American Forest & Paper Association

AMERICAN WOOD COUNCIL

Statement of Paul R. Noe
Vice President, Public Policy
American Forest & Paper Association
American Wood Council

Before

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"Shining Light on the Federal Regulatory Process"
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Chairman Gowdy, Ranking Member Cummings, and Members of the Committee, my name is Paul Noe, and I am the Vice President for Public Policy for the American Forest & Paper Association and the American Wood Council. Thank you for the honor to testify before you on regulatory transparency. This is a fundamentally important issue that goes to the heart of our governmental system -- due process, fundamental fairness and accountability, and we applaud the Committee for doing the hard work of addressing it.

I have been involved in regulatory policy in Washington for over 32 years, including the privilege of having served as counsel to Chairmen Fred Thompson, Ted Stevens and Bill Roth on the Senate Governmental Affairs Committee, and as a drafter of agency good guidance practices when I served as Counselor to Administrator John Graham at the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB). My experience working for the heavily regulated forest products industry for the last nine years further reinforces my appreciation of the importance of transparency and accountability in our regulatory process. Today, I would like to focus on a handful of specific agency problems and offer some solutions regarding the need for: (1) better compliance with good guidance practices; (2) stronger compliance with presidential orders on benefit-cost analysis, such as Executive Order 12866, by interpreting regulatory statutes to allow for balancing the benefits and costs of regulations to maximize societal well-being; (3) greater transparency about the key information supporting regulatory decisions; and (4) better compliance with the Congressional Review Act.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are

committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products. AF&PA and AWC work together to advance policies of issues of mutual concern, including regulatory reform.

II. Curtail the Evasion of Presidential Orders on Benefit-Cost Analysis by Interpreting Regulatory Statutes to Allow for Full Benefit-Cost Balancing.

A. Background

While efforts to promote the use of benefit-cost analysis[30] have been longstanding, over time a remarkable consensus has emerged. In the Executive Branch, there is a striking similarity among the principles for benefit-cost balancing and centralized review of regulation required by every president for over 37 years, from Ronald Reagan to Donald Trump. The Judicial Branch, and the Supreme Court in particular, has clarified that benefit-cost analysis can have a central role in a host of regulatory programs, and if agencies ignore this invitation, they could jeopardize the very regulations they want to promote. In Congress, there is a renewed interest in requiring benefit-cost analysis by statute that is greater than any time in the past 20 years.

On their face, probably the greatest consensus on the "cost-benefit state"[31] is reflected in the Executive orders governing regulatory analysis and review. Going back to 1981, President Reagan's Executive Order 12291 established general requirements that, "to the extent permitted by law:

- "[r]egulatory action shall not be undertaken unless the ***potential benefits to society for the regulation outweigh the potential costs to society***," and
- "[r]egulatory objectives shall be chosen to ***maximize the net benefits to society***" (Emphasis added).

Similarly, President Clinton's E.O. 12866, issued in 1993 and still in effect, requires that agencies, to the extent permitted by law:

- "propose or adopt a regulation only upon a reasoned determination that the ***benefits of the intended regulation justify its costs***," and
- "in choosing among alternative regulatory approaches, . . . select those approaches that ***maximize net benefits*** (including potential economic, environmental, public health and safety, and other advantages; distributive

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[30] Benefit-cost analysis (BCA) is "[a] systematic quantitative method of assessing the desirability of government projects or policies when it is important to take a long view of possible side-effects." OMB Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs," Appendix A (1992). BCA involves calculating and comparing the benefits and costs of regulatory options, including an account of foregone alternatives and the status quo, with the goal of identifying the option that would maximize societal welfare. As Justice Breyer explained, "every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). The term "benefit-cost analysis" can be used interchangeably with "cost-benefit analysis."

[31] I adopt the definition of the "cost-benefit state" advanced by President Obama's former OIRA Administrator, Cass Sunstein – "that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation." Cass R. Sunstein, The Cost-Benefit State: The Future of Regulatory Protection, Chicago, IL, American Bar Association, Section of Administrative Law and Regulatory Practice (2002).

effects; and equity) unless a statute requires another regulatory approach" (Emphasis added).

President Obama's E.O. 13563 (2011) reaffirms the Clinton order and reiterates virtually verbatim the two provisions listed above, as well as others. E.O. 13563 also more strongly embraces quantitative benefit-cost balancing than the Clinton order by elevating both provisions to general principles" that the agencies "must" execute and by adding a new principle promoting quantitative benefit-cost analysis and risk assessment:

- "In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

Thus, there has been strong bipartisan consensus that benefit-cost balancing should play a central role in the question of whether and how to regulate. As the Clinton Administration explained in OMB's first Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997):

> "[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.
>
> The only way we know how to distinguish between regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits." (p. 10)

While this remarkable political consensus is laudatory, insufficient progress has been made over the last 37 years. There are many reasons why presidential orders directing agencies to implement regulatory statutes through benefit-cost balancing have been far less effective than intended. This includes the severe and chronic under-funding of OIRA (which now has far more responsibilities and less than half the staff it had under President Reagan);[32] institutional limitations of the agencies and OMB; and political

[32] When OIRA was created in fiscal year 1981, it had a full-time equivalent (FTE) ceiling of about 97 staff; by fiscal year (FY) 2016, OIRA had about 47 staff. See Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, "Regulators' Budget from Eisenhower to Obama: An Analysis of the U.S. Budget

dysfunctions, including interest group dynamics and Presidential electoral politics.[33] But one of the greatest yet most readily addressable impediments to the cost-benefit state is that ***the regulatory agencies have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing and to maximize societal well-being, as required by the President.***[34]

Why? Agencies have interpreted their regulatory statutes in ways that circumvented the presidential orders and the requirement to maximize net benefits to society, sometimes relying on selected pieces of legislative history to limit their interpretations of the statutory text. Of course, none of that legislative history met the Bicameralism and Presentment requirements for legislation and thus did not require or authorize non-compliance with the presidential benefit-cost orders.

While only a small minority of statutes explicitly ***mandate*** benefit analysis-cost,[35] and a very small minority ***prohibit*** it,[36] the challenge has been what agencies should do when implementing the large majority of regulatory statutes that are ***silent or ambiguous*** on cost-benefit balancing. One problem that may have contributed to agency evasion of the presidential orders is that, in earlier Supreme Court case law from 1981 and 2001, there was some misleading dicta that some claimed established a "presumption" against

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for Fiscal Years 1960 through 2017" (May 2016), at p. 20 (Table A-3). In contrast, the agency staff dedicated to writing, administering and enforcing regulations rose from 146,000 in FY1980 to over 278,00 in FY2016. As OIRA's budget was reduced from about $14 million in 1981 to $8 million in FY2016 in constant 2009 dollars, the agencies' budgets increased from about $16.4 billion in FY1980 to over $61 billion in FY2016 in constant 2009 dollars. At the same time, OIRA's statutory responsibilities have grown through a wide variety of requirements, including: the Small Business Regulatory Enforcement Fairness Act, the E-Government Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Information Quality Act, the Regulatory Right-to-Know Act, the Small Business Paperwork Relief Act, and a variety of appropriations riders. See Comment Letter on Federal Regulatory Review from Paul R. Noe, American Forest & Paper Association, to OMB's Office of Information and Regulatory Affairs (March 16, 2009), citing Comment Letter on Federal Regulatory Review from Rosario Palmieri, National Association of Manufacturers, to OMB's Office of Information and Regulatory Affairs (March 16, 2009).

[33] See, e.g., John D. Graham and Paul R. Noe, "Beyond Process Excellence: Enhancing Societal Well-Being," in Achieving Regulatory Excellence, Brookings Institution Press (2016) (discussing the institutional impediments in the Executive Branch to ensuring that regulations do more good than harm -- such as bureaucratic turf battles among the agencies, failure to utilize both internal and external expertise, bias, the mismatch between the vast volume of regulation and OIRA's shrinking resources, the large volume of "stealth regulation" such as guidance not submitted for OIRA review, lack of support for OIRA by varying administrations or leaders, and lack of judicial review for benefit-cost balancing – as well as the political impediments in the Executive Branch and Congress to ensuring that regulations do more good than harm).

[34] John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016). https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/

[35] See Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (providing for EPA to mitigate unreasonable environmental effects).

[36] See Whitman v. American Trucking Associations, 531 U.S. 457 (2001) (Section 109 of Clean Air Act does not grant EPA the authority to consider cost in setting National Ambient Air Quality Standards).

benefit-cost balancing unless it was clearly authorized in the regulatory statute.[37] But more recently, the Supreme Court has made quite clear that agencies have broad discretion to implement their regulatory statutes through benefit-cost balancing.[38]

Shortly after President Reagan's groundbreaking Executive Order 12291 imposed a cost-benefit test on regulations -- and three years before the Chevron USA v. Natural Resources Defense Council (1984)[39] decision deferring to EPA's interpretation of an ambiguous statute -- the Supreme Court held, in American Textile Manufacturers Institute v. Donovan (1981),[40] that the Occupational Safety and Health Administration was not ***required*** to engage in cost-benefit analysis in setting "feasible" public health and safety standards. But the majority also asserted in dicta that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."[41]

Twenty years later, in Whitman v. American Trucking Associations (2001), an unanimous Supreme Court found it "implausible" that the modest standard to set national ambient air quality standards at a level "requisite to protect public health with an adequate margin of safety" gave the EPA the discretion to determine whether costs should moderate the health standards. Writing for the Court, Justice Scalia stated that, to prevail in their quest to have the EPA take costs into account, the industry respondents would have to show a "textual commitment" of authority for the EPA to consider costs in standard setting, and "*that textual commitment must be a clear one.*" Yet, in a prescient concurring opinion, Justice Stephen Breyer warned that the Court should resist

> ***"a presumption, such as the Court's presumption that any authority the [Clean Air] Act grants the EPA to consider costs must flow from a "textual commitment" that is "clear."*** ... In order better to achieve regulatory goals- for example, to allocate resources so that they save more lives or produce a cleaner environment- regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public hard. Hence, I believe that, other things being equal, ***we should read silences or ambiguities in the language***

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[37] See, e.g., Jonathan Cannon, "The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.," 34 Harv. Envir. L. Rev. 425 (2010); Amy Sinden, "Cass Sunstein's Cost-Benefit Lite: Economics for Liberals," 29 Colum. J. Envtl. L. 191, 240 (2004).

[38] E.g., compare John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016). https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/ with Amy Sinden, "Supreme Remains Skeptical of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 26, 2016) http://www.regblog.org/2016/09/26/sinden-cost-benefit-state/; and see John D. Graham and Paul R. Noe, "A Reply to Amy Sinden's Critique of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 27, 2016) http://www.regblog.org/2016/09/27/graham-noe-reply-critique-cost-benefit-state.

[39] 467 U.S. 837 (1984).

[40] 452 U.S. 490 (1981).

[41] 452 U.S. at 509.

of regulatory statuses as permitting, not forbidding, this type of rational regulation."[42] (Emphasis added).

Finally, in Entergy Corp. v. Riverkeeper, Inc. (2009), the Supreme Court disposed of the dicta relating to a purported "presumption" against cost-benefit balancing.[43] Riverkeeper involved a challenge to an EPA regulation under section 316(b) of the Clean Water Act, which required that the EPA adopt a standard to "reflect the best technology available for minimizing adverse environmental impact." The EPA, with the strong encouragement of the White House Office of Management and Budget (OMB), based its standard on cost-benefit analysis. Although the statutory provision was silent on the use of cost-benefit analysis, the Supreme Court applied Chevron deference in holding that "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden." Aligning the issue of agency authority to use cost-benefit analysis with Chevron, the Court reasoned that "it is eminently reasonable to conclude that" the Clean Water Act's "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." In so doing, the Court disavowed the purported "presumption" against benefit-cost analysis embodied in American Textile and limited American Trucking to "the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." The Court concluded that the Clean Water Act's silence "cannot bear that interpretation."[44]

Riverkeeper raised the ante for agencies that ignore cost-benefit analysis. Although Riverkeeper did not *require* the agency to use cost-benefit analysis, its logical corollary is that an agency must now provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome. Otherwise, the agency's regulation could be vulnerable to an arbitrariness challenge under the Administrative Procedure Act.

That became quite clear in the Supreme Court's decision in Michigan v. EPA (2015),[45] which involved a challenge to the EPA's decision to regulate hazardous air pollutants, such as mercury, from power plants. Section 112(n) of the Clean Air Act authorizes the EPA to regulate hazardous air pollutants from power plants only if it concludes that regulation is "appropriate and necessary." In reaching that conclusion, the EPA had said that cost was irrelevant. The Court held that the EPA strayed beyond the bounds of reasonable interpretation in concluding that cost is not a relevant factor in determining whether to regulate under the "capacious" phrase, "appropriate and necessary."

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[42] 531 U.S. at 490.

[43] 556 U.S. 208 (2009).

[44] 129 S. Ct. at 1508.

[45] 135 S. Ct. 2699 (2015).

Writing for a 5-4 majority in Michigan, Justice Antonin Scalia bluntly stated, "no regulation is 'appropriate' if it does significantly more harm than good." Quoting Justice Breyer's concurring opinion in Riverkeeper, Justice Scalia further reasoned that:

> "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost."[46]

Notably, although the dissenters argued that the EPA could (and did) consider cost at the later stage in developing its regulation, all nine Justices agreed on the principle that, unless Congress states otherwise, "an agency ***must take costs into account*** in some manner before imposing significant regulatory burdens." (Emphasis added).[47]

The wisdom in Justice Breyer's American Trucking concurrence supporting cost-benefit balancing has prevailed. The Supreme Court now defers to agency interpretations of "silences or ambiguities in the language of regulatory statutes as ***permitting, not forbidding***, this type of rational regulation."[48]

B. The Need for Action

The importance of clarifying agency authority to use cost-benefit balancing should not be underestimated. The majority of environmental statutes -- and, to my knowledge, the majority of ***all*** regulatory statutes -- are silent or ambiguous on cost-benefit analysis. And agencies too often interpret such statutes as only allowing limited consideration of costs and benefits.

Within the broad range of relevant ambiguous statutes, three categories merit consideration – statutory provisions that: (1) are silent or ambiguous on the consideration of costs and lack a broad "omnibus factor,"[49] (2) do not explicitly require benefit-cost analysis but authorize consideration of costs and/or contain one or more

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[46] 576 U.S. at ___, Slip Op. at 7-8 (emphasis added).

[47] Under longstanding principles of administrative law, an agency may not lawfully neglect an important aspect of a problem. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Michigan v. EPA made clear that, unless Congress states to the contrary, cost is an important aspect of the problem of whether or not to regulate.

[48] American Trucking, 531 U.S. at 490 (Justice Breyer, concurring) (emphasis added).

[49] The term "omnibus factor" is used to capture broad, open-ended statutory decisional criteria that typically are intended to allow the regulatory agency to consider any factor important for determining the regulatory standard that might not otherwise be captured in the other decisional criteria specified by Congress.

broad omnibus factors, such as anything that the agency head considers "appropriate," "necessary," "relevant," "feasible," "reasonable," "in the public interest," etc., and (3) authorize benefit-cost analysis but are ambiguous on the extent or rigor of the benefit-cost balancing that may be done. (For examples of statutory provisions in each of these categories, see the Appendix attached to this testimony.) I believe that the Supreme Court decisions in Entergy Corp. v. Riverkeeper, Inc. and Michigan v. EPA advance benefit-cost balancing in interpreting all three subcategories of ambiguous statutes.

President Trump should take an historic step to enhance societal well-being by directing agencies, including independent agencies, to reexamine their statutory interpretations in light of Riverkeeper and its progeny and -- unless prohibited by law -- implement those statutes through cost-benefit balancing. As the Supreme Court has concluded, it is "eminently reasonable" to ensure that regulations do more good than harm.[50]

APPENDIX – Categories of Regulatory Statutes

1. Silent or Ambiguous on Costs and Lack an Omnibus Factor		
Statue	**U.S. Code**	**Regulatory Authority**
Clean Water Act	33 USC § 1326(b)	"... reflect the ***best*** technology available for minimizing adverse environmental impact." Entergy v. Riverkeeper: "best" in § 1326(b) can mean most cost-effective; benefit-cost balancing upheld.
Resource Conservation and Recovery Act	42 USC § 6901	"establish such standards . . . as may be ***necessary*** to protect human health and the environment" See MI v. EPA: refusal to consider cost in determining whether Clean Air Act regulation was "appropriate and necessary" was arbitrary and capricious under that "capacious" phrase.
2. Authorize Consideration of Cost and/or Include an Omnibus Factor		
Clean Air Act	42 USC § 7412(n)	determine whether regulation is "***appropriate and necessary***" MI v. EPA: refusal to consider cost was arbitrary and capricious under the "capacious" phrase of § 7412(n), "appropriate and necessary." "No regulation is 'appropriate' if it does significantly more harm than good."
Clean Water Act	33 USC § 1314(b)(2)	use "***best*** technology ***economically achievable***" (BAT). In assessing BAT, "take into account . . . the ***cost*** of achieving such effluent reduction, ***non-water quality environmental impacts (including energy requirements)***, and ***such other factors as the Administrator deems appropriate***."

3. **Clearly Authorizes Benefit-Cost Analysis, But Ambiguous on Extent or Rigor of Benefit-Cost Balancing**		
Energy Policy Conservation Act	42 USC § 6295(o)	Energy conservation standards must be ". . . ***economically justified*** . . . considering . . . (I) the ***economic impact*** . . .; (II) the ***savings*** in operating costs . . . ***compared to any increase in the price of, or in the initial charges for, or maintenance expenses*** . . .; (III) . . . ***savings*** likely to directly result from the imposition of the standard . . . (IV) any ***lessening of the utility or performance*** of the covered products . . . ; (V) the impact of ***any lessening of competition*** . . . ; (VI) the ***need for national energy and water conservation***; and (VII) ***other factors as the Secretary considers relevant***."
Dodd-Frank Act	15 USC § 78c(f)	Whenever SEC is required to consider whether an action is "***necessary and appropriate in the public interest***, the Commission shall also consider, in addition to the protection of investors, whether the action will promote ***efficiency, competition, and capital formation***." Business Roundtable v SEC, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (SEC's "failure to apprise itself – and hence the public and Congress – of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious").