Testimony of

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On Behalf of the
National Association of Home Builders

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Hearing on H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015"; and, H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015"

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Chairman Marino, Ranking Member Johnson, and members of the Committee, I am pleased to appear before you today on behalf of the National Association of Home Builders (NAHB) on H.R. 3438, the *Require Evaluation before Implementing Executive Wishlists Act of 2015*, and H.R. 2631, the *Regulatory Predictability for Business Growth Act of 2015*, both of which would help repair our broken federal regulatory rulemaking system. My name is Ed Brady, and I am a home builder from Bloomington, Illinois, and NAHB's 2015 First Vice Chairman of the Board. We appreciate the invitation to appear before the committee on this important issue.

NAHB represents over 140,000 members involved in single-family and multifamily building and remodeling, as well as other aspects of residential and light commercial construction. Each year, NAHB's builder members construct approximately 80 percent of all new housing in America. To do so, they must navigate an ever-growing and increasingly complex thicket of government regulations. The total of regulations imposed by government at all levels account for 25 percent of the final price of a new single-family home.[1] This is particularly noteworthy in an industry with thin margins and acute consumer sensitivity to price fluctuation.

Administrative Procedures Act

Congress enacted the Administrative Procedures Act (APA) in 1946 to establish a set of rules to restrain and govern the action of America's unelected rule makers. According to the Attorney General's Manual on the Administrative Procedures Act, "the basic purpose of the APA is to: 1) require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3); 2) provide for public participation in the rule making process (sec. 4); 3) prescribe uniform standards for the conduct of formal rule making (sec. 4 (b)) and adjudicatory proceedings (sec. 5), i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8); and, 4) restate the law of judicial review (sec. 10)."[2]

Unfortunately, regulatory rulemaking agencies under both Republican and Democratic administrations have increasingly sought to diminish public participation in rulemaking. Coupled with a lack of meaningful judicial review of agency actions, this has rendered our rulemaking system broken and not at all in line with the APA.

The bills we are here to discuss today represent significant progress toward restoring the public participation Congress intended and provide an adequate judicial check on unrestrained rulemaking agencies.

Judicial Review – H.R. 3834

H.R. 3438, the *Require Evaluation before Implementing Executive Wishlists Act of 2015,* also known as the REVIEW Act*,* provides for a stay of enforcement pending judicial review for high-cost rules. NAHB believes that judicial review helps ensure agency actions are both consistent with the APA and its

[1] http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311

[2] Clark, Tom C., *Attorney General's Manual on the Administrative Procedure Act,* United States Department of Justice, 9

underlying statute. Postponing implementation of high-cost rules pending judicial review is a fair and balanced approach.

The business community has long advocated for "certainty" in policy making, including in the regulatory process. Nothing is more uncertain than a judicial review outcome. Yet a business must make investments to comply with a costly, new regulation as soon as the rulemaking process is finalized Even if the courts ultimately throw out a flawed rule, the damage has already been done. Small businesses like mine cannot afford to comply with all the rules that are eventually overturned.

While courts issue preliminary injunctions when a rule faces legal review, these injunctions are unusual and extremely difficult for businesses to obtain. Courts require businesses to show that the regulation would impose "irreparable harm," but generally do not include monetary costs associated with compliance as meeting that standard — even though small businesses have no realistic means of seeking repair from the compliance costs for a rule later thrown out by the courts.

NAHB believes that current case law defers too much to regulatory rulemaking agencies. Without an appropriate check from the judicial branch, rulemaking agencies have demonstrated little concern for the economic and compliance burdens placed on small businesses. Enhanced judicial review of certain agency actions would help ensure rulemaking agencies are complying with the spirit and letter of the APA.

There are currently a number of regulations that are — or will be — before the courts, including a new ozone standard. Home builders will have to comply with these rules immediately, even if the courts subsequently reverse them.

EPA's New Ozone Standards

On October 1, 2015, the EPA strengthened the National Ambient Air Quality Standards (NAAQS) for ground-level ozone to 70 parts per billion (ppb). The EPA-instituted changes may have a significant and unambiguously negative effect on small home builders, and will cost the U.S. economy more than a billion dollars.

NAHB is concerned that this change will negatively impact home builders and developers. EPA's revised standard will greatly increase the number of impacted areas throughout the country, and the additional rules and regulations that state and local governments will be required to adopt will have a direct, negative effect on NAHB members and the overall housing market. Because of the impacts that will result from any change in the standard, NAHB encouraged EPA to retain the current 75 ppb standard.

The revised ozone NAAQS will subject large segments of the home building industry to new regulations as all states with non-attainment designations develop required State Implementation Plans (SIPs). For states that have never had to contend with non-attainment designations, there will be fewer traditional industrial sectors (i.e., electric power plants or factories) upon which to rely for emissions reductions. Similarly, in areas previously designated by EPA as non-attainment, the emissions reductions attributable to traditional industrial sectors may have already been counted toward compliance with

earlier versions of the ozone NAAQS standard. In both scenarios, states will increasingly look toward non-traditional sectors, including residential land development and construction activities, to achieve EPA's more stringent ozone air quality standards.

Land use decisions are complex and highly localized – thus the long-held tradition in American governance that these decisions are almost exclusively the domain of local authorities.[3] The following examples demonstrate situations where the Clean Air Act (CAA) spurred actions that have adversely impacted the development industry and, in turn, the availability of affordable housing. The revised NAAQS will result in an increase in the number of builders and developers facing the prospect of having to comply with an assortment of new or expanded regulations that limit or effectively dictate both where and how to build.

Daytime Construction Restrictions

The Texas Natural Resources Conservation Commission (TNRCC) proposed the Construction Equipment Operating Limitations rule, which would have banned the daytime use of all diesel construction equipment 50hp or greater during the ozone season (defined as April to October).[4] Such a ban would have had an economic impact as high as $50-$70 million annually in the Dallas/Fort Worth metropolitan area and another $100-$135 million annually in the Houston/Galveston metropolitan areas. The ultimate environmental benefit of TNRCC's proposal was extremely questionable because it would have only delayed the NOx emissions rather than preventing them altogether.

While this proposal was ultimately withdrawn, it is important to note that proposed restrictions on construction activities are likely to be tied to the ozone monitoring season. As a result, any extension of the monitoring season will only magnify the fiscal impact of potential restrictions.

Second, nighttime construction, especially in residential areas, is prohibited in most areas by municipal ordinances. For example, in Seattle, most construction can only occur in residential areas between 7:00 am and 7:00 pm on weekdays and between 9:00 am and 7:00 pm on weekends. Construction in all other areas cannot occur after 10:00 pm.[5] Similarly, in Maricopa County, Arizona, construction in residential areas can take place between 5:00 am or 6:00 am (depending on the time of year) and 7:00 pm. In non-residential areas, construction must end at 10:00 pm.[6] Other municipalities establish decibel limits that effectively preclude nighttime construction.[7] Under the revised ozone NAAQS, jurisdictions with few options for compliance may consider daytime construction moratoria, which coupled with the

[3] *See Solid Waste Agency of Northern Cook County v. Army Corps of Engineers,* 531 U.S. 159, 174 (2001)(the government's action "would result in a significant impingement of the States' traditional and primary power over land and water use."); *see also Rapanos v. United States,* 547 U.S. 715, 738 (2006)("Regulation of land use…is a quintessential state and local power.").

[4] TNRCC Chapter 14, *proposed*, Control of Air Pollution from Motor Vehicles Rule Log Number 2001-025a-114-AI

[5] Seattle, Wash, Mun. Code § 25.08.425 (2009).

[6] Maricopa Cnty., Ariz., Hours of Construction Ordinance §102 (2004).

[7] *See., e.g.,* D.C. Mun. Regs., tit. 20, §2802.2 (1977)(requiring construction activities occurring between 7:00 pm and 7:00 am to adhere to the maximum noise levels prescribed for all activities occurring during that time.

prevalence of noise ordinances, will make it increasingly difficult to build a home during the summer months — when construction typically takes place.

Impact Fee

In California, the San Joaquin Valley local air quality district adopted an indirect source rule that imposes an impact fee on developers and builders of up to $1,772 per home.[8] The air quality district based this figure on the projected air pollution generated by diesel construction equipment and the presumed transportation-related air pollution generated by future homeowners while commuting between employment centers and these housing developments.[9]

States desperate for emissions reductions and revenue generation may seize these types of programs without considering the ancillary adverse impacts, such as a reduction in affordable housing.

AIR v. EPA

A recent Ninth Circuit decision also demonstrates a way in which the home building industry could be adversely impacted by a more stringent ozone NAAQS. In 2012, the Ninth Circuit ruled in Association of Irritated Residents v. EPA that reductions in vehicle miles traveled (VMTs) cannot be calculated by using aggregate emissions reductions resulting from more efficient vehicles.[10] For areas designated as severe non-attainment, the CAA requires states to adopt transportation control measures to offset an increase in VMTs and reduce motor vehicle emissions.[11] Thus, jurisdictions designated as severe non-attainment areas that are located within the Ninth Circuit can no longer use aggregate emissions reductions to fully satisfy CAA section 176.52. It remains to be seen whether other circuits will apply this reasoning once the more stringent NAAQS requirements are realized.

NAHB is concerned that a more stringent NAAQS, coupled with decisions like Association of Irritated Residents, may force jurisdictions into land use decisions that are incompatible with local jurisdictions and detrimental to the housing industry. H.R. 3438 would subject these substantially reduced standards to judicial review and protect small businesses from the excessive expense and potential tumult in the event the new standards are eventually overturned.

Department of Labor Overtime Regulation

NAHB has also been greatly concerned about the significant changes the U.S. Department of Labor (DOL) has made in its proposal to amend the overtime requirements under the Fair Labor Standards Act's (FLSA) administrative, executive, professional, and outside sales exemption (i.e. "the white collar exemption"). The proposal raises the exemption's salary threshold from $455 per week to $970 per week, which represents an unprecedented increase of over 102 percent. NAHB is concerned that such a

[8] The fee covers developments with 50 or more housing units.
[9] District Rule 9510, Indirect Source Rule, San Joaquin Valley Air Pollution Control District, Adopted December 15, 2005.
[10] *Association of Irritated Residents v. U.S.E.P.A,* 686 F.3d 668, 678-681 (9th Cir. 2012).
[11] 42 U.S.C. § 7511a(d).

sudden and dramatic change will reduce job advancement opportunities and employment flexibility for full-time construction supervisors, while leading to construction delays, increased costs, and less affordable housing.

DOL estimates that 4.6 million currently exempt workers would become entitled to overtime pay in the first year the proposal takes effect. According to DOL, the average annualized direct employer costs to implement the rule would be between $239.6 million and $255.3 million per year. In addition to the direct costs, transferred income from employers to employees would be between $1.18 and $1.27 billion. Each affected business would incur $100 to $600 in direct costs and an additional $320 to $2,700 in payroll costs.

NAHB analysis shows that approximately 116,000 construction supervisors would be affected by the proposal.[12] More than 31 percent of total employment for this occupation class sector would no longer be eligible for the exemption. However, a separate membership survey shows that the proposal is unlikely to result in an increase in workers' take home pay. The survey data reveals that employers would take steps to restructure their workforce or scale back on pay or benefits to avoid the overtime requirements. In the same survey, 44 percent of builders stated that the proposal will result in higher home prices.

Although DOL contends that this rule will ensure that the FLSA's overtime protections are appropriately applied, the agency has taken an overly broad approach that will cause problems and unintended consequences that have not been explored. NAHB strongly opposes the overtime proposal. H.R. 3438 would ensure the financial impact of this rule on home builders and other small businesses is properly mitigated.

Increased Public Participation in Rulemaking – H.R. 2631

NAHB believes that increased public participation in the rulemaking process will ultimately aid rulemaking agencies in issuing better regulations that consider the full costs of compliance for home builders while providing for improved health and safety for workers and consumers alike.

H.R. 2631, the *Regulatory Predictability for Business Growth Act of 2015*, would ensure rulemaking agencies appropriately solicit public comment for significant changes to existing, longstanding interpretive rules in accordance with congressional intentions when it passed the APA in 1946. Increasingly, regulatory rulemaking agencies have utilized changes to interpretive rules as a loophole to avoid public notice of proposed rulemaking and comment requirements. This has silenced the regulated community and ultimately produced lower-quality regulations.

What follows are examples in which regulatory rulemaking agencies avoided public notice and comment requirements by issuing interpretive rules in lieu of rulemaking.

[12] *See* attachment, "Occupation of First-Line Supervisors of Construction Trades and Extraction Workers," National Association of Home Builders, Housing Economics and Policy Group (July 2015).

EPA and the Clean Water Act

An excellent example of the need for H.R. 2631 is the lack of clarity with respect to the scope of waters protected under the Clean Water Act (CWA). Since its inception, the CWA has helped to make significant strides in improving the quality of our water resources and, ultimately, the quality of our lives. Under the CWA, home builders must obtain and comply with section 402 storm water and 404 wetlands permits to complete their projects. A regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources is most important to these compliance efforts. Unfortunately, such a permitting program is becoming more and more elusive.

Prior to the regulation that was finalized earlier this year,[13] the most recent CWA regulation addressing the scope of jurisdiction was finalized in 1986. The use of interpretive guidance over a 29-year span is particularly troublesome due to a number of Supreme Court decisions that subsequently limited the CWA's reach. Rather than working with the business community and following the congressionally mandated rulemaking process to translate the Court's directives into a workable framework, the EPA and the Army Corps of Engineers (the agencies) issued interpretive guidance documents that have only created more confusion and disarray.

Supreme Court decisions lead to interpretive guidance

The Supreme Court offered two major decisions that have changed the scope of CWA jurisdiction. In 2001, the Court decided *Solid Waste Agency of Northern Cook County v. Corps (SWANCC)*.[14] In *SWANCC*, the Court addressed the reach of the term "waters of the United States" and held that isolated, intrastate, non-navigable waters could not be regulated under the CWA based solely on the presence of migratory birds. In response to *SWANCC*, and in an attempt to clarify and standardize the way that jurisdictional decisions were made, the agencies issued guidance in 2003 as part of an Advanced Notice of Proposed Rulemaking on the regulatory definition of "waters of the U.S." Unfortunately, the Administration ultimately decided not to move forward with the rulemaking process but the guidance remained in force.

Due to increased confusion over jurisdictional authority, in 2006 the Supreme Court again considered the definition of "waters of the U.S." in *Rapanos v. United States.*[15] *Rapanos* concerned two consolidated cases: *Rapanos v. United States*,[16] and *Carabell v. U.S. Army Corps of Engineers*[17] (collectively *Rapanos*). Both cases followed the same, familiar fact-pattern: wetlands miles away from traditional navigable waters that drained through multiple ditches, culverts and creeks, which eventually flowed to traditional navigable waters. In both matters, the Sixth Circuit upheld the Corps'

[13] The new regulatory definition of "Waters of the United States" became effective on August 28, 2015. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay against the enforcement of the new rule. The legal case is ongoing.
[14] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.,* 531 U.S. 159 (2001).
[15] *Rapanos v.* United States, 126 S.Ct. 2208 (2006).
[16] *Rapanos v.* United States, 376 F.3d 704 (6th Cir. 2004).
[17] *Carabell v.* U.S. Army Corps of Eng'rs.,391 F.3d 704 (6th Cir. 2004).

determinations that wetlands, connected through an attenuated aquatic chain to navigable-in-fact bodies, were jurisdictional.

The Court issued a 4-1-4 plurality opinion. Five of the *Rapanos* Justices concurred in the judgment that the Corps' assertion of jurisdiction under the hydrologic connection theory was impermissible, and they vacated the Sixth Circuit's decisions affirming the agency's actions.[18] However, the justices could not form a majority as to the proper test for CWA jurisdiction.

Some have maligned *Rapanos* because the justices failed to reach a majority opinion. In an effort to interpret the Court's decision, the agencies initially issued a series of memorandums attempting to spell out which classes of water bodies are subject to CWA jurisdiction given the court decision in the *Rapanos* case. In June 2007, a full year after the *Rapanos* decision, the agencies finally issued "Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*." This guidance had the same effect and force as a regulation, but never went through the formal rulemaking process.

NAHB acknowledges that the Court's rulings imposed a difficult and challenging burden on the agencies. Drafting a regulation and moving it through the APA process to define what waters are federally jurisdictional is daunting. Even the Supreme Court failed to figure it out. But the path forward should not rely on bureaucrats developing regulation disguised as guidance, with no oversight, industry input, nor consideration of the cost and benefits. The solution is to work with all stakeholders and develop a workable regulatory framework. But if agencies are going to try to "backdoor" regulations by concealing them as guidance, Congress must step in to restore the integrity of the rulemaking process. H.R. 2631 would do exactly that.

Agency Rulemaking Needed to Clarify the CWA's Jurisdictional Scope

The agencies' initial reaction to *Rapanos* made a difficult regulatory program even more complicated. Prior to the issuance of the guidance, NAHB frequently heard from its members that field operations had come to a grinding halt and that the Corps' personnel were not making jurisdictional determinations because the law was unclear. It was commonly reported that the Corps' districts had not made any decisions on "navigable waters" jurisdiction between the time when *Rapanos* was handed down in June 2006 and the guidance was issued in June 2007.

The agencies decision to use guidance is troubling. It goes beyond reason why the agencies did not opt to follow an open and transparent rulemaking process. The guidance never received any APA protections, such as a cost-benefit analysis or opportunity for public comment. The agencies only requested public comments on the guidance implementation. The guidance provided extensive policy changes without the legally required protections. As a result, the guidance appears to be more of a mandate than a clarification, more of an expectation than an option, thus more of a regulation than mere advice.

[18] *Rapanos,* 126 S.Ct. at 2235 (Scalia, J., plurality); Id. at .2252 (Kennedy, J., concurrence).

The substance of the guidance also is a cause for concern. While the guidance provides some criteria upon which decisions can be made, it lacks the clarity and consistency needed for a nationally applicable program. One of its primary goals is to "ensure nationwide consistency, reliability, and predictability in our administration of the statute."[19] Implementation was inconsistent within and across the agencies, resulting arbitrary requirements that differed across the country. Led by the lack of clarity, the failure to provide a set of defensible definitions, and the absence of a reasonable decision-making process, the guidance was a regulatory nightmare from the start. Most troubling is that any remedy for judicial review of the guidance is uncertain, and would require litigation over the very issue of whether the guidance is "final agency action" subject to court scrutiny.

The "Waters of the United States" Rule Is Not the Answer

In the wake of *Rapanos*, there now is even greater need for regulations to provide a comprehensive set of rules regarding which water bodies the agencies will regulate as waters of the United States. After hearing the pleas from the regulated community, on April 21, 2014, the agencies proposed a rule redefining the scope of waters protected under the CWA. Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features that are already regulated at the state level. While we applaud the agencies' desire to provide a rulemaking, this rule goes well beyond the bounds of federal regulatory authority under the CWA.

<u>DOL Employee Misclassification Guidance</u>

To combat misclassification of employees as independent contractors, U.S. Department of Labor (DOL) Wage and Hour Division Administrator David Weil on July 15, 2015 issued an administrator's interpretation regarding application of the standards for who is an employee under the Fair Labor Standards Act (FLSA). The guidance purported to provide meaningful and comprehensive guidance to all employers and employees regarding its interpretation of the standards set forth in the FLSA. The guidance, however, represents a significant shift in the focus on the standards traditionally relied upon by employers, and especially home builders.

In the administrative interpretation, DOL rejects the common law control test and affirms that six economic realities factors guide the proper determination of whether a worker is truly an independent contractor rather than an employee. The six factors in the "economic realities" test include:

1. Whether the work performed is an integral part of the company's business;
2. Whether the worker's managerial skills affect the company's opportunity for profit or loss;
3. Whether the worker is retained on a permanent or indefinite basis;
4. Whether the worker's investment is relatively minor as compared to the company's investment;
5. Whether the worker exercises business skills, judgment and initiative in the work performed; and,

[19] *Rapanos* Guidance, Appendix A, p. 4.

6. Whether the worker has control over meaningful aspects of the work performed.

Key to the administrator's interpretation is that no single factor, including the nature and degree of the company's control, is determinative. Instead, the interpretation concludes that each factor should be used as a guide to answer the ultimate question of economic dependence or independence.

While Administrator Weil argues there has not been a formal change in the legal standard, the interpretation of the independent contractor classification in the eyes of DOL appears to be substantially different. Home builders' lack of direct control over subcontractors historically placed home builders on solid footing with regard to employee classification; however, the new emphasis on economic dependence represents a significant shift.

NAHB strongly believes the Wage and Hour Division wrongfully issued guidance in lieu of a formal rulemaking, thus depriving the industry an opportunity to publicly comment. NAHB is equally concerned with the lack of employer compliance assistance provided by DOL. In 2009, the Wage and Hour Division ceased issuing opinion letters at the beginning of President Obama's administration. These opinion letters provided clarity to employers seeking counsel from the Administration on complicated workforce issues, like employee classification. While Administrator Weil claims the July 15th guidance will provide meaningful direction to all employers, the lack of individual compliance assistance in the form of opinion letters coupled with the new focus on economic dependence will leave employers ill-informed and unprepared for this aggressive enforcement environment.

<u>Floodplain Management (FEMA)</u>

New national policy on floodplain management is currently being imposed by the Administration without being subject to a formal rulemaking process or obtaining any meaningful public input. This will greatly affect how and where new development, redevelopment and construction may occur.

On January 30, 2015, President Obama signed Executive Order (EO) 13690 creating a Federal Flood Risk Management Standard (FFRMS) for federally funded projects (including private projects with federal grants, loans or financing) that will expand the definition of "floodplain" well beyond the long-accepted 100-year floodplain. Since 1977, the term "floodplain" has meant that area subject to a 1%-or-greater chance of flooding in any given year – the 100-year storm event. Now, federal agencies will have three options for establishing the new FFRMS elevation and flood hazard area:

- Climate-informed Science Approach – Using the best-available data and methods that integrate current and future changes in flooding.
- Freeboard Value Approach – Adding an additional two or three feet of freeboard to the base flood elevation of the 100-year flood.
- 500-year Elevation Approach – The area subject to flooding by the 0.2%-annual-chance flood.

FEMA issued implementing guidelines to instruct agencies on how to interpret the EO. While FEMA allowed for a comment period, the new interpretation of floodplain was predetermined and not subject to public comment. Therefore, no matter the type or weight of the evidence provided by the public, this

input was not incorporated into the revision of the longstanding definition a floodplain. NAHB believes that this is not the public process contemplated by the APA.

The new expanded floodplain will be subject to additional requirements, including floodplain avoidance, mitigation, and increased elevation and resilience standards. Project time requirements and costs will undoubtedly increase. These delays and increased construction costs pose a serious threat to housing affordability in communities along the nation's rivers and coasts.

Conclusion

In crafting the APA, Congress clearly intended to let regulated communities provide meaningful input when regulations are developed, and to allow judicial review to serve as a check on unelected bureaucrats. Unfortunately, all too often federal regulatory agencies view APA compliance as either a technicality of the federal rulemaking process or, worse yet, unnecessary. And existing case law has rendered the judicial review requirements of the APA ineffective.

The legislation discussed here today would codify and help to restore the intent of Congress when it passed the Administrative Procedures Act in 1946. In so doing, the legislation would reduce the burdens that poorly designed regulations place on small businesses while providing for more effective health and safety measures for workers and consumers.

Thank you again for the opportunity to testify today.