



214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

MICHIGN SENATE TESTIMONY

EPA Overreach Burdens Michigan

**Testimony before
Committee on Natural Resources
Michigan Senate**

September 16, 2015

**Diane Katz
Senior Research Fellow in Regulatory Policy
The Heritage Foundation**

My name is Diane Katz. I am a Senior Research Fellow in Regulatory Policy at the Heritage Foundation, and an Adjunct Scholar for the Mackinac Center for Public Policy. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or the Mackinac Center.

Today's hearing is focused, in part, on a \$15,000 grant from the U.S. Environmental Protection Agency (EPA) to a team of students at the University of California-Riverside to develop "preventive technology" for reducing emissions of fine particulate matter (PM 2.5) from residential barbecue grills.¹ The grant, funded through the agency's People, Prosperity and the Planet program,² was intended to promote "cutting-edge solutions for the most challenging environmental issues facing California, and the world."³

The environmental impact of grilling is not an entirely new issue for the EPA, which in 1999 conducted a study of "Emissions from Street Vendor Cooking Devices (Charcoal Grilling)."⁴ But for the agency to regard the use of backyard Webers and hibachis as among the most challenging environmental issues facing California and the world demonstrates the extremism that pervades the EPA.

This extremism imposes enormous costs on Michigan citizens and the entire nation. The constant increase in regulatory burden acts as a drag on the economy by shifting resources from innovation, business expansion and job creation to regulatory compliance. And the more powerful the EPA has grown, the more essential political influence has become. All of which undermines America's fundamental principles of governance.

As noted by political scholar Joseph Postell, "Our government has been transformed from a limited, constitutional, federal republic to a centralized administrative state that for the most part exists outside the structure of the Constitution and wields nearly unlimited power."⁵

The Rise of Red Tape

Despite dramatic gains in environmental quality, both the number and cost of federal regulations have continued to climb, and especially so under President Obama. Between

¹Environmental Protection Agency, EPA selects students at U.C. Riverside to receive sustainable design funding, News Releases from Region 9, Oct. 15, 2014, <http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/01ae78a0ae72dab885257d7200690cb7!opendocument>

²Environmental Protection Agency, People, Prosperity and the Planet Student Design Competition for Sustainability, <http://www.epa.gov/ncer/p3/>

³Environmental Protection Agency, EPA selects students at U.C. Riverside to receive sustainable design funding, News Releases from Region 9, Oct. 15, 2014, <http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/01ae78a0ae72dab885257d7200690cb7!opendocument>

⁴Suh Y. Lee, Emissions from Street Vendor Cooking Devices (Charcoal Grilling), June 1999, <http://www.epa.gov/ttn/catc/dir1/mexfr.pdf>

⁵Joseph Postell, From Administrative State to Constitutional Government, Heritage Foundation Special Report #116, December 14, 2012, <http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government>

2009 and 2014, the administration imposed 184 new major regulations,⁶ with costs exceeding \$80 billion annually.⁷ The EPA alone accounted for more than half of these new annual costs.

This testimony documents three new regulations that will have costly consequences for Michigan, if allowed to stand. However, congressional leaders, activists and scholars are increasingly calling upon states like Michigan to stand up against this regulatory onslaught and demand reform.

Blame to Share

Regulatory overreach by the executive branch is only part of the problem. A great deal of the excessive regulation is also the result of Congress granting broad powers to agencies through passage of vast and vaguely worded legislation. The Clean Air Act, the Clean Water Act, and the Endangered Species Act are prime examples. In delegating its legislative authority to bureaucrats, lawmakers invite corruption, and prevent constituents from holding their elected representatives accountable.

States are not blameless, either. For example, Michigan's rulemaking procedures lack suitable requirements for cost-benefit analyses. Its regulation of wetlands is inconsistent and duplicative.⁸ And most recently, Gov. Rick Snyder announced⁹ that the state will cooperate with the Obama Administration to implement the EPA's new Clean Power Plan, which requires Michigan to reduce carbon emissions from power plants by an untenable 40 percent in the next 15 years.¹⁰

Rather than abet the feds' unwarranted takeover of the nation's energy sector, the better policy would be for Gov. Snyder to join with more than a dozen states that are challenging the 1,560-page regulation as unconstitutional, and to pledge, as other governors have done, not to collaborate with the EPA on such an egregious rule.

The Case for Challenging the EPA

Michigan has succeeded before in challenging the EPA. Most recently, the state prevailed in its lawsuit against the agency's Mercury and Air Toxics Standards, which would have further regulated power plant emissions. The state rightfully challenged the regulation as unjustified because the EPA failed to consider costs in deciding that stricter standards were "appropriate and necessary." In promulgating the regulation, the agency estimated

⁶A major regulation is defined as a rule estimated to cost the private sector more than \$100 million a year.

⁷James L. Gattuso, Red Tape Rising: Six Years of Escalating Regulatory Costs Under Obama, Heritage Foundation Backgrounder #3015, May 11, 2015, <http://www.heritage.org/research/reports/2015/05/red-tape-rising-six-years-of-escalating-regulation-under-obama>

⁸Jack McHugh, Return enforcement of state wetlands protection to the federal government, Mackinac Center for Public Policy Study, June 8, 2009, <http://www.mackinac.org/10647>

⁹Michigan Agency for Energy, Michigan to Develop Its Own State Carbon Implementation Plan to Ensure It Retains Control of Its Energy Future, September 1, 2015, http://www.michigan.gov/documents/energy/Michigan_to_Develop_Its_Own_State_Carbon_Implementati_on_Plan_to_Ensure_It_Retains_Control_of_Its_Energy_Future_498764_7.pdf

¹⁰ Clean Power Plan: State at a Glance, Michigan, <http://www.epa.gov/airquality/cpptoolbox/michigan.pdf>

that the cost of compliance would exceed \$9.6 billion annually while the benefits would total a meager \$4 million to \$6 million annually.

The U.S. Supreme Court on June 29, 2015 ruled in favor of Michigan, holding that the EPA acted “unreasonably” by refusing to consider cost.¹¹ As noted by Justice Antonin Scalia in the majority opinion, “It is not rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” The case has been remanded to the Court of Appeals for the D.C. Circuit, which may vacate the rule entirely, or require the EPA to account for cost in weighing the regulatory justification.

Obama's Power Grab

The Clean Power Plan epitomizes all that is wrong with a great many environmental regulations: costs are ignored, benefits are exaggerated, and legislative and constitutional boundaries are breached.

Indeed, the only way that the EPA could document that the benefits of the power plan exceed the costs was to 1) count presumed benefits worldwide rather than just the United States, and 2) ascribe the majority of benefits to health impacts associated with the reduction of ancillary air pollutants that are already controlled under other regulations. This regulatory sleight-of-hand is all too common for regulations that otherwise would cost far more than they return in benefits.

The regulation is also an attempt to bypass Congress on energy policy. Lawmakers have previously rejected a regulatory crackdown on carbon emissions because there is as little support for a policy that will raise energy costs, destroy jobs, and hamper economic growth.

Exacerbating matters is the fact that the regulation will have no discernible effect on global temperatures. According to climatologist Paul Knappenberger, “Even if we implement the Clean Power Plan to perfection, the amount of climate change averted over the course of this century amounts to about 0.02 C. This is so small as to be scientifically undetectable and environmentally insignificant.”¹²

Gov. Snyder attempts to justify cooperation with the EPA by claiming that “We need to seize the opportunity to make Michigan’s energy decisions in Lansing, not leave them in the hands of bureaucrats in Washington, D.C.”¹³ In fact, the state plan must win approval from the EPA, which holds veto power over any and all provisions. As it is, the EPA will

¹¹Michigan et al. v. The Environmental Protection Agency et. al,
http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf

¹²Nicolas Loris, Four Big Problems with the Obama Administration’s Climate Change Regulations, Heritage Issue Brief No. 4454, August 4, 2015, <http://www.heritage.org/research/reports/2015/08/four-big-problems-with-the-obama-administrations-climate-change-regulations>

¹³ Michigan Agency for Energy, Michigan to Develop Its Own State Carbon Implementation Plan to Ensure It Retains Control of Its Energy Future, September 1, 2015,
http://www.michigan.gov/documents/energy/Michigan_to_Develop_Its_Own_State_Carbon_Implementati_on_Plan_to_Ensure_It_Retains_Control_of_Its_Energy_Future_498764_7.pdf

not credit the state of Michigan for more than half of the “renewable” energy generation constructed to meet the state’s renewable portfolio standard.¹⁴

Drowning in “Navigable Waters”

The regulatory burden on Michigan will also grow exponentially if the EPA and the Army Corps of Engineers succeed in vastly expanding their regulatory authority under the Clean Water Act.

As currently written, the Clean Water Act applies to “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.” This notoriously vague definition has invited the Corps and the EPA to stretch their authority well beyond constitutional limits. In 1986, for example, they concocted the “migratory bird rule” to assert authority over any waters that are or could be used by migratory birds—reasoning that in crossing state lines, the birds render such waters as interstate waters of the United States.

Not surprisingly, the rule was overturned by the U.S. Supreme Court in 2001.

Earlier this summer, the EPA and the Corps finalized yet another definition of waters under their purview to effectively cover any wet spot on private property.¹⁵ If successful, this reclassification will result in a massive devaluation of property, and do so without an effective means for property owners to collect compensation. This would prove particularly problematic for Michigan, a state defined by its abundant waters.

Numerous states filed legal challenges within days of the rule’s publication in the Federal Register. On Aug. 27, 2015, a federal district judge in North Dakota delayed the effective date of the rule in the 13 states¹⁶ that were parties to the lawsuit until the case is resolved. The judge concluded that the plaintiff states are likely to succeed on their claim that the EPA violated its Congressional grant of authority in issuing the regulation, and failed to comply with federal rulemaking requirements.¹⁷

The Regulatory Pipeline

Hundreds of other costly regulations are also in the works. The most recent Unified Agenda—a semi-annual compendium of planned regulatory actions by agencies—lists 2,219 rules (proposed and final) in the pipeline. Of these, 126 are classified as “economically significant.”

¹⁴Michigan Agency for Energy, Michigan to Develop Its Own State Carbon Implementation Plan to Ensure It Retains Control of Its Energy Future, September 1, 2015, http://www.michigan.gov/documents/energy/Michigan_to_Develop_Its_Own_State_Carbon_Implementati_on_Plan_to_Ensure_It_Retains_Control_of_Its_Energy_Future_498764_7.pdf

¹⁵Daren Bakst, What You Need to Know About the EPA/Corps Water Rule: It’s a Power Grab and an Attack on Property Rights, Heritage Foundation Backgrounder #3012, April 29, 2015, <http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacorps-water-rule-its-a-power-grab-and-an-attack-on-property-rights>

¹⁶Alaska; Arizona; Arkansas; Colorado; Idaho; Missouri; Montana; Nebraska; Nevada; New Mexico; North Dakota; South Dakota; Wyoming.

¹⁷North Dakota et al. v. EPA et al., <http://www.ag.nd.gov/NewsReleases/2015/WOTUSOrder9-4-15.pdf>

Of particular concern are stricter standards for emissions of ozone, which many analysts predict will be the most costly regulation ever imposed. The EPA is proposing to lower the allowable level of ozone to a range of 65–70 parts per billion (ppb), and has solicited comment on levels as low as 60 ppb. By the EPA’s own accounting, a 60-ppb standard could cost as much as \$39 billion per year, but even that estimate involves a high degree of uncertainty. As it is, the existing standards have not been fully implemented.

Reform of Environmental Policy

Environmental policy has long been based on the notion that only the federal government can adequately protect natural resources against the destructive self-interests of humans (as producers and consumers). The result is a vast command-and-control regulatory regime that is not only ineffective, but also destructive to a free and vibrant society.

A major part of the problem is the centralization of regulatory power in Washington. Federal agencies set regulatory standards for a multitude of pollutants across numerous industrial sectors. But Washington bureaucrats hardly possess sufficient information and expertise to impose controls on hundreds, if not thousands, of dissimilar locations across the 50 states.

Science can offer reliable—but not definitive—guidance for such tasks, but regulatory goals are often based on politics, not empiricism. Too often, agencies fail to properly perform scientific analyses before imposing rules, and many of the analyses that are conducted are biased toward regulation. Regulators selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda.

The technical risk assessment and regulatory impact analyses with which the EPA and states justify many regulations are fraught with implausible assumptions and extrapolation based on absurd use of the precautionary principle, i.e., the notion that all risk can and must be avoided.

Meanwhile, the supposed science underlying regulations is often hidden from the public and unavailable for vetting by experts. Statutes intended to discipline regulators, such as the Information Quality Act, are often ignored for lack of accountability.

Also problematic is the government’s emphasis on “inputs” rather than results. That is to say, many regulations focus on requiring installation of specific control technologies to limit emissions and discharges. Actual monitoring and enforcement are secondary. Such a system rewards compliance rather than innovation, and offers no incentive to the private sector to devise more efficient methods of pollution control.

Decades of experience and research have documented numerous problems with this complex, time-consuming and litigious approach. As Yale scholar Bruce Ackerman, notes, “The present regulatory system wastes tens of billions of dollars every year, misdirects resources, stifles innovation, and spawns massive and often counterproductive litigation.”

Virtually all of the nation's foundational environmental statutes date from the 1970s, when smokestacks and tailpipes presented the most pressing problems. Environmental conditions are dramatically different today, in large part because of technological innovation.

Four decades of regulatory experience has vastly increased our knowledge about the shortcomings of the command-and-control model.

The Way Forward

Michigan citizens want a clean, healthy, and safe environment. The question is what policies will realize these goals most effectively. It isn't enough only to consider how to reform federal regulation. A more substantive debate must address the extent to which it is even appropriate for the federal government to intervene.

Despite Washington's infatuation with heavy-handedness, history has shown that command-and control regulation is inherently inefficient and often counterproductive.

In contrast, the well-being of societies and individuals has long been enhanced by individual freedom, free markets, property rights, and limited government. The annual Index of Economic Freedom, for example, documents that the intensity of poverty in countries whose economies are considered "mostly free" or "moderately free" is only about one-fourth the level found in countries that are rated less free.¹⁸ Moreover, per capita incomes are much higher in countries that are economically free.

The same goes for the environment: Free minds and free markets improve environmental quality far more than federal regulation. But this obvious reality is fiercely resisted by those who benefit from the status quo—politicians, bureaucrats and many incumbent businesses.¹⁹

An alternative set of policy principles has been enunciated as the "American Conservation Ethic."²⁰ This ethic holds that Americans must be good stewards of the environment for the well-being of the current generation as well as that of future generations. The following are the eight principles that comprise this ethic:

1. People are the most important, unique, and precious natural resource.

¹⁸Terry Miller and Anthony B. Kim, 2015 Index of Economic Freedom, The Heritage Foundation Special Report, <http://www.heritage.org/index/>

¹⁹For a discussion of special interests in environmental regulation, see Todd J. Zywicki, Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform, *Tulane Law Review*, Vol. 73.

²⁰Environmental Conservation: Eight Principles of the American Conservation Ethic, http://thf_media.s3.amazonaws.com/2012/EnvironmentalConservation/Environmental-Conservation-Full-Book.pdf The first version of the American Conservation Ethic was crafted under the auspices of a conservative, free market conservation group, NWI, by Robert Gordon (then the organization's Executive Director), The Hon. Becky Norton Dunlop, The Hon. George S. Dunlop, James R. Streeter, The Hon. Kathleen Hartnett White, Alan A. Moghissi, PhD, and Lisa M. Jaeger, Esq.

2. Renewable natural resources, such as air, water, and soil, are not fragile and static but resilient and dynamic and respond positively to wise management.
3. Private property protections and free markets provide the most promising opportunities for environmental improvements.
4. Efforts to reduce, control and remediate pollution should achieve real environmental benefits.
5. As we accumulate scientific, technological, and artistic knowledge, we learn how to get more from less.
6. Management of natural resources should be conducted on a site- and situation-specific basis.
7. Science should be employed as one tool to guide public policy.
8. The most successful environmental policies emanate from liberty.

Major reforms are needed to virtually every environmental statute on the books—both federal and state. The following reforms would go a long way toward improving environmental policy at all levels.

1. Shift responsibility for environmental regulation from the federal government to the states. All states already have environmental protection agencies, and states are far better equipped to customize policies for local conditions. A state-based regime would also mean more direct accountability—taxpayers would have an easier time identifying the officials responsible for environmental policies, and the people making those regulatory decisions would have to live with the consequences.
2. Authorize a system of tradable permits for air emissions and water discharges.²¹ A permit “market” would create incentives for firms to implement the most effective means of pollution control at the lowest cost. It would also impose discipline on sources of emissions because of the value that could be derived through permit trading. The property rights inherent in a tradable permit system also increase accountability, according to economist Bruce Yandle, by “provid[ing] a legal basis for taking action against those who generate pollution that degrade property values.”
3. Limit delegation of regulatory authority. Congress and state legislatures routinely enact vague environmental statutes, and leave the regulatory details to unelected bureaucrats. This system invites gross inefficiency because there’s little accountability for incompetence or error. Elected representatives, not regulators, should make the laws and be accountable to the people for the results. Therefore, no major environmental regulation

²¹This recommendation does not apply to a “cap-and-trade” system for so-called greenhouse gases. There is no credible basis for regulating carbon dioxide and other GHGs.

should be allowed to take effect until Congress or the state legislature explicitly approves it.

4. Compensate citizens for regulatory “takings.” The benefits of environmental improvements are enjoyed by the public, but the regulatory costs are routinely imposed on individuals. This leaves regulatory agencies to act without any consideration of the costs of regulation. Whenever the use of private property is prohibited, property owners should be compensated for the lost value. In the event compensatory funding is exhausted, further regulatory takings should be prohibited. This would encourage agencies to prioritize various conservation efforts.

5. Codify stricter information-quality standards for rulemaking, including limits on agency use of co-benefits in rulemaking. Federal and state agencies too often mask politically driven regulations as scientifically based imperatives. In such cases, agencies fail to properly perform scientific and economic analyses or selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda. Strict information-quality standards for rulemaking should be imposed, along with oversight to ensure that the standards are met. Compliance with stuck standards ought to be subject to judicial review, and noncompliance ought to be deemed “arbitrary and capricious.”

6. Establish a sunset date for environmental regulations. To help ensure that obsolete and ineffective rules are taken off the books, sunset dates should be set for all major regulations. After this sunset date, rules should expire automatically if not explicitly reaffirmed by the relevant agency through the formal rulemaking process. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Such sunset clauses already exist for some new regulations. They should be the rule, not the exception.

7. Shift federal land holdings to states. The federal government’s land holdings are greater than the areas of France, Spain, Germany, Poland, Italy, the United Kingdom, Austria, Switzerland, the Netherlands, and Belgium combined, approaching a third of the U.S. land mass, including Alaska and Hawaii. Only a fraction of it is composed of National Parks. Federal agencies are unable to adequately manage these lands and the natural resources on them.

I appreciate the opportunity to address the committee, and hope that this testimony will prove useful in your reform efforts.

The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2013, it had nearly 600,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2013 income came from the following sources:

Individuals	80%
Foundations	17%
Corporations	3%

The top five corporate givers provided The Heritage Foundation with 2% of its 2013 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey, LLP.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.