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SUBCOMMITTEE ON ENVIRONMENT

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Thank you, Chairman Shimkus, Vice-Chairman McKinley, Ranking Member Tonko, and distinguished Members of the Subcommittee, for the opportunity to testify today about the importance of both environmental law and a rational regulatory process.

I am Professor of Law at the George Washington University Law School, a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and past-Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of environmental law, energy law, and administrative law, I specialize in the role of these laws in society. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I am a co-author of textbooks on both environmental law and energy law. Early in my career, I practiced environmental engineering; that experience and training inform my assessment of the role of environmental law in bettering our society.

In my testimony today, I will begin with an overview of the immense cost-justified benefits that environmental law has bestowed on our citizens and economy. Indeed, the available data reflect that environmental law and progress have successfully come hand-in-hand for decades. Second, I will turn to another matter related to valuing the benefits of environmental regulation: unwise efforts to tamper with the rationality of the regulatory process. A recent example is the so-called "2-for-1" Executive Order issued January 30, 2017. This Order

undermines agency efforts to ensure that environmental regulations protect public health, safety, and welfare *and* provide continuing cost-justified benefits.

I. Environmental Laws Have Strengthened Our Country

To properly appreciate the extraordinarily beneficial impact of environmental laws, one must appreciate the direness of the time before. The Cuyahoga River was so polluted that it caught fire. Toxic waste leaked into homes and schoolyards in Love Canal. Pollutants traveled far across state lines, damaging everything from drinking water supplies to forests, and causing cancer, heart and lung disease, birth defects, and premature deaths. This was not so long ago, and we can't afford our memories to become short.

Today environmental law safeguards our health and environment—and there is still much to do. But history has another lesson, going to the heart of this hearing: environmental protection is itself an economic good that contributes to a thriving economy.[1]

First, look at our progress over time. Between 1970 and 2011, aggregate emissions of air pollutants dropped 68% while the U.S. Gross Domestic Product (GDP) increased 212%. During that same period, private sector jobs increased by 88%.[2] Our population has increased, we have used more energy, and we have built more infrastructure—all while improving our environment.

Second, consider that rules issued by the Environmental Protection Agency (EPA) undergo a rigorous cost-benefit analysis. EPA is required to follow Office of Management and Budget (OMB) accounting principles and assess both the costs and the benefits of regulations. Many researchers have concluded that these constrained analyses "vastly understate" the benefits of environmental regulations.[3] Thus, OMB-driven cost-benefit analyses should be understood as very conservative because they systematically undervalue things like human life and a clean environment.[4] Even with this caveat, the results are compelling. For example, OMB reported to

Congress that from 2004 through 2014, the economic benefits of all of EPA's major rules exceeded the costs by a ratio of nearly 21 to 1.[5]

Third, consider in more detail just what those conservatively estimated benefits are. The Clean Air Act (CAA), in particular, has had an enormous beneficial impact on our economy. Air pollutants have considerable adverse health and environmental effects: ozone, for instance, is linked to respiratory illnesses, heart attacks, premature death, and negative effects on forests and crop yields.[6] When people are sick, caring for ill loved ones, or dying too early, they cannot work, which is detrimental to the economy. By contrast, environmental protections offer savings:

- OMB reports that the monetized benefits of CAA regulations accounted for 80% of the benefits of all regulations analyzed for its 2015 report to Congress.[7]

- A 2011 peer-reviewed EPA study showed that the benefits of the 1990 CAA Amendments and implementing regulations exceed costs by a factor of more than 30 to 1.[8]

- The 2011 study also revealed that EPA's CAA rules saved over 164,000 lives in 2010, and are projected to save 237,000 lives in 2020.[9]

- These same rules saved 13 million days of lost work and 3.2 million days of missed school in 2010. By 2020, these numbers will increase to 17 million and 5.4 million days, respectively.[10]

- Since EPA began regulating lead as a criteria pollutant under the CAA, the median concentration of lead in the blood of children between 1 and 5 years old has decreased 93% as of 2011-12. Moreover, several studies have documented an association between reducing exposure to lead and a reduction in criminal behavior.[11]

- A study published in the proceedings of the National Academies of Sciences found the cumulative benefits to the economy of CAA air toxics regulations by 2050 to be over $104 billion.[12]

Numerous additional studies reveal that we are improving in our efforts to protect human health and the environment. Just a few of the relevant recent findings include:

- Thanks to agencies' efforts to inform pediatricians about preventing, diagnosing, and treating environmental health illnesses in children, over 700,000 medical care providers have had outreach and training between 1999 and 2014.[13]

- Thanks to EPA, environmental risk assessments geared at children now consider their life stages, enabling a more fine-tuned approach to regulating exposure to carcinogens.[14]

- The climate benefits of programs that have reduced methane emissions from 1993 to 2013 – *prior* to many of the most recent programs—include a cumulative savings of more than 5 times the methane emissions in 2013, for monetized benefits of $255 billion dollars.[15]

- A new comprehensive study has documented "large declines in most pollutants the Clean Water Act targeted" since the Act's enactment.[16] Notably, declines in mercury and pH are also attributable to CAA regulations.[17]

- Air quality for the major criteria pollutants has improved between 1980 and 2015: for example, 8-hour ozone levels have declined 32%, 1-hour nitrogen dioxide levels have declined 59%, and 1-hour sulfur dioxide levels have declined 84%.[18]

Despite these successes, there is much more to do. The crisis in Flint, Michigan demonstrates the importance of ensuring that compliance with our existing regulations must be monitored and enforced. As we continually introduce new compounds into our environment, which find their way into our air, food, soil, and drinking water, we need a robust system of environmental laws, regulations, and enforcement to ensure our safety. And as all of us increasingly experience the tremendous impacts of climate change, we *must* have a foundation of environmental law on which to build our future.

II. The Flaws of Tampering With Rational Regulation: The 2-for-1 Executive Order

As we move forward with strengthening our environmental protections, we must also ensure that our regulatory process is sound. The White House's January 30, 2017 Executive Order on Reducing Regulation and Controlling Regulatory Costs (the so-called "2-for-1 Order") is an example of sloppy regulatory policy that will be harmful to the public, especially with

respect to environmental law. This Order, as interpreted by the Acting Administrator of the Office of Information and Regulatory Affairs (OIRA),[19] provides that executive agencies must rescind 2 rules for every 1 promulgated, such that the net cost of any new rule is zero.[20]

The Order raises numerous concerns, but here I focus the most alarming: the overall impact of this Order is to systematically disfavor the critical environmental, health, and safety protections that we need to ensure a thriving economy. Most stunningly, it appears to direct agencies to count regulatory costs but not benefits.[21] Given that most major federal regulations are cost-justified, it is utterly arbitrary and contrary to law to ignore the beneficial impacts of protective regulations. Indeed, such an approach is an affront to this institution, which has enacted our environmental laws to secure their many benefits discussed above.

Other systematic means of undermining the regulatory process are more subtle but no less nefarious. In carrying out the Order, agencies are permitted to bundle rescissions with new regulations.[22] But suppose that during notice-and-comment rulemaking, commentators demonstrated that the proposed rescissions were unwarranted. The agency would be caught in an anti-regulatory trap: It could not issue the new regulation while rescinding the other two because doing so would be contrary to the record, making the agency vulnerable on judicial review. And the agency could not issue the new regulation by itself because it would be barred by the Order. The result? A chilling effect on necessary new regulations meant to ensure our future.

III. Conclusions

Environmental laws were enacted to ameliorate a classic market failure: polluters have every incentive to impose costs that they have created on public health and the environment rather than taking responsibility for those impacts themselves. I contend, however, that these laws do more: they represent our society's recognition of a moral obligation to protect our

neighbors, our children, our natural environment, and our future. There is still a great deal more to do, and we cannot afford complacency.

We must also be vigilant about protecting the integrity of our regulatory process. The 2-for-1 Order is just one example of how failing to do so trades naked, arbitrary politics for our country's future. We cannot afford a systematic undoing of the environmental, health, and safety protections that Congress wisely established.

Thank you again for the opportunity to testify today. I look forward to your questions.

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[1] *See generally* Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation*, CTR. FOR PROGRESSIVE REFORM WHITE PAPER #1109 (July 2011), at http://www.progressivereform.org/articles/RegBenefits_1109.pdf.; *see also* Stephen M. Meyer, *Environmentalism and Economic Prosperity: Testing the Environmental Impact Hypothesis*, MIT PROJECT ON ENVIRONMENTAL POLITICS AND POLICY iv (Oct. 5, 1992) (measuring economic performance of all fifty states as compared to state environmental rank, and concluding that "states with stronger environmental policies did not experience inferior rates of economic growth.").

[2] ENVTL. PROTECTION AGENCY, THE CLEAN AIR ACT AND THE ECONOMY, at https://www.epa.gov/clean-air-act-overview/clean-air-act-and-economy#_ednref6 (last visited Feb. 15, 2016).

[3] *E.g.*, Elsie M. Sunderland et al., *Benefits of Regulating Hazardous Air Pollutants from Coal and Oil-Fired Utilities in the United States*, 50 ENVTL. SCI. & TECH. 2117, 2117 (Feb. 5, 2016); *see generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

[4] The Congressional Research Service and others have demonstrated that a September 2010 report widely cited by opponents of environmental regulations like the Small Business Administration relied on flawed methodology. Curtis W. Copeland, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS, CONG. RESEARCH SERV. NO. 7-5700 (Apr. 6, 2011). In fact, the report's authors failed to even consider regulatory benefits. *Id.* at 25.

[5] OFFC. OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 9 (2015).

[6] *See generally* Final Rule, National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015).

[7] OMB, *supra* note 5, at 12.

[8] ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-1 (Mar. 2011).

[9] *Id.* at 7-9.

[10] *Id.* at 5-25 (Tbl. 5-6).
[11] *Id.* at A216.
[12] Amanda Giang & Noelle E. Selin, *Benefits of mercury controls for the United States*, 113 PNAS 286 (Jan. 12, 2016).
[13] Michael Firestone et al., *Two Decades of Enhancing Children's Environmental Health Protection at the U.S. Environmental Protection Agency*, 124 ENVTL. HEALTH PERSPECTIVES A214, A215 (Dec. 2016).
[14] *Id.* at A216.
[15] At a 3% discount rate. *See* April M. Melvin et al., *Climate Benefits of U.S. EPA Programs and Policies That Reduced Methane Emissions 1993-2013*, 50 ENVTL. SCI. & TECH. 6873, 6876, 6879 (May 26, 2016).
[16] David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act on the Demand for Water* Quality, NAT'L BUREAU OF ECON. RESEARCH WORKING PAPER 21-23 (Jan. 2017).
[17] *Id.* at 23.
[18] ENVTL. PROTECTION AGENCY, AIR QUALITY—NATIONAL SUMMARY, at https://www.epa.gov/air-trends/air-quality-national-summary (last visited Feb. 15, 2017).
[19] Memorandum from Dominic J. Mancini, Acting Administrator, OIRA, Re: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," Feb. 2, 2017 (hereinafter, "Memorandum").
[20] 2-for 1 Order § 2.
[21] *See, e.g.*, Memorandum at 4 (referring only to costs for accounting purposes).
[22] Memorandum at 5.