislative days to submit statements and supporting materials for the record. Any objection to that? Without objection, so ordered.

This hearing is now adjourned.

Congressman West Statement on EPA Regulations

In the midst of a recession, it really defies all common sense that the EPA would move forward with instituting some 30 new costly regulations, without taking into account the job losses they will create. The EPA's complete disregard for the Regulatory Flexibility Act, a federal law designed to protect small businesses from unnecessary federal regulations, is also extremely troubling.

This hearing today was called to determine if the EPA is complying with the Regulatory Flexibility Act, which is intended to protect small businesses from severe government regulations by forcing federal agencies to account for the economic burdens the regulations impose on small business. Currently, unelected bureaucrats at the EPA are attempting to implement a scheme to regulate everything from greenhouse gases to fuel additives.

Glenn Johnston, vice president of regulatory affairs for Gevo Inc., an advanced biofuels company located in Englewood, Colorado, has state that the EPA regulations in the Clean Air Act are blocking his company from providing a bio-based alternative to petroleum-based fuels.

Gevo and the Advanced Biofuels industry in general believe that the EPA should review its regulatory regime and to the extent possible should assure that biofuels other than ethanol have equal and unfettered access to the market. The Clean Air Act would prohibit the use of isobutanol, a fuel source made from renewable raw materials that could be used as an alternative to gasoline in combustion engines. Gevo is working to develop the fuel, which would lessen our dependency on foreign oil.

Currently, almost half of America's energy is generated from coal and in 2009, 135 tons of coal ash was produced as a result. However, it is possible to recycle coal ash to make concrete and cement.

In the Agency's single-minded quest to gain more enforcement authority over the disposal of coal ash, EPA appears resolved to ignore the negative impacts of its actions on an entire recycling industry and the small businesses that comprise it. If the EPA succeeds in getting the regulations it wants, our nation will end up putting hundreds of millions of tons more material into landfills rather than safely recycling it.

Improving the quality of environmental work conditions and programs in the 22nd district is a priority. As we work together, I am considering every aspect of what is needed to build a vibrant and competitive city. One of the most pressing issues in our district is the state of our environment and the protection of public health for workers.

However, I will not allow the Obama Administration attempt to regulate where Congress has not used its legislative authority. The Clean Air Act Amendments, passed in 1990, include a requirement that the EPA doing assess the impact any regulation may have on jobs and the economy prior to issuing it. In *Massachusetts v. EPA,* the Supreme Court instructed the agency

to determine whether greenhouse gases like carbon dioxide pose a danger to human health and safety under the Clean Air Act. In December 2009, the EPA determined that the gases were a danger, and assumed the authority to take action against a wide range of enterprises from coal plants to paper mills to foundries.

Now, the EPA is further overreaching its authority to regulate emissions of hospitals, small businesses, schools, churches and perhaps even single-family homes. The end result of this overreach will be a decrease in energy sources at a time when the nation should be seeking new ones. The EPA's regulations equate to a 'none of the above' energy policy that will do nothing but cost jobs, make energy more expensive, and increase our dependence on foreign sources of energy.

I honestly believe that the best solution is for Congress to overturn the EPA's proposed greenhouse gas regulations. However, with the help of the Democratic House members, a sensible bipartisan effort to mandate that the EPA delay its regulations could assist with both job preservation and environmental safety.

I heard firsthand from small business owners who are already overwhelmed by a plethora of EPA mandates, not to mention other federal mandates such as Obamacare. The last thing small firms need is more onerous regulations that will prevent them from remaining profitable and unable to create jobs. Small businesses are the engines that drive our economy and the Obama administration must start recognizing this if they want to get our economy back on the right track.