

Written Testimony of

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before the

**The Subcommittee on Regulatory Reform, Commercial and Antitrust Law**  
**U.S. House of Representatives**

**on**

H.R. 348, the “Responsibly And Professionally Invigorating Development Act of 2015” (RAPID Act); H.R. 712, the “Sunshine for Regulatory Decrees and Settlements Act of 2015”; and, H.R. \_\_\_\_, the “Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015” (SCRUB Act)

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on H.R. 348, the “Responsibly And Professionally Invigorating Development Act of 2015” (RAPID Act); H.R. 712, the “Sunshine for Regulatory Decrees and Settlements Act of 2015”; and, H.R. \_\_\_\_\_, the “Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015” (SCRUB Act)”. I am Amit Narang, Regulatory Policy Advocate at Public Citizen’s Congress Watch. Public Citizen is a national public interest organization with more than 350,000 members and supporters. For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 150 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and I write only on behalf of Public Citizen.

## **I. Introduction**

Although I present substantive feedback on the three pieces of legislation that are the focus of this hearing later in my testimony, I want to begin by touching on three areas. First, the false claim underlying support for all three of the bills that regulations increase unemployment. Second, the crucial importance of regulations to consumers and working families in their everyday lives. Third, the current problems in the regulatory process that are exacerbated by two of the three bills.

There is simply no credible, independent, and peer-reviewed empirical evidence supporting the claim that there is a trade-off between economic growth and strong, effective regulatory standards. Experts from across the political spectrum have acknowledged that arguments linking regulations to job losses are nothing more than mere fiction. For example, Bruce Bartlett, a prominent conservative economist who worked in both the Reagan and George H.W. Bush administrations, referred to the argument that cutting regulations will lead to significant economic growth as “just nonsense” and “made up.”<sup>1</sup>

Mr. Bartlett’s claims are backed up by a recent book entitled “Does Regulation Kill Jobs?”<sup>2</sup>, a comprehensive empirical study conducted by numerous distinguished academics that closely scrutinized the claim that regulations are linked to job loss and concluded that “to date the

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<sup>1</sup> Charles Babington, Bruce Bartlett, Ex-Reagan Economist: Idea That Deregulation Leads to Jobs ‘Just Made Up,’ Huffington Post, October 30, 2011, [http://www.huffingtonpost.com/2011/10/31/gop-candidates-plans-on-economy-housing\\_n\\_1066949.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/2011/10/31/gop-candidates-plans-on-economy-housing_n_1066949.html?view=print&comm_ref=false).

<sup>2</sup> CARY COGLIANESE & ADAM M. FINKEL & CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS (2013).

empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States.”<sup>3</sup> The authors go on to definitively state that “the empirical evidence actually provides little reason to expect that U.S. economic woes can be solved by reforming the regulatory process.”<sup>4</sup>

By contrast, the so-called “evidence” that regulations are killing jobs or ruining the economy comes from biased and partisan sources using methodology that is not peer-reviewed and doesn’t pass muster under scrutiny. For example, the *Washington Post* recently vetted a report entitled “the Ten Thousand Commandments” from the Competitive Enterprise Institute claiming that the annual regulatory burden adds up to \$15,000 for each household in America or 1.8 trillion for the whole country.<sup>5</sup> As the *Post* notes, the report foregoes any attempt at computing the benefits of the regulations it includes and the *Post* found that the report has “serious methodological problems” and deserved “two pinocchios” given that the report’s authors themselves admit that the report is “not scientific” and “back of the envelope.”<sup>6</sup> Reports using similar methodology and reporting similar figures have also been exposed as flawed and have been disavowed.<sup>7</sup>

To the extent that there is a link between regulations and job losses, it points in the opposite direction with a lack of regulation being the culprit for the financial collapse of 2008 and the ensuing Great Recession. As the Financial Crisis Inquiry Commission noted, “Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets.”<sup>8</sup> A GAO report quantified the tragic costs of the financial crisis, finding that lost economic output could exceed \$13 trillion and that American households collectively lost \$9.1 trillion.<sup>9</sup> The lack of demand that drove the mass layoffs can be directly attributed to the economic slowdown following this financial crisis.

Second, the benefits that federal regulations provide to our country consistently dwarf the costs of those regulations according to official government figures. Every year, the Office of Management and Budget (OMB) analyzes the costs and benefits of rules with a major economic impact in a report to Congress. The most recent OMB report found that:

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<sup>3</sup> *Id.* at 7

<sup>4</sup> *Id.* at 10

<sup>5</sup> Glenn Kessler, *The Claim That American Households Have a 15,000 Regulatory 'Burden'*, WASHINGTON POST (Jan 14, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/14/the-claim-that-american-households-have-a-15000-regulatory-burden/>

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

<sup>7</sup> Mark Drajem, *Rules Study Backed by Republicans 'Deeply Flawed,' Sunstein Says* (Bloomberg, June 3, 2011) available at <http://www.bloomberg.com/news/2011-06-03/rules-study-backed-by-republicans-deeply-flawed-sunstein-says.html>

<sup>8</sup> Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. Washington, D.C.: Government Printing Office. p. 30.

<sup>9</sup> U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 12. available at: <<http://www.gao.gov/products/GAO-13-180>>.

The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2003, to September 30, 2013, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$217 billion and \$863 billion, while the estimated annual costs are in the aggregate between \$57 billion and \$84 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.<sup>10</sup>

This means that even by the most conservative OMB estimates, the benefits of major federal regulations over the last decade have exceeded their costs by a factor of more than two-to-one, and benefits may have exceeded costs by a factor of up to 14.

Yet, the raw numbers do not fully portray the critical role that regulations play in our lives every day. Over the last century, and through the Obama administration, regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much more.

While many of us take these regulatory protections as granted, the true value of regulatory standards become tragically apparent following avoidable crises and catastrophes stemming from a lack of regulation. Deregulatory failures such as the aforementioned 2008 financial collapse and Great Recession, the 2010 British Petroleum oil spill disaster in the Gulf of Mexico, the Upper Big Branch mine explosion in West Virginia, the numerous tainted food recalls and food safety crises that still occur on a regular basis, the massive recalls of unsafe children's toys and defective consumer products, and most recently the explosion at a West Texas fertilizer plant, all point to the need to strengthen, not weaken, our system of regulatory protections.

Finally, it is true that the regulatory system is broken, but not because there is too much regulation. Rather the system is broken because the current regulatory process is too slow, too calcified, and too inflexible to respond to public health and safety threats as they emerge. As Public Citizen's striking visual depiction of the regulatory process shows,<sup>11</sup> the current process is a model of inefficiency, with a dizzying array of duplicative and redundant requirements

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<sup>10</sup> Office of Management and Budget, Office of Information and Regulatory Affairs. (2014). Draft 2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities. p.1. available at:

<sup>11</sup>Public Citizen, *The Federal Rulemaking Process*, <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.

interspersed throughout a byzantine network that is a virtual maze for agencies to navigate. This is the result of an accumulation of analyses and procedures that Congress and the Executive have imposed on agencies over the years leaving agencies in a state of “paralysis by analysis.” Far from the popular conception of “regulators run amok,” the reality is that agency delays are rampant, deadlines are routinely missed or pushed back, and ample evidence exists that the situation is getting worse.

These delays and missed deadlines are the sign of a broken regulatory system that is crumbling under the cumulative weight of ever increasing analytical and procedural requirements. The next two bills I discuss will make these problems even worse.

## **II. The Sunshine for Regulatory Decrees and Settlements Act of 2015**

Resting on a number of misconceptions, the “Sunshine for Regulatory Decrees and Settlements Act of 2015” (SRDSA), H.R. 712, would represent a breach of the rule of law by perpetuating unlawful actions by federal agencies. This dangerous legislation is founded on a number of false and misleading allegations based on assumptions that federal agencies are colluding with public interest groups to enter into settlement agreements that ultimately result in outcomes preferred by those public interest groups who bring the lawsuit. These settlement agreements have been pejoratively dubbed “sue and settle” agreements by supporters of H.R. 712. I will address these assumptions by drawing upon the findings from the December 2014 Government Accountability Office (GAO) in their report entitled “Impact of Deadline Suits on EPA’s Rulemaking Is Limited.”<sup>12</sup> The report focuses specifically on the Environmental Protection Agency (EPA) and, it should be noted, was requested by Republican members of the Committee on Energy and Commerce of the House of Representatives including Rep. Fred Upton, Chair of the Committee, and Reps. Ed Whitfield and Tim Murphy, Chairs of the relevant subcommittees.

In correcting the false record of misconceptions advanced by supporters of H.R. 712, the first step is to provide clarity on the substance of the suits that give rise to the untrue allegations of so-called “sue and settle” practices. The aforementioned GAO report terms these lawsuits “deadline suits”<sup>13</sup> because the lawsuits allege that the EPA failed to perform a nondiscretionary, or mandatory, act by a deadline established by Congress. In other words, these lawsuits allege that agencies such as the EPA broke the law by failing to commit a congressionally mandated action by a date established in statute. These lawsuits are among the simplest to understand and prove. To illustrate, if the law says EPA must finalize a rule by March 2<sup>nd</sup>, 2015 and the EPA does not finalize the rule by that date, third parties are entitled to bring a “deadline suit” to enforce the congressionally mandated deadline. That EPA, working with the Department of Justice (DOJ), seeks to settle these lawsuits instead of going to trial should be obvious and surprise no one. It makes little sense to waste agency, and by extension taxpayer, resources to

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<sup>12</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA’S RULEMAKING IS LIMITED (DEC. 2014), available at <http://www.gao.gov/assets/670/667533.pdf>.

<sup>13</sup> *Id.* at 3.

defend against claims that the EPA didn't perform a legal requirement by a congressionally imposed deadline when the parties who are bringing the suit only have to point to the calendar in order to prove their case. In these situations, "it is very unlikely that the government will win the lawsuit" according to the GAO report.<sup>14</sup> Thus, it is entirely sensible for the EPA, in consultation with DOJ, to settle these cases.

The next needed point of clarity is regarding whether such settlements pre-ordain the *substance* of the agency action that the EPA and other agencies agree to finalize under the terms of the settlement. Again, the GAO report here is very clear and the answer is a resounding no. According to the report, "EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule."<sup>15</sup> This is consistent with a 1986 DOJ memo from President Reagan's Attorney General Edwin Meese which prohibits the EPA from entering into settlement agreements that prescribe specific substantive outcomes regarding final rules. Thus, the allegation that "sue and settle" litigation involves back-room negotiations between pro-regulatory groups and complicit federal agencies which result in agreements that dictate the content of rules or bind agency discretion is patently false and cannot serve as legitimate justification for H.R. 712.

The final point of clarity is with respect to the actual outcome of so-called "sue and settle" litigation since, as has been demonstrated by the GAO, the outcome does not at all dictate the substance of any final rule resulting from a settlement agreement. In short, the settlement agreement that results from a "deadline suit" sets out nothing more than a simple timeline for the agency, the EPA in the GAO report, that has missed a Congressionally mandated deadline to complete the action. If the action is a rule involving rulemaking, the agency must generally follow the traditional public notice and comment rulemaking process prescribed by the Administrative Procedures Act or procedures prescribed by the agency's authorizing statute. In the case of the EPA, all of the settlements scrutinized by GAO pursuant to the EPA's rulemaking authority under the Clean Air Act went through the public notice and comment process allowing all members of the public an opportunity to comment on the rule before it is finalized.<sup>16</sup> Thus, any claims by supporters of H.R. 712 that "sue and settle" litigation and resulting settlement agreements circumvent the normal rulemaking process or somehow deny the public the ability to participate in that process are completely baseless.

Since all of the allegations from supporters of H.R. 712 claiming the existence of collusion or impropriety in reaching settlement agreements under so-called "sue and settle" litigation have been revealed as unsubstantiated, one can only speculate that the true motivation for this legislation stems from opposition to the regulatory action itself, which in the case of the EPA,

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<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 12.

more often than not involves air pollution regulations that implement the Clean Air Act. While Congress has multiple remedies available to dispense with regulations it opposes, including repeal of underlying statutes such as the Clean Air Act or repeal of air pollution regulations, H.R. 712 cannot serve this function. Simply put, if supporters of H.R. 712 are unhappy with third parties who exercise their right to force agencies such as the EPA to follow the law, they must seek to change the law itself instead of pursuing a thinly veiled attack on ability of third parties to enforce the law and thereby shutting down implementation of the law.

The existence of missed statutory deadlines is a symptom of a much larger problem that is deeply disconcerting for the public, namely that our regulatory process is broken as I describe earlier in my testimony. The GAO report bears this out with eye-opening examples. For example, the Clean Air Act rules that GAO studied included rules which missed Congressional deadlines by shocking and unacceptable margins. For example, one rule was finally implemented 26 years after the Congressional deadline to finalize the rule.<sup>17</sup> Another missed its deadline by 19 years.<sup>18</sup> A quick review of the rest of the rules paints a sobering picture of significant delay. H.R. 712 would not shorten these delays, it would lengthen them.

### **III. The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015**

I turn now to the “Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015” or “SCRUB Act of 2015.” At the outset, it must be noted that the bill is fashioned to be one-sided in its focus and impact. That is to say, the SCRUB Act only enables the repeal or removal of regulations and ignores the possibility of strengthening ineffective regulations or identifying gaps in our regulatory system that leave the health and financial well-being of consumers and working families at risk. If enacted, this one-sided approach would have real world consequences and is far from a theoretical concern.

On a daily basis, Americans suffer the effects of a lack of adequate protections and safeguards from environmental hazards, unsafe consumer products including products for children, dangerous workplaces, abusive and deceptive financial products and practices, and tainted food just to name a handful. All too often, these gaps in our regulatory system are demonstrated in dramatic and tragic fashion. A little over a year ago, unregulated and little-known chemicals leaked into the Elk River in West Virginia cutting off many communities from a safe water supply, including in the primary business hub of Charleston where small businesses were forced to shut down for days. The culprit was a chemical storage tank owned by now defunct Freedom Industries who was aptly, although presumably coincidentally, named for their “freedom” from any chemical regulations. Likewise, trains carrying highly flammable oil have derailed repeatedly over the past couple years, igniting massive explosions and imperiling communities

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<sup>17</sup> *Id.* at 11

<sup>18</sup> *Id.*

that didn't even know such trains passed through their backyards until these tragic incidents occurred.

The SCRUB Act will do nothing to prevent the next oil train explosion or the next massive chemical leak in lakes and rivers that communities rely on for access to clean water. Indeed, the bill has no intention of preventing the next major deregulatory disaster. Instead, as I will illustrate later in my testimony, the SCRUB Act could potentially impede agencies from pursuing critical new regulations to address safety or security gaps caused by a lack of regulation. This is simply because the SCRUB Act is only interested in promoting deregulation.

A very brief overview of how the SCRUB Act is designed to function is helpful. The bill establishes a "Retrospective Regulatory Review Commission" (RRRC) under Title I that is composed of nine appointed members who will compile, on a semi-annual basis, a list of regulations across all agencies that the RRRC recommends repealing according to criteria articulated in the bill and including recommendations from the President, Members of Congress, government officials and the public. This list is submitted to Congress who then votes to approve the list through a joint resolution of approval. Once approved, agencies have 60 days to repeal the rules that the RRRC has identified. Agencies can also act to adopt the RRRC's recommendation of rule repeals voluntarily. Under either scenario, agencies must repeal rules identified by the RRRC and, under Title II, apply such cost "savings" to offset the costs of any new rules agencies are contemplating adopting. In short, agencies are prohibited from adopting new rules that carry costs, irrespective of the benefits of those rules, unless they are able to repeal rules identified by the RRRC that imposed the same measure of costs.

To begin, the bill presumes that there exists a voluminous set of rules that are obviously outdated and in bad need of being repealed, thus justifying the RRRC's existence. This presumption is far from clear. A recent academic survey by a noted administrative law scholar found that more than 80 percent of the business owners who claimed that regulations are a cause of concern for their business could not cite any specific regulations that were burdening them.<sup>19</sup> Public Citizen also undertook research to study the results when the business community, and specifically the Chamber of Commerce, was asked to identify outdated regulations that needed to be repealed. Again, despite broad and ongoing claims about regulatory burdens, the Chamber of Commerce, and other businesses were only able to provide a very modest number of examples regarding regulations that were outdated and should be repealed.<sup>20</sup> Clearly, perception is driving the need for this legislation, not empirical reality.

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<sup>19</sup> Deborah Borie-Holtz & Stuart Shapiro, Trying to Float in a Sea of Regulation: Perception and Realty about Regulation Overload, Sept. 15, 2014, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2496436](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496436).

<sup>20</sup> Taylor Lincoln, Streamlining the Rules-Making Process, THE HILL (Sept. 16, 2014), <http://thehill.com/blogs/congress-blog/the-administration/217751-streamline-the-rules-making-process>.

Compounding this problem is the ongoing work pursuant to Executive Order 13563<sup>21</sup> to require agencies to identify outdated regulations they intend to repeal. President Obama announced this retrospective regulatory review initiative in 2011 and the result has been the removal of dozens of regulations with costs savings of up to 10 billion, although the initiative suffers from the same one-sided deregulatory focus and impact as the RRRC in the SCRUB Act. There is little need to duplicate the ongoing work being done by federal agencies at the Administration's behest and the redundancy of the RRRC is no small matter given the taxpayer funds it will expend. Yet, there is a more fundamental question as to what function the RRRC will actually serve if so many of the outdated rules available to repeal have already been identified and repealed by federal agencies under the Administration's retrospective review initiative. It is incumbent upon supporters of the SCRUB Act to demonstrate with concrete and specific examples the types of rules that warrant the existence of the RRRC, and by extension the SCRUB Act, and which have not already been identified and repealed. To date, those cases are few and far between.

It is also troubling that the SCRUB Act directs the RRRC to prioritize repeal of major rules that have been in effect for 15 years or more. Major rules comprise the category of rules that provide the greatest benefits to consumers and working families. Many major rules which have been in place for over 15 years have resulted in some of the greatest public policy success stories both from a public health and economic standpoint. Several of these are detailed in a 2011 report by Public Citizen entitled "Regulation: The Unsung Hero in American Innovation."<sup>22</sup> The removal of ozone destroying chlorofluorocarbons (CFCs), or the banning of carcinogenic vinyl chloride that endangered workers in workplaces, or the reduction of sulfur dioxide emissions from power plants that caused acid rain, or the enactment of energy efficiency standards for consumer appliances are all examples of major rules that have greatly benefited society but that could potentially be targets of the RRRC under the SCRUB act.

Title II of the SCRUB Act, the "cut-go" section, is one of the most dangerous and harmful elements of the bill. The effect of this section would be to require agencies to eliminate rules, with limited exceptions, as a prerequisite to promulgating new ones. The section contains no exemptions for instances in which, for national security or urgent public health and safety matters, agencies need to issue emergency rules. In short, title II of the SCRUB Act would tie our government's hands in responding to a disaster that imperils the public's health, safety, and security.

Even beyond the realm of emergency situations, title II would potentially prevent agencies from putting forth critical new regulations if older regulations of a similar magnitude that were identified by the RRRC and approved by Congress were not concurrently removed. So for example, would the EPA have to remove older regulations such as limiting the amount of lead in

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<sup>21</sup> Exec. Order 13,563, 3 C.F.R. 13,563 (2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

<sup>22</sup> PUBLIC CITIZEN, REGULATION: THE UNSUNG HERO IN AMERICAN INNOVATION (Sept. 2011), available at <http://www.citizen.org/documents/regulation-innovation.pdf>.

gasoline in order to find the cost “savings” to combat climate change and air pollution? Would the Department of Transportation have to remove the regulations requiring seatbelts in cars before requiring new auto safety features? Would the Food and Drug Administration have to remove old food safety measures in order to enact the new pending rules under the bi-partisan Food Safety Modernization Act? If the RRRC says so and Congress approves it, then the answer is yes.

Finally, the SCRUB Act creates a process which entrenches a clear double standard that prioritizes the repeal of rules over the need to develop and finalize new rules that protect the health and financial security of our public. To elaborate, the SCRUB Act requires agencies to repeal rules identified by the RRRC and approved by Congress within 60 days and/or before the agency promulgates a new rule with identical costs. The bill does not allow agencies to give notice to the public and accept comments from the public on the repeal of the rule or do any regulatory analysis of the impacts of the repeal, such as a cost-benefit analysis of the repeal’s impact, before finalizing the repeal. For those rules which must be repealed within 60 days, this would be impracticable in any case given the short time frame. On the other hand, once an agency has foregone public comment and all regulatory analysis including cost-benefit analysis in repealing a rule, it then must go through all of these same steps in producing a new rule.<sup>23</sup> There is simply no justifiable procedural principle to exempt the repeal of rules from public participation and regulatory impact analysis. Yet, that is exactly what the SCRUB Act does.

#### **IV. The Responsibly and Professionally Invigorating Development Act of 2015**

Turning to the Responsibly and Professionally Invigorating Development Act of 2015 (RAPID), H.R. 382, the bill makes dramatic changes to the process by which agencies examine the environmental impacts, in other words the costs and benefits to the environment, of approving permits to site energy projects. Broadly speaking, agencies are required, under certain circumstances, to conduct environmental impact statements (EIS) under the National Environmental Policy Act (NEPA) before approving permits that allow project development. H.R. 382 imposes a “one-size-fits-all” approach to reforming the NEPA process, and more broadly the permit approval process, which will leave our agencies and the public less informed about the potential harmful environmental impacts of allowing energy project development to proceed while leaving unaddressed other factors that will continue to pose obstacles to approval of project development permits.

H.R. 382 is founded on the assumption that agency compliance with NEPA analyses is a primary cause for delay in approving permits. This assumption ignores the many other factors external to the NEPA analytical process that also impact the timing of a permit approval. Recent Congressional Research Service (CRS) and Government Accountability Office (GAO) reports<sup>24</sup>

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<sup>23</sup> A new rule that an agency has deemed must be promulgated under the notice and comment provisions in 5 U.S.C. § 553.

<sup>24</sup> “The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues

have indicated that local/state and project-specific factors have played a critical role in influencing permit approval timing, including local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope. Making reforms to the NEPA analytical process through H.R. 382 will do little to ensure that permit approvals occur on an expedited timeline without also addressing the other CRS and GAO identified factors.

H.R. 382 also introduces a basic and extremely troubling conflict of interest in seeking to reform the NEPA analytical process. The bill would allow “project sponsors,” in other words those parties seeking to obtain permit approval, the ability to conduct the NEPA analysis themselves. This would place project developers in the driver seat of determining the potential environmental costs of approving a permit for their project. It is easy to see that project developers will have a vested interest in downplaying those costs in order to gain permit approval. This is akin to asking big banks to determine the costs and benefits of new Wall Street reform rules, or big energy companies to determine the costs and benefits of new climate change or air pollution measures. Such an approach is sure to work against the public interest and in favor of project developers who are able to manipulate the NEPA process to achieve their own desired outcome.

Regarding the reforms to the permit approval process proposed by H.R. 382, the process that the bill puts in place is highly prescriptive, rigid in imposing deadlines and default approvals if those deadlines are missed, limits the number of reasonable alternatives that may be robustly analyzed by agencies in order to allow minimal environmental impact while achieving the permit approval outcome, and curtails the potential for aggrieved parties, including local communities, to seek redress in courts. Other academics and experts who have testified before this committee in the past on very similar versions of H.R. 382 have already detailed in compelling fashion the dangers these procedural reforms pose, and, for the sake of brevity, I refer you to those remarks here.<sup>25</sup> But I would be remiss if I didn’t take this opportunity to make crystal clear the double standard that this bill establishes when considered in conjunction with not only the other two pieces of legislation addressed in this testimony, but also the broader universe of “regulatory reform” proposals that have been previously proposed, three of which have already passed the House of Representatives in this Congress.<sup>26</sup>

To illustrate this point, it is useful to compare the procedural reforms to the permit approval process in H.R. 382 to the procedural reforms to the Administrative Procedures Act (APA) rulemaking process in H.R. 185, “the Regulatory Accountability Act” (RAA). It is helpful to keep in mind two points. First, the process established by the APA applies to a large swath of

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for Congress”, CRS 7-5700, R42479, April 11, 2012.

<sup>25</sup> See, e.g., Responsibly and Professionally Invigorating Development (RAPID) Act of 2013: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113<sup>th</sup> Cong. 71-95 (July 11, 2013) (Statement of Scott Slesinger, Legislative Director, Natural Resources Defense Council), <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81852/pdf/CHRG-113hhrg81852.pdf>.

<sup>26</sup> H.R. 50, H.R. 185, and H.R. 527.

new regulations that agencies issue, including a large swath of new regulations that are intended to protect the public such as new public health and safety standards, environmental standards, Wall Street reforms, workplace safety standards, and consumer product safety standards, protections for seniors and veterans to name just a handful. Second, the APA process does not apply to permit approvals under H.R. 382.

One organization in particular, the Chamber of Commerce (Chamber), has identified H.R. 382, the RAPID Act, and H.R. 185, the RAA, as two of their three top priorities in reforming the regulatory system.<sup>27</sup> In a letter sent to House members earlier this year in support of H.R. 185, the RAA, the Chamber states plainly “the bill would improve the rulemaking process.”<sup>28</sup> If the Chamber believes this is the case, then why not advocate this procedural approach for approving permits as well? For example, according to the Chamber the RAA “would enhance the regulatory process by requiring that agencies must choose the least costly option...”<sup>29</sup> when adopting new regulations. If that is the case, then why not also require project developers to commit to developing their projects in a way that is as least costly to the environment as possible? Why not force agencies to approve permits only if project developers can demonstrate that they will develop their project in the most environmentally sound way? This is far from the approach established by the RAPID Act. The Chamber goes on to state that the principles underlying the RAA “would make the regulatory process more transparent, agencies more accountable, and regulations more cost-effective.”<sup>30</sup> If that is the case, then why has the Chamber decided to support a very different process under the RAPID Act for the approval of permits?

The Chamber can of course speak for itself, but my suspicion is that the Chamber will continue to support one process for government actions, such as approval of permits for energy projects, that the Chamber and the regulated industries it represents supports, and a very different and distinct process for government actions the Chamber and its members oppose, such as new public health and safety standards, environmental standards, Wall Street reforms, workplace safety standards, and consumer product safety standards. As Public Citizen has repeatedly pointed out in the past, legislation such as the three bills discussed in this testimony, along with other various “regulatory reform” measures such as the RAA, are not intended to improve or streamline the regulatory process. Instead, they are designed to render the regulatory process even more dysfunctional, inefficient, and redundant than it currently is. Indeed, the three bills being considered in this testimony, when scrutinized together, demonstrate that supporters of this legislation seek to manipulate the regulatory process so it is as efficient and effective as possible when working in the interests of regulated industries and as inefficient and ineffective as possible when working to protect the public.

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<sup>27</sup> H.R. 712, “Sunshine for Regulatory Decrees and Settlements Act of 2015,” is the third.

<sup>28</sup> <https://www.uschamber.com/letter/key-vote-letter-house-supporting-hr-185-regulatory-accountability-act>

<sup>29</sup> [https://www.uschamber.com/sites/default/files/150112\\_multi-industry\\_hr185\\_regulatoryaccountabilityact\\_house.pdf](https://www.uschamber.com/sites/default/files/150112_multi-industry_hr185_regulatoryaccountabilityact_house.pdf)

<sup>30</sup> *Id.*

To put it simply, it is an attempt to make our government work for corporate special interests and regulated industries and against consumers and working families.