



**Summary
of
S. 951 - The Regulatory Accountability Act of 2017**

May 2017

Shot: If the Regulatory Accountability Act of 2017 had been the law in the 1970s, EPA never would have banned lead in gas.

Chaser: And if the Regulatory Accountability Act of 2017 becomes the law, EPA will not be able to clean up lead in drinking water.



The Upshot: Rulemaking Slowed to a Stall

In 1973, the Environmental Protection Agency (EPA) started down a road that banned lead in gasoline in 1986. This action was the product of lengthy rulemaking proceedings under the Administrative Procedure Act. A broad constituency of public health experts, child advocates, government officials, and industry representatives agree that banning lead in gas was the right thing to do given the severe harm the rule prevented.

Before the ban went into full effect, 5,000 people died annually because of lead-related heart disease. In other words, between 1986 and today, the rule saved 155,000 lives. The rule reduced blood lead levels by 75 percent, breaking the back of a lead poisoning epidemic that harmed two million children annually. Federal Court of Appeals Judge Skelly Wright, the author of the opinion upholding EPA's decision, wrote:

Man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations. It is only recently that we have begun to appreciate the danger posed by unregulated modification of the world around us, and have created watchdog agencies whose task it is to warn us, and protect us.

Ethyl Corp. v. EPA, 541 F.2d 1 (1976)

Fast forward to today's EPA, which is literally under siege for committing "overregulation," whatever you construe that misleading and oft-repeated term to mean. It is excoriated by conservatives from President Trump on down, has the same budget in constant dollars as it had in the early 1980s, and, if the president has his way, will have nearly a third of its budget eliminated come Fiscal Year 2018.

EPA has struggled unsuccessfully for years to control the new front in the battle against lead poisoning: aging pipes that supply drinking water to schools, daycare centers, and homes. The discovery of dangerous lead levels in Flint, Michigan, spurred a *USA Today* series that identified almost 2,000 additional water systems spanning all 50 states where testing shows excessive levels of lead contamination. The investigation revealed that lead poisoning via drinking water threatens the brain development of untold numbers of children who live in urban, suburban, and rural areas. The water systems, which reported lead levels exceeding outdated and unduly weak EPA standards, collectively supply water to six million people, or nearly 1 in every 53 Americans. Some 600 public water systems showed lead levels topping 40 parts per billion (ppb), which is more than double the EPA's woefully inadequate action level limit. At least 180 of the water systems failed to notify consumers about these test results as required by federal rules.

The Status Quo: Notice and Comment Rulemaking

When EPA tackled lead in gas, it wrote a standard that required water suppliers to reduce lead levels to the point that they did not pose a threat to children. It published that standard and anyone who wanted to comment on its application or implications could submit written comments, which EPA staff then analyzed, making whatever changes that, in their expert judgment, would protect children. These conclusions were fiercely opposed by the oil industry, and the case was litigated through the D.C. Circuit Court of Appeals, which took the unusual step of re-hearing the case *en banc* (with all judges sitting) because the rule was so important and hotly contested. As indicated by Judge Wright's opinion quoted earlier, the final court to hear the case recognized that EPA's mission was to *prevent* and not merely ameliorate harm after the fact.

This "notice and comment" rulemaking process was affordable for the agency, provided the public with meaningful opportunities to weigh in on the rule as it was developed, and subjected EPA's decision-making to effective accountability measures. The judges who reviewed the case were able to grapple with the evidence presented to them by the public.

Over the last 25 years, regulated industries have successfully advocated so many procedural changes to the rulemaking process that agencies like EPA can barely afford it. When they propose a rule, agencies must analyze whether the legislation would impose an unfunded mandate on state and local governments; consider small business objections; and conduct an elaborate cost-benefit analysis covering hundreds of pages. The process is so extensive and takes so long that no member of the general public could possibly keep up with it from start to finish. Fortunately, public interest groups are funded to address these concerns, although they are David to the Goliath of corporate special interest groups.

With a budget that, in constant dollars, stands at the same level as its funding in the early 1980s, EPA is just able to produce rules at the end of a process that takes anywhere from four to ten years. EPA rarely tackles any problem unless it is ordered to do so by Congress and given a deadline and, even then, it is most often late. Throughout this long period, the industries to be regulated by the new rule routinely seek congressional and judicial interventions that are expensive and time-consuming.

Some would say that because rules impose millions (even billions) of dollars in compliance costs, this extensive and burdensome process is necessary to make sure that regulatory costs are “justified.” They ignore the equally important reality that people get sick and die while the lobbying continues.

In sum, politics and its most significant manifestation — lobbying — produce regulatory delays that are already egregious. This outcome is especially intolerable because, as the lead saga shows, the more we have learned about human exposure to almost any industrial chemical, the more we are convinced that the chemicals are more harmful than we thought at the outset. For example, when EPA first proposed eliminating lead from gas, the accepted exposure standard was 50 micrograms per deciliter ($\mu\text{g}/\text{dL}$); today it is one-tenth that level, or 5 $\mu\text{g}/\text{dL}$.

Regulatory “Reform”

Many would argue that regulatory delays in such circumstances, involving a known toxin and well-documented harm, should mean that any *procedural reforms* of rulemaking should simplify, not complicate, the existing process, which is already at the edge of practicability. But the Senate Regulatory Accountability Act of 2017 moves with undue speed in the opposite direction, erecting even higher barriers to public participation and slowing rulemaking to a stall.

Sponsors advertise the Senate Regulatory Accountability Act as a “reform” of the 1946 Administrative Procedure Act that will facilitate public participation and produce better

decision-making. Instead, the legislation would add so many burdensome steps that rulemakings opposed by any influential special interest would be almost impossible to implement and enforce. The legislation represents a drastic overhaul of the Administrative Procedure Act. It would create dozens of new analytical and procedural requirements that all agencies must satisfy before issuing protective safeguards. These burdensome, one-size-fits-all requirements would not improve the quality of agency regulatory decision-making.

The most troubling provisions include:

- **Adversarial hearing procedures for certain “major” rules and all “high-impact” rules.** The public would be hard-pressed to participate in such formal proceedings, which would involve legal counsel to identify witnesses and conduct cross examination.
- **A new requirement for “major” and “high impact” rules requiring calculations of the “indirect” effects a rule might have on the nation’s economy.** This expansion of cost-benefit calculations to include far-fetched and speculative effects will result in the production of lengthy documents that few will read and even fewer will understand.
- **A new requirement that agencies choose the most “cost-effective” alternative when issuing a final “major” or “high-impact” rule.** Even though this requirement would serve as the linchpin for most rulemakings, remarkably, the Senate Regulatory Accountability Act does not define what cost-effective means. In reality, agencies already face enormous pressure to choose the least expensive of equally effective remedies. In practice, this requirement would likely result in agencies inappropriately diminishing their definition of what qualifies as “effective” so they can choose industry’s preferred alternative, with the result that health, safety, and the environment receive sub-par protection.
- **Burdensome new analytical and procedural requirements for “major” guidance documents.** Agencies routinely issue informal opinions to help businesses understand how to comply with regulatory requirements. These communications are critical because they create the certainty that regulated parties typically crave. For the first time, the Senate Regulatory Accountability Act would require that agencies analyze the desirability of such guidance during a process that will be expensive and time-consuming, defeating the goal of achieving a streamlined, nimble regulatory process.
- **Overemphasis on costs and under-emphasis of benefits.** Many of the new analytical procedural requirements are one-sided in nature in that they privilege

considerations of costs on regulated industries in agency decision-making, providing well-resourced corporate interests with even more opportunities to seek changes that would weaken the safeguards that rules provide.

- **More authority for the White House “regulatory czar.”** The Administrator for the Office of Information and Regulatory Affairs (OIRA) would receive significant new authorities that would enable it to interfere in individual agency rulemakings, especially at the behest of politically powerful corporate interests.
- **Restrictions on the use of scientific research.** The legislation would restrict agencies to the use of the “best” science, allowing endless disputes about what is “good” and what is “bad” science, in stark contrast to the “weight of all evidence” approach traditionally taken by scientific advisors on policy.
- **Transfer of power from agency experts to the judiciary.** For the last three decades, the courts have generally deferred to agency decisions that require sophisticated technical and scientific analysis. The legislation would empower judges to interfere in such matters despite their lack of relevant expertise.
- **Inadequate savings clause.** The Senate Regulatory Accountability Act includes a “savings clause” that the sponsors claim will preserve the substantive provisions of popular statutes like the Clean Air and Clean Water Acts; the Food, Drug, and Cosmetics Act; and the Food Safety Modernization Act. But the bill’s various analytical and procedural requirements will in many cases still effectively function as “supermandates” that override existing laws by requiring agencies to prioritize industry profits over protection of public health, safety, the environment, and financial security.

A full analysis of the Senate Regulatory Accountability Act is available at www.progressivereform.org/articles/RAA-S951_2017_Analysis_Full.pdf.

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