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**Testimony of Stephen L. Johnson,
Deputy Administrator
U.S. Environmental Protection Agency
before the
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
of the
Committee on Government Reform
U.S. House of Representatives**

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Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the status of the Environmental Protection Agency's (EPA) efforts to improve the way the Agency develops regulations and guidance documents. More specifically, I appreciate this opportunity to discuss EPA's progress in responding to nominations for regulatory reform made by the public and included in recent Office of Management and Budget (OMB) regulatory accounting reports.¹

EPA publishes hundreds of regulations and guidance documents each year – some that are simple and non-controversial and some that are highly complex. EPA has taken numerous steps in recent years to improve our action development process, along with the quality of the supporting scientific, economic, and policy analysis. The Agency has also strengthened our partnerships with states and other external stakeholders, which EPA considers extremely important for achieving our environmental goals. These steps have strengthened the credibility and quality of our policy decisions and, in turn, have helped EPA fulfill its mission more efficiently and effectively.

¹See, Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (December 2001); Stimulating Smarter Regulations: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (December 2002); Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (September 2003); and Informing Regulatory Decisions: 2003 Draft Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (February 2004).

Recent Improvements to EPA's Action Development Process

Improving the underlying analysis of EPA's regulatory and non-regulatory actions (such as guidance documents) has been a consistent theme of the Agency and this Administration. One of the first actions taken by former EPA Administrator Christine Todd Whitman after arriving at the Agency was to form a task force to examine EPA's action development process and make recommendations for improving it. The task force concluded that the process was basically sound, but that it could be improved in several ways. It found that EPA managers, scientists, and economists should be more actively involved throughout the action development process. The task force also identified a need for more in-depth analysis to support action development, more careful consideration of policy alternatives, and more effective consultation with co-regulators and stakeholders. EPA has worked to implement the task force's recommendations, and I would like to highlight our progress in several areas.

To strengthen the quality and consistency of scientific and policy analysis supporting our regulatory decisions and significant non-regulatory actions, EPA has taken several steps. First, EPA appointed a Science Advisor from the Office of Research and Development (ORD). The Science Advisor is staffed by seven full time employees dedicated to supporting the use of science in rulemaking and other Agency decisions. ORD has also increased both staff and monetary resources for EPA's Integrated Risk Information System, an electronic database of information on human health effects that may result from exposure to various chemicals in the environment. In addition, EPA appointed an Economic Advisor from the Office of Policy, Economics, and Innovation (OPEI) and has added more staff resources to OPEI's National Center for Environmental Economics (NCEE) to further support and strengthen economic analyses in rulemakings.

To sharpen our regulatory and policy analysis and to ensure the Agency does not overlook sound and potentially better policy alternatives, the Agency created the Regulatory Analysis and Policy Division within OPEI. This Division's primary responsibility is to ensure that Agency's senior management has all of the pertinent information needed to take scientific findings, relative benefits and costs, and policy issues into full consideration before making decisions. This includes actively participating in priority regulation and policy development, conducting timely and effective policy analysis, and ensuring that Agency decision processes are invested with high quality and timely information.

EPA has also provided significant input to the Office of Management and Budget (OMB) as OMB developed its guidance to agencies on conducting regulatory analysis.² At the request of OMB, the Director of NCEE co-chaired an interagency review group that provided expert feedback to OMB on the draft guidance. EPA also provided OMB with Agency comments. Although Circular A-4 is largely consistent with the current version of *EPA's Guidelines for Preparing Economic Analysis*, it does describe several new analytic expectations. For this reason, as well as to incorporate state-of-the-art improvements regarding economic analysis, EPA is in the process of revising its own *Guidelines*. A full draft of the revised document is expected to be completed in Spring 2005 for peer review, with the final document expected in late Summer 2005. EPA is also holding training sessions on Circular A-4 for EPA's analytic staff to highlight the new expectations regarding economic analysis. In addition, in May 2004, I requested that a special economics workgroup be established for each of the Agency's economically

² OMB's guidance, referred to as Circular A-4 (September 17, 2004), provides guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(c) of Executive Order 12866, "Regulatory Planning and Review," the Regulatory Right-to-Know Act, and a variety of related authorities. The Circular also provides guidance to agencies on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act.

significant rules to further improve the Agency's economic analysis and ensure consistency with OMB guidance.

The aforementioned actions are examples of steps the Agency has taken to strengthen our regulations and policies. These actions have resulted in heightened attention to scientific, economic, and policy issues in EPA's action development process.

Agency Process to Respond to Regulatory Reform Nominations

Congress requires that OMB submit an annual Report to Congress that estimates the total annual costs, benefits, and impacts of federal rules and paperwork – in the aggregate, by agency, and by rule.³ Each Spring, OMB publishes its draft report and then solicits comments on the content of the report and on any regulatory actions or guidance documents the public believes should be nominated for reform before finalizing the report (usually at the end of the year).

On December 21, 2001, OMB published its annual Report entitled *Making Sense of Regulation: 2001 Report to Congress on the Cost and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. Of the 71 nominations for reform, 24 pertained to EPA regulations and guidance documents. OMB categorized 8 of

³ The requirements for OMB's regulatory accounting reports were enacted as: Sec. 645 of the Treasury, Postal Services and General Government Appropriations Act for 1997 (P.L. 104-208); Sec. 625 of the Treasury and General Government Appropriations Act for 1998 (P.L. 105-61); Sec. 648 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277); Sec. 628 of the Treasury and General Government Appropriations Act for 2000 (P.L. 106-58); and Sec. 624 of the Treasury and General Government Appropriations Act (P.L. 106-554.)

these 24 candidates as “high priority,”⁴ all of which were given serious consideration by EPA.

On March 18, 2002, OMB published its draft 2002 Report and received approximately 1,700 public comments in response. OMB’s Office of Information and Regulatory Affairs (OIRA) conducted a preliminary review of these comments and identified 316 rules and guidance documents that were nominated for reform. In the final Report released on December 18, 2002 entitled *Stimulating Smarter Regulations: 2002 Report to Congress on the Cost and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OIRA referred 20 regulations and 17 guidance documents to EPA for evaluation. OIRA requested that EPA complete an initial review of these 37 nominations by February 28, 2003 and report on the Agency’s recent, ongoing, or future activities concerning the issues raised by the public commenters.

In response to OMB’s request, EPA created a process to review these nominations. First, EPA circulated the list of 37 regulations and guidance nominations to each of our program offices to provide a response, including information on what the final product, goal or objective would be and any milestones (anticipated or completed) with estimated or actual dates of completion. After analyzing those responses, the Agency categorized the nominations as follows: 17 “actions already under review;” 4 “will investigate;” and 16 “low priority.” EPA met with OMB’s OIRA Administrator, Dr. John Graham, to discuss our initial review on February 26, 2003, thereby meeting the February 28 deadline set out in the 2002 Report. As a follow-up to the meeting, OMB asked EPA to provide an update on the additional 29 regulations and guidance documents nominated for reform in

⁴ “High priority” was defined as meaning that the points raised in the nomination were valid and that the Agency should evaluate the practicality and feasibility of the suggested reform.

the 2002 Report but not previously referred to EPA for response. EPA provided the additional requested material to OMB as part of our official response on April 11, 2003.

On December 5, 2003, OIRA's Dr. Graham requested from EPA an updated implementation schedule, with monthly milestones, that detailed the Agency's plan for addressing all nominations that had not been resolved. This included the 21 nominations from the 2002 Report listed as "action already under review" or "will investigate," along with the 29 additional items that OMB asked for information on from the 2002 Report. EPA responded to this request and, on January 20, 2004, EPA met with OIRA to discuss our updates on all 50 aforementioned nominations. At that time, EPA categorized 22 as being completed, 15 as on target with our previously reported milestones and proposed dates of completion, and 13 as having new projected dates of completion.

Though both the 2001 and 2002 Reports contained nominations for regulatory reform, OMB's final report published on September 22, 2003, entitled *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* primarily focused on the release of OMB's *Circular A-4 Guidance* and published Agencies' responses to the 2002 nominations. The 2003 Report did not nominate any regulations or guidance documents for reform.

OMB has not yet published the final 2004 Report. We have reviewed the draft 2004 Report that was published on February 2, 2004, entitled *Informing Regulatory Decisions: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. The draft 2004 Report focuses on the manufacturing industry and specifically requests commenters to suggest reforms that would improve "manufacturing regulation by reducing unnecessary costs, increasing

effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility.”

EPA is pleased with the Agency’s overall track record on responding to nominations from OMB’s regulatory accounting reports. Of the 70 regulatory reform nominations received between 2001 and 2002,⁵ EPA considers its response complete for 44 nominations (63%). This number includes: those nominations for which the Agency took the comments that were nominated into consideration when taking action; those for which the Agency had previously addressed or considered the commenter’s suggestion; and those where the Agency seriously considered the comment, but nevertheless disagreed with the commenter’s recommendation. Of the remaining 26 nominations, 18 are those for which the Agency has actions underway via notice-and-comment rulemaking, peer review, and other Agency processes designed to ensure the final products are based on the best and most current information. Three of the remaining nominations are those that are part of ongoing Agency programs that are being continually improved and five of the remaining nominations are those for which the Agency is still considering the best approach to address the outstanding issues raised by commenters.

Progress on Specific Regulatory Reform Nominations

As the actions I have just described show, EPA has taken the process of responding to public nominations for regulatory reform very seriously. This process has proven to be very helpful to focus our attention on issues in our regulations or guidance that may warrant changes or may need to be clarified for the regulated community. Although our review of the nominations has not always led us to change our decisions, it has challenged

⁵ This includes the 66 nominations raised in the 2002 Report and referred to EPA for response (several of which were also nominated in the 2001 Report), along with an additional 4 actions that were nominated in the 2001 Report only.

us to scrutinize specific regulations and policy directives, and to either confirm our approach or recognize the need for revision.

The nominations for reform that were raised in the 2001 and 2002 Reports cover a wide range of issues. I would like to highlight a specific nomination with a particularly favorable result related to submetering water systems and then will address specific nominations for reform in which the Subcommittee expressed an interest: (1) the New Source Review (NSR) program; and (2) the Toxics Release Inventory (TRI) program. The Agency has made substantial progress in both of these areas. Before discussing these issues, I would like to very briefly address the Subcommittee's interest in mercury. No regulations or guidance documents related to mercury were nominated for reform in either the 2001 or 2002 OMB Reports. However, the Agency is on track to issue its first-ever rule to regulate mercury emissions from power plants by March 15, 2005. To ensure that the proposed mercury rule be based on the best available information, the Agency has been and continues to analyze the risks posed by mercury in the environment and the degree to which those risks can be reduced by regulating mercury from power plants.

Now, I would like to talk about a guidance document issued by EPA in June, 2000 related to submetering water systems. The memo interpreted the term "selling" under the Safe Drinking Water Act (SDWA) as applying to submetering of individual tenants by owners of multifamily dwellings. Submetering means installing separate water meters on each apartment and billing each tenant for their actual water use, rather than including a fixed water charge in the rent that is unrelated to use. The effect of this interpretation was to subject multifamily dwellings with more than 15 units to regulation as public water systems under the SDWA if they engaged in submetering.

Commenters raised concerns that: (1) studies have shown that submetering significantly reduces water usage by providing an incentive for water conservation; (2) multifamily dwellings that practice submetering do not store or treat water and there are no associated adverse health impacts resulting from submetering; and (3) EPA's June 2000 interpretation of the term "selling" imposed substantial regulatory burden on owners that engaged in submetering and thus, discouraged the practice. After considering the comments and looking into the issue, the Agency issued a revised policy on December 23, 2003 (68 FR 246) changing its interpretation of how SDWA applies to submetered properties. The revised policy clarifies that a property owner who installs submeters to track usage of water by tenants on his or her property will not be subject to SDWA regulations -- i.e., will not be considered to be selling drinking water -- solely as a result of taking the administrative act of submetering and billing. Although EPA's revised policy is focused on submetered apartments and other residential properties, states are given the flexibility to determine whether, and how, to best track other properties that submeter. In general, the scope of the revised policy is not intended to extend to properties with large distribution systems, or to those that serve a large population or a mixed commercial/residential population. In addition, EPA is sponsoring further study on this issue and intends to seek public comment on the relationship of rental unit billing systems to water conservation and revise our policy accordingly.

New Source Review

NSR reform has been one of EPA's highest priorities under this Administration because of the more than 10 years of history on the need for reform from a variety of stakeholders. The NSR program was well known to be overly complex and burdensome, resulting in uncertainty for industry, delayed projects that businesses need to maintain their competitiveness, and sometimes led to results that actually discouraged environmentally beneficial projects. NSR also was identified as a high priority for regulatory review in

OMB's 2001 Report. Likewise, the Administration's 2001 National Energy Policy Report entitled *Reliable, Affordable, and Environmentally Sound Energy for America's Future*, recommended that EPA review NSR's impact on the utility and refinery industries.

In response to this review and the longstanding calls for reform, in June 2002, EPA recommended a series of high-priority reforms to streamline the program and provide greater regulatory certainty and flexibility, while also maintaining strong environmental protection. EPA went to work to carry out these recommendations expeditiously. The recommended NSR reforms are contained in three rules – EPA has finalized two of the rules, and intends to propose a third.

The first rule, known as the NSR Improvement Rule, includes a set of major improvements to the NSR program that will provide greater regulatory flexibility and certainty, and will remove barriers to – and create incentives for – environmentally-beneficial projects.⁶ EPA finalized the NSR Improvement Rule in December 2002 and it became effective in March 2003. In response to several legal challenges, the Agency is defending this rule in Court – oral arguments are scheduled for January, 2005. In the meantime, EPA is also working with state and local agencies to provide them the necessary approvals to begin running NSR programs under this new rule.

⁶ One specific reform included in this rule relates to plantwide applicability limits (PALs). To provide facilities with greater flexibility to modernize their operations without increasing air pollution, facilities that agree to operate within strict site-wide emissions caps called PALs will be given flexibility to modify their operations without undergoing NSR, so long as the modifications do not cause emissions to violate their plantwide cap.

The second NSR rule is the Equipment Replacement Provision. This rule is a critical step toward providing certainty as to when equipment replacements automatically are excluded from NSR requirements because they are routine maintenance, repair and replacement activities, and when further review may be necessary. It will promote safe facilities by removing a significant impediment to the replacement of damaged or deteriorating parts. It will also maintain requirements that facilities go through NSR review in appropriate circumstances.

The Agency proposed the Equipment Replacement Provision in December 2002 and finalized the Equipment Replacement Provision in October 2003. The Equipment Replacement Provision has been challenged in the Court of Appeals for the District of Columbia and has not yet become effective because it was stayed by the Court until there is a final decision in the case. As a result of petitions filed with EPA, the Agency agreed to reconsider various aspects of the Equipment Replacement Provision through a second public comment process. EPA is currently reviewing the numerous comments it received and considering the Agency's response.

The third NSR improvement rule is intended to address remaining issues, including how to determine whether NSR applies to sources with multiple, interconnected emissions units (de-bottlenecking) and to sources with multiple construction projects (aggregation), and how to handle variants of the plant-wide applicability limits (PALs) based on allowable emissions.

More to the point, the President has directed EPA to continue our success in improving our national air quality with smarter regulations. Our Clean Air suite – Clear Skies or the Clean Air Interstate Rule, coupled with the Nonroad Diesel Rule and other existing state and federal control programs brings nearly 90% of the counties in the Eastern U.S. most

affected by EPA's new health-based air quality standards into attainment with the new ozone and particulate matter rules. The Clean Air Suite also will minimize the conflict, litigation, and delay of programs such as NSR, and locks in the certainty needed to create new jobs and opportunity, especially in urban areas. We can accomplish this with a much smaller financial impact to consumers and businesses compared to what you might otherwise pay under existing Clean Air Act programs. The Clean Air Suite the Agency is implementing minimizes the possibility that the power sector would fuel switch to natural gas to comply with air standards under the current Clean Air Act, and will likely avoid the higher natural gas prices that would inevitably result. In addition, attainment gains through these programs will reduce the need to require further costly reductions from the manufacturing sector.

Toxics Release Inventory (TRI)

I will now turn to EPA's efforts to improve TRI. Since its implementation in 1987, TRI has been the centerpiece of the Agency's right-to-know program, and it has proven to be a very useful tool for assisting communities in protecting their environment and for making businesses more aware of their chemical releases. Before I describe our response to the recommendations in OMB's reports, I would like to share information about the recent TRI modernization initiative. This initiative was announced in May to increase the use of electronic reporting and data management tools, moves that will reduce the amount of time between when data are submitted and reported and greatly improve data quality. For the 2003 reporting year, ninety-three percent of the TRI reporting community used our award winning software, TRI-Made Easy (TRI-ME) to submit their data. In addition, electronic submissions over the Central Data Exchange (CDX) are up 50% (from 22% for 2002 data). This new electronic system provides a seamless way to transmit data from reporters to EPA over the Internet, and in the near future, will enable simultaneous report to EPA and state governments with the click of a button. We are proud of these

developments, and believe they will help address some of the concerns that led the public to nominate TRI as a reform target.

In the midst of these improvements, in September 2002, EPA initiated a stakeholder dialogue process to identify opportunities to reduce the burden on facilities reporting under the TRI program. Our goal was to publish a rule that would reduce burden associated with the TRI reporting requirements while simultaneously continuing to provide valuable information to the public consistent with the TRI law. The Agency prepared a white paper laying out five options for streamlining TRI reporting, and received 700 public comments in response. The options included increasing reporting thresholds for small business, and for classes of chemicals or facilities, and introducing a “no significant change” option as measured against a baseline reporting year.⁷ The formal comment period on the White Paper ended in early 2004, but we continue to seek input – the Agency’s most recent meeting with stakeholders was held as on October 19, 2004.

The public input we have received will inform our TRI improvement efforts. To provide burden reduction as quickly as possible, we are pursuing a two-tiered approach:⁸ a

⁷ Under the "no significant change" option, a business filing a TRI report could report using a surrogate, or an indicator, to assess whether or not a facility’s reportable quantities of a TRI chemical have varied significantly from one reporting year to the next based on criteria laid out by EPA. This indicator of change would need to be an appropriate indicator of changes (or lack of change) in reportable quantities. If the projected change was small from one year to the next, a facility could instead report "no significant change" to EPA with an expedited submission, thereby reducing unnecessary reporting while still providing EPA with an indicator of reportable amounts. This special expedited submission could be allowed for a specified number of years (e.g., 1-3 years). One important challenge of this "no significant change" option is identifying an appropriate indicator for reliably determining when there has been a significant change in chemical release and waste management quantities, thereby enabling EPA to accept this indicator as a proxy for a full report.

⁸ EPA has examined the public input and identified a number of potential changes to the TRI regulations. At this time, all of the options are still under consideration.

proposed rule covering the more complex issues raised in the options presented in the white paper, to be proposed in Fall 2005, and a separate, expedited rulemaking covering simpler, streamlining revisions to the reporting forms. We anticipate the latter rule will be proposed in December 2004.⁹

The Agency has another initiative under way that could affect TRI reporting. As you know, in 2001 EPA lowered the TRI reporting threshold for lead and lead compounds to 100 pounds. Currently, we are evaluating the scientific approach we use to assess hazards and risks associated with metals. A draft framework for evaluating metals is undergoing interagency review. Following that review the EPA Science Advisory Board will evaluate the draft framework.¹⁰ Once the new framework is complete, EPA will assess its implications with respect to current TRI and other EPA program requirements.

Conclusion

The Agency has an important responsibility to ensure the quality and credibility of every regulatory and policy decision. Under this Administration, EPA has taken important actions to improve the quality and credibility of our regulations and guidance documents. We have strengthened our regulatory process, invested in sound science and analysis, and been supportive of and responsive to public involvement. I believe these actions have

⁹ The rule scheduled for proposal this December includes a review of all sections of TRI Forms R and A. EPA is identifying portions of the forms that may be streamlined or eliminated without giving up important data. EPA is also looking at ways to use data already collected by other EPA programs to reduce duplicative collection, through information technology such as web services. The rule scheduled for proposal in 2005 will follow up on one or more options from the white paper, and may include, for example, a proposal to implement the “no significant change” option discussed previously.

¹⁰ The current schedule for this activity calls for a review at a Science Advisory Board peer review meeting in late January 2005, with the draft framework being finalized in November 2005.

created a solid foundation for improving our regulatory effectiveness and for accelerating progress toward meeting our nation's environmental goals.

Thank you for the opportunity to testify today. I would be happy to answer any questions that you may have.

