

# EXAMINING ENVIRONMENTAL BARRIERS TO INFRASTRUCTURE DEVELOPMENT

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## JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON THE INTERIOR,  
ENERGY, AND ENVIRONMENT

AND THE

SUBCOMMITTEE ON INTERGOVERNMENTAL  
AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES

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# CONTENTS

Hearing held on March 1, 2017 .....	Page 1
WITNESSES	
Mr. Richie Beyer, County Engineer, Elmore County, Alabama	
Oral Statement .....	7
Written Statement .....	9
Mr. Wayne D'Angelo, Counsel for the Steel Manufacturers Association, Kelley Drye and Warren LLP	
Oral Statement .....	16
Written Statement .....	18
Mr. Nicolas Loris, Herbert and Joyce Morgan Research Fellow in Energy and Environmental Policy, Institute for Economic Freedom and Oppor- tunity, The Heritage Foundation	
Oral Statement .....	23
Written Statement .....	25
APPENDIX	
Statement for the record from Kevin Rames, regarding Amalago Bay Resort, submitted by Ms. Plaskett .....	58
Statement for the record from Alicia Barnes, Former Commissioner of the Government of the Virgin Islands, Department of Planning and Natural Resources, submitted by Ms. Plaskett .....	62
Questions for the record to Nicolas Loris, submitted by Mr. Farenthold .....	64



## EXAMINING ENVIRONMENTAL BARRIERS TO INFRASTRUCTURE DEVELOPMENT

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Wednesday, March 1, 2017

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE INTERIOR, ENERGY AND  
ENVIRONMENT JOINT WITH SUBCOMMITTEE ON  
INTERGOVERNMENTAL AFFAIRS,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, D.C.*

The subcommittees met, pursuant to call, at 10:01 a.m., in Room 2154, Rayburn House Office Building, Hon. Blake Farenthold [chairman of the Subcommittee on Interior, Energy and the Environment] presiding.

Present: Representatives Farenthold, Palmer, Ross, Duncan, Comer, Massie, Plaskett, Demings, and DeSaulnier.

Mr. FARENTHOLD. Good morning. The Subcommittee on the Interior, Energy and Environment and the Subcommittee on Intergovernmental Affairs will now come to order. Without objection, the chair is authorized to declare a recess at any time. The chair notes the presence of our colleagues from the full Oversight and Government Reform Committee, and we appreciate your interest in this topic and welcome your participation today. I'd like to ask unanimous consent that all members of the Committee on Oversight and Government Reform be allowed to fully participate in today's hearing. Without objection, so ordered.

Well, good morning. Today's Subcommittee on the Interior, Energy and Environment, and the Subcommittee on Intergovernmental Affairs, will examine Federal impediments to infrastructure development. Numerous reports over the last decade have documented how burdensome environmental regulations have delayed, if not completely derailed, important infrastructure projects. Today, we'll explore where these regulations have gone wrong in the hopes that we can pinpoint solutions that benefit American infrastructure and development.

Under the Clean Air Act, every 5 years, the Environmental Protection Agency is required to evaluate and, if needed, set national, ambient air quality standards—and that's called NAAQS for those of you who don't speak government vernacular—to ensure that pollutants are not hurting public health or the environment. Currently, in my home State of Texas, we have got two regions, Dallas and Fort Worth, that are classified as being in nonattainment, which means they don't meet current standards for NAAQS.

Because of this, the State Department of Transportation and Metropolitan Planning Organization, located within these two re-

gions, are obliged to comply with transportation conformity requirements. Failure to do so can result in a loss of Federal highway funds for those counties, along with many other issues associated with being in nonattainment. Conformity requirements entail additional analysis to determine how a potential product could impact air quality. These requirements lengthen an already significant planning process by a minimum of 6 months, and have resulted in cost delays costing over \$65 million, just in the Dallas-Fort Worth and Houston regions.

By forcing State and local governments to spend more money on burdensome red tape, fewer roads are paved, meaning there is fewer construction jobs, and more traffic congestion, which, in fact, results in more emissions. In October of 2015, the EPA revised NAAQS and lowered the standard for ozone, a recognized pollutant, from 75 parts per billion to 70 parts per billion. Under this proposed revision, the San Antonio and El Paso regions will join Dallas-Fort Worth and Houston in nonattainment, costing even more jobs, running up expenses, and hindering much-needed infrastructure projects.

In addition to the nonattainment issues, the National Environmental Policy Act, known as NEPA, has become one of the most burdensome regulations facing project development in America. This law was passed with great intentions almost 50 years ago but has been expanded by constant tinkering by Federal agencies. The time for a full environmental review for a highway project has grown from 2 years to over 8 in some cases. State and local agencies have to navigate reams of Federal regulations in an alphabet soup of Federal agencies, all of whom need to sign off on a project under NEPA.

If they're able to make their way through the process, they often get the added joy of a lawsuit from an opponent, often an environmental activist group, or a not-in-my-back yard group who wants to stall the development, or stop all development. While I have addressed highway infrastructure projections, rail, airports, pipeline, oil and gas development, and private sector development all face similar burdens. We have to find a way to stop this paralysis by analysis and get America building again while still protecting our environment.

So that's my opening statement, and I now recognize our Ranking Member, Ms. Plaskett, for the Subcommittee on the Interior, Energy and Environment, for her opening statement.

Ms. PLASKETT. Thank you very much, Mr. Chairman, and thank you for calling today's hearing concerning barriers to infrastructure development. And I want to thank our witnesses for being here.

More than most places, my district, the U.S. Virgin Islands, understands the importance of striking the balance between environmental regulations and development. The Virgin Islands are home to just under 107,000 people. With the cost of living 33 percent higher than even the District of Columbia's outrageous cost of living, every dollar in the local economy is crucial to the survival of the citizens of these Islands. This is why we cannot afford drawn-out delays in permitting for economic development projects. There are many projects in the Virgin Islands that have been subject to numerous delays through the Federal permitting process. One of



those projects has been ongoing for the last 10 years with no final decision from the Federal Government. A draft biological opinion was issued, but it has been 18 months since the last correspondence to address the findings in the opinion. This is completely unacceptable.

Tourism is the primary industry for the Islands now. Tourism and travel, including the effects of investment, account for about 30 percent of the Islands' GDP. Nearly 3 million tourists come to the Islands every year. Many of the tourists come to the Virgin Islands to enjoy our beautiful beaches, dive to see the coral, so we understand that protecting our natural resources and species is crucial to the Islands' economy, and we also understand that protecting the environment can add time and expense to the completion of a project that will employ our citizens, but we must find an appropriate balance.

The U.S. Virgin Islands and other insular territories, while not major emission sources of greenhouse gases, and thus not contributors to global warming, are experiencing exponential adverse impacts of initiatives and regulations to remedy those things. While I am mindful that measures should be taken to ensure sustainable development, in many instances, technocrats within the ranks of Federal agencies approach the Virgin Islands and places like us, development permitting and other enforcement regulations are done blindly, and simply do not take into consideration the socioeconomic implications of those actions.

One of the primary problems to moving projects out of the environmental review have been inadequate staffing at the National Oceanic and Atmospheric Administration, or NOAA, the Federal agency that handles projects having an impact on coral. There simply are not enough staff to do the consultations that would allow permitting. Currently, the southeast region of the United States is one of the fastest growing regions in the country. Despite that fact, NOAA only has 14 full-time employees handling endangered species-related consulting. The West Coast has 150 full-time employees doing the same consultation.

The Governor of the Virgin Islands wrote the White House back in August about excessive delays to a hotel being built on St. Croix. We have been raising the alarm from the Islands for a while now. We are concerned that under President Trump, the problem may be exacerbated. President Trump has declared a hiring freeze, and so there will be no hiring in permitting agencies that are already understaffed. President Trump has also announced that he will cut budgets in agencies needed for economic development. The hiring freeze and budget cuts to come will hurt infrastructure development in the future. For example, NOAA recently did a listing in 2015 of 19 additional coral species on the endangered species list. This will increase permitting time, and the cost for the Army Corps of Engineer process.

I speak for the Virgin Islands regardless of who's in the White House. The President has to understand that a hiring freeze is going to bring development in the Virgin Islands and the whole southeast region of the United States to a screeching halt. I hope today we can discuss some sensible solutions to these issues. Thank you.

Mr. FARENTHOLD. Thank you. I'll now recognize Mr. Palmer, the chairman of the Subcommittee on Intergovernmental Affairs, for his opening statement.

Mr. PALMER. Thank you, Mr. Chairman, and thanks to the witnesses for appearing here today. We're going to hear from witnesses who can attest to how the Federal Government is a roadblock to States and local communities in infrastructure projects, and, hopefully, develop some ways that Congress can assist in getting the Federal Government out of the way. And States and localities know the needs of their communities. We want to increase their ability to handle these projects. They should be trusted to use funds to fulfill those needs with the least Federal Government interference.

Many of these environmental regulations have become irrelevant, outdated, and abused by groups and organizations simply looking to block economic development rather than protect the environment. As Chairman Farenthold mentioned, examples of environmental regulatory burden are the National Environmental Policy Act, NEPA, and the Endangered Species Act.

Policy uncertainty emanating from Washington discourages investment in private infrastructure projects that is a major part of President Trump's efforts to rebuild and improve our national infrastructure, which will help spur economic growth and provide more jobs. Duplicative responsibility between the States and Federal Government for planning of federally funded projects, many projects require State and Federal officials to oversee them when only one is necessary, also helps to drive up the cost.

In 1956, the year the Highway Trust Fund was established, total Federal, State, and local expenditures on administration and research accounted to 6.8 percent of construction costs. By 2002, that had risen to 17 percent. And overall, a former head of the Federal Highway Administration, Robert Ferris, suggests that Federal regulations increase costs by 30 percent. I think in some projects in my home State of Alabama, we have seen that those costs were doubled. According to one estimate, complying with Federal rules raises overhead costs to approximately 25 percent of project cost, while the overhead costs represent only about 5 percent of project costs for locally funded roads that do not have to comply with the Federal Rules.

Compliance with NEPA regulations is complicated and involves detailed documentation procedures. If planners do not know whether a project will have a significant environmental effect, an environmental assessment must be prepared. If the assessment finds that a project will have a significant effect on the environment, the Federal Highway Administration must create an environmental impact statement to document the expected effects of any reasonable alternative actions. Because they have to meet so many different requirements, many affected by NEPA, major highway construction projects take as long as 10 to 15 years to complete. For example, California's transportation corridor agencies have spent the last 15 years attempting to comply with Federal environmental review process for a toll road under construction. Since NEPA became law, the average time required to complete an environmental impact

statement for a Federal infrastructure project has increased from 2 years to more than 8 years.

The Obama administration recognized the burdensome nature of the NEPA process when it exempted 179,000, 179,000, stimulus projects from environmental review. The goal, according to Secretary of Energy Steven Chu, was to get the money out and spent as quickly as possible. What I would add is that these regulations, particularly the Endangered Species Act, can serve to halt contract projects that have created extensive delays and added significant cost increases, especially on projects that have already started. We are holding this hearing today as part of an effort by Congress to find ways to continue protecting our environment while simultaneously encouraging infrastructure development and economic growth. I look forward to our hearing this morning and how it can play a role in beginning to streamline the regulatory process and devolve control back to the States. I yield back.

Mr. FARENTHOLD. Thank you, sir. I'll now recognize Ms. Demings, the Ranking Member of the Subcommittee on Intergovernmental Affairs, for her opening statement.

Mrs. DEMINGS. Mr. Chairman, good morning, and thank you so much for this hearing today. And to our witnesses, thank you so much for being with us.

I certainly support new projects aimed at repairing the Nation's crumbling infrastructure, and expanding the infrastructure to meet the needs of the population and the modern commerce. There are significant barriers to achieving that goal. Inadequate Federal funding for infrastructure is a significant barrier. According to the American Society of Civil Engineers, \$3.6 trillion in new investment is needed to fix the Nation's network of bridges, roads, waterways, levies, and dams. Inadequate staffing at Federal agencies to process development applications is a significant barrier. President Trump's hiring ban will worsen backlogged development permit applications because vacant positions cannot be filled, and more civil servants are approaching the age of retirement. But environmental protection laws are not a significant barrier.

Some opponents of the National Environmental Policy Act, or NEPA, say that NEPA is the primary cause of delays. Not so. In fact, 95 percent of major actions that are reviewable under NEPA are considered to be part of the categorical exclusion, which means that they do not require environmental analysis. Even with the remaining 5 percent of major projects that require additional environmental review, NEPA does not constrain the agency if the agency determines that the benefits of a particular development project outweigh its environmental impacts.

I, for one, do not want to return to the days before NEPA. At that time the public had virtually no input into public infrastructure projects, even if it literally ran through their backyard. The only considerations for major projects like the interstate highway system was whether there was an available open space, and whether the acquisition cost was low for that space. It did not matter if this available open space was a historic site or a public park. It did not even matter whether the space was not open in some instances. Often infrastructure was built on the backs of the urban poor and minorities. For example, a segment of Interstate 4 was constructed

directly through Parramore, a community on the outskirts of downtown Orlando, Florida, and the growing business district.

Prior to I-4 construction, Parramore was a thriving African American community with several successful civic organizations, black-owned businesses, including a tailor shop, a theater, and several professional offices. Dr. William Monroe Wells, a prominent physician, opened a hotel and a South Street casino which hosted now legendary jazz and blues performers.

Unfortunately, the interstate highway that helped make Orlando the vacation capital of the United States had disastrous consequences for one of central Florida's most thriving African American communities. Built along the historic Division Street, named for the segregation boundary in postwar Orlando, I-4 displaced 551 homes and severed access to downtown Orlando. For decades, Parramore struggled to remain a strong community. The neighborhood that once boasted more than 10,000 residents dwindled to 5,200 by 1980, while movie theaters, libraries, grocery stores, and community centers closed their doors. Fortunately for Parramore, the neighborhoods like it across the country, Federal, State, and municipal officials understand that communities always do better when those impacted have a seat at the table. We do not want to return to that past where the Federal Government steamrolls a vibrant town into a second thought.

Thank you so much, Mr. Chairman. I yield back.

Mr. FARENTHOLD. Thank you very much. And we'll hold the record open for 5 legislative days for any member who would like to submit a written opening statement.

We'll now recognize our panel of witnesses. I'm pleased to welcome Richie Beyer, County Engineer with Elmore County in Alabama; Mr. Wayne D'Angelo is a partner with Kelley, Drye & Warren LLP. He serves as counsel for the Steel Manufacturers Association and is testifying on their behalf today. And finally, Mr. Nicholas Loris. He is the Herbert and Joyce Morgan Research Fellow in Energy and Environmental Policy at the Institute for Economic Freedom and Opportunity at the Heritage Foundation. We had a couple of other witnesses we were trying to get. We actually ran up against a couple that were concerned that their testimony here might interfere with their company's permitting process, which is another issue we might need to address at some point. Anyway, to those of you with the courage to attend, welcome.

Pursuant to committee rules, all witnesses will be sworn in before they testify. Would you please rise and raise your right hand. Do you solely swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Let the record reflect all witnesses answered in the affirmative. You all may be seated. In order to allow time for discussion, we would appreciate it if you would limit your oral testimony to 5 minutes. Your entire written statement will be made part of the record, and the members of the panel have copies of it.

So, Mr. Beyer, we'll recognize you for 5 minutes. You've got a timer in front of you. The green light will go for 4 minutes. The yellow light will come on when you have 1 minute left, time to

start summing up. And the red light means time's up. Mr. Beyer, you are recognized for 5 minutes.

## WITNESS STATEMENTS

### STATEMENT OF RICHIE BEYER

Mr. BEYER. Chairman Farenthold, Chairman Palmer, Ranking Member Plaskett, and Ranking Member Demings, and distinguished members of the subcommittees, thank you for holding this hearing today. I am honored to testify before you today on behalf of the National Association of Counties and the National Association of County Engineers. My name is Richie Beyer, and I serve as the county engineer for Elmore County, Alabama. Elmore County serves a population of approximately 82,000, and is one of the fastest growing counties in our State. My experience in infrastructure extends not only to Elmore County, but to the national level as well, as I am a past president of the National Association of County Engineers and currently serve as vice chair of the National Association of Counties Transportation Steering Committee.

Elmore County is responsible for 1,000 miles of road and 127 bridges. Our funding resources, however, are not sufficient to maintain our infrastructure, as we operate on about one-third of the revenue needed. The situation is not unique to Elmore County, though. My county shares many similarities with counties across the Nation who work every day to stretch the taxpayer dollars they are entrusted to manage to ensure their effective and efficient use. Counties are innovators, and in many cases, do so to survive. The Federal Government can assist this innovation by providing a regulatory environment designed to empower project delivery, not hampering it. My remarks to this committee today will provide recommendations to strengthen this effort.

Currently, counties are required to follow the same exhaustive Federal requirements on a small sidewalk or preservation project as they would for mega projects, and this simply doesn't make sense. Let's take a look at a simple resurfacing project in Elmore County where we want to place 1-1/2 inch wearing surface on a roadway with new traffic stripes and markers. Once the contractor completes the project, this is what the county will have: a project file 20 times thicker than the overlay that was placed; we would have paid on average two times the cost of a similar project funded solely with local funds; we would have spent 9 to 12 months longer to get the project to construction than if it was funded with local funds; and we would have a road that is materially the same regardless of the funding source.

Another example, after years of working to secure Federal funds for two areas of need in our rapidly growing county, we have been working to make intersection and corridor improvements at two different locations. The projects will have immense safety benefits to the public, yet small impact to the few residents adjacent to the improvements. As the project start times are separated by one year, we have been in the design and environmental approval phase for the two projects for 15 and 30 months, respectively. Currently, we are on pace to deliver these projects to construction in

another 2 years. Construction costs for these two projects are small at \$1 million and \$3 million, respectively.

I would like to provide the committee one last example of the type of issues these Federal impediments can create. On Christmas Day 2015, many Alabama counties, including Elmore County, were impacted by torrential rains. A portion of the county sustained severe damage that caused the closure of several roads. Our largest damage site was on Holley Mill Road in the northeast part of the county. A 50-plus-year-old drainage structure failed under the immense water pressure. The failure created a chasm in the roadway, sending several hundred yards of roadbed downstream. Our county team met with State and Federal officials within weeks of the disaster, and after meeting with them, we were made aware that FEMA was not recognizing a provision in the FAST Act exempting emergency work from environmental reviews.

That same day, we contacted Fish and Wildlife and the U.S. Corps ourselves. The county received approvals and clearances from these two Federal agencies the next day. Despite those clearances and approvals though, we were told that our projects would still have to go through a full FEMA review. To avoid loss of reimbursement, we were forced to immediately halt our project, despite the fact that it was vital to restoring services to our citizens.

Thirty days later, we were given approval to move forward with our work. So you may be thinking, well, that's fast for approvals compared to some of the other environmental horror stories that we hear, but the real issue is every day we delayed work, our community, our citizens, and our environment were negatively impacted.

These examples point to some of the challenges we face in local government, and I offer the following two recommendations for ensuring we can provide our citizens the best possible services given our limited resources: First, we would like to recommend that Congress build on the principles introduced in MAP-21 and furthered in the FAST Act by creating an exemption from all Federal requirements if the project receives less than \$5 million in Federal funding. Second, creation of an exemption that removes all Federal requirements from emergency repairs to any transportation facility damaged by a disaster would expedite restoration of services to our citizens, lower the cost of repairs, refocus the Federal resources to be available to support and assist with recovery efforts, all while being accomplished without harm to the environment.

In closing, counties stand ready to work with our Federal partners to achieve our shared goals for strengthening transportation networks, improving public safety, and advancing our economic competitiveness.

Thank you again, Mr. Chairman, Ranking Members, and members of the subcommittee, for the opportunity to testify today, and I will be pleased to answer any questions.

[Prepared statement of Mr. Beyer follows:]



**Written Statement for the Record**

**Walter Richard (Richie) Beyer IV**  
**County Engineer**  
**Elmore County, Alabama**

**On behalf of the National Association of Counties**  
**and**  
**The National Association of County Engineers**

**Impediments to the Effective Delivery of Federal Aid Projects**

**Before the U.S. House Committee on Oversight and Government Reform**  
**Subcommittee on Intergovernmental Affairs**  
**Subcommittee on Interior, Energy and Environment**

**March 1, 2017**  
**Washington, DC**

Chairman Palmer, Chairman Farenthold, Ranking Member Demings, Ranking Member Plaskett and distinguished members of the Subcommittee on Intergovernmental Relations and Subcommittee on Interior, Energy and Interior, thank you for holding today's hearing. I am honored to testify before you today on federal environmental impediments to project delivery on behalf of the National Association of Counties and National Association of County Engineers.

My name is Richie Beyer, and I serve as the County Engineer for Elmore County, Alabama. Elmore County serves a population of approximately 82,000 and is one of the fastest growing counties in our state. Located just north of our state's capitol, Montgomery, we are a destination for many who wish to live in a setting with abundant natural resources, a quality education system and a comfortable standard of living.

My experience in infrastructure development extends not only to Elmore County, but to the national level as well, as I am a past president of the National Association of County Engineers and currently serve as Vice-Chairman on the National Association of Counties' Transportation Steering Committee. I have served on various state and federal committees and working groups during my tenure with county government, many of which have focused on the effective delivery of projects and the effective use of federal funding.

Elmore County is responsible for over 1,000 public road miles and 127 public bridges within our boundaries. Our funding resources, however, are not sufficient to address what is needed to maintain our vast infrastructure. The Silent Crisis, a 2010 analysis of Alabama county roads and bridges, indicated Elmore County's surface infrastructure system operates on about one-third of the revenue needed to adequately maintain our road and bridges. Its important to note that this analysis did not take into account the capacity needs of the county, only the basic maintenance needs for our roads and bridges. With Elmore County's growing population as a burgeoning suburb of our state capital, our roads and bridges are experiencing more traffic than ever. As a result, our surface transportation infrastructure is under more increasing stress.

Counties face financial challenges because, in many cases, state legislatures limit our ability to raise revenue to fund critical infrastructure projects. The main general revenue sources for a great many counties are property and sales taxes. However, while counties in 45 states collect property taxes, they can only keep about a quarter (23.7 percent) of what is collected. Limitations like these that significantly impact counties' ability to effectively raise additional revenue to pay for services and infrastructure, especially unforeseen expenses such as emergency repairs. Due to these state and local funding constraints, counties such as Elmore depend on a strong state and federal partnership to deliver transportation investments that are critical to our communities and our national economy. Our nation's 3,069 counties build and maintain 45 percent of public road miles and 40 percent of bridges, as well as over one-third of the nation's transit systems and airports. Not only do county roads, bridges and highways connect our counties and states, they serve as a lifeline for rural counties and our citizens, playing a critical role in the movement of freight and other goods and services.

This situation is not unique to Elmore County. My county shares many similarities with counties across the nation who work every day to stretch the taxpayer dollars they are entrusted to manage to ensure their most effective and efficient use. Counties are innovators and in many cases must be to survive. The federal government can assist this innovation by providing a regulatory environment designed to empower project delivery, not hamper it. My remarks to this committee today will provide recommendations to strengthen this cooperation.

I am reminded of an observation made to me several years ago by someone that I have great respect for. He observed that, in most situations, lower levels of government inevitably believe that the higher levels of government have the funding to address issues, while the higher levels of government don't think that the lower levels of government have the expertise to properly manage the resources with which they are entrusted. Thus, we have an ongoing struggle between levels of government for control and an increased chance that our resources aren't going to be utilized in the most effective manner. In the words of Ralph Waldo Emerson, "*Our distrust is very expensive.*"



The infrastructure partnership between local, state, and the federal government is a key element in the success of our nation's economies. Local roads are the original arterial roadways; it is these roadways which connect to our state and federal highway system. All routes originate on these local roads. Finding the balance between regulation and reality is the key, to making this partnership productive for the American people. Today, I will highlight some of these challenges and provide recommendations for how Congress can help us tackle these issues.

I will also illustrate three areas where local government can accomplish faster project completion without sacrificing environmental oversight or project safety. Whether they be road or bridge projects or emergency repairs, local governments possess the capabilities to produce results in considerably less time and for less money.

#### **Road and Bridge Challenges**

When county projects utilize federal funding, higher project costs and longer delivery times are the norm. Bureaucratic red tape and duplicative or cumbersome environmental reviews slow projects down and drive labor costs up. Currently, counties are required to follow the same exhaustive federal requirements on a small sidewalk or preservation project as they would for mega-projects. This simply does not make sense.

Let's take a look at a simple resurfacing project in Elmore County. A county wants to place a treatment on a road that has reached its service life. The project would entail placing a 1 ½ inch thick wearing surface on a roadway and place new traffic stripes and markers. The road is wide enough to handle the traffic volumes it is experiencing, and there are no apparent safety issues. The work takes a contractor less than 30 days to complete.

Twelve to fifteen months in advance, the county must plan to begin the paperwork for this project. Between state requirements and federal regulations, the county will spend the better part of this time preparing required federal documentation to address whether the project has appropriate federal measures in place to address items such as safety, Americans With Disabilities Act (ADA) compliance, material selection, historical context and railroad involvement, just to name a few. By far the most cumbersome obstacles are those related to meeting environmental regulations.

By the time the documentation is complete and a project is deemed ready to accept bids, the county has spent over 13 percent of their allocated funding to pay the state for its federally mandated oversight of the project development process. It is important to note that these fees are not at the discretion of the state, but rather the Federal Highway Administration (FHWA) requires the charge to be applied if the state intends to charge overhead to any state-sponsored federally funded project. Once the project bids are accepted and awarded, the state must then begin to assess – per mandate by the federal government – construction, engineering and inspection (E&I) charges to the project as well. This can range from five to ten percent of the project cost and depends on project duration. The county would normally utilize about five percent or less of the project amount of E & I for quality control and assurance inspections.

Once the contractor completes the project, the county will have:

- a project file 20 times thicker than the overlay that was placed;
- paid **on average two times the cost** of a similar project funded solely with local funds (\$160,000 per mile federal vs \$80,000 per mile local only);
- spent nine to twelve months longer to get the project to construction than if it was funded with local funds only;
- **a road that is materially the same regardless of the funding source.**

Let me provide an example of what we have experienced in Elmore County as a result of the federal environmental review process. After years of working to secure federal funding for two areas of need in our rapidly growing county, we have been working to make intersection and corridor improvements at two different locations. The projects will have immense safety benefits to the public, yet small impacts to the few residents adjacent to the

improvements. As the project start times are separated by one year, we have been in the design and environmental approval phase of two projects for 15 and 30 months, respectively. Approvals on our federal environmental reviews ensuring adherence to National Environmental Protection Act (NEPA) have become stalled in the federal bureaucracy, and thus we cannot move to right-of-way acquisition or utility relocation to keep the project on track. Currently, we are on pace to deliver these projects to construction in another two years. Construction costs for these two projects are \$1,000,000 and \$3,000,000, respectively. This amount is exponentially more than it would cost without the delays resulting from federal interference in processes that can be handled at the state or local level.

So why do counties attempt projects under the federal aid program? In most areas of the country, it's a public safety issue. Road safety is among the greatest concerns for many counties, especially in rural America. The fatality rate on rural roads is nearly 2.5 times higher than on urban roads, according to the Federal Highway Administration's Office of Safety.

In 2012, 19 percent of the U.S. population lived in rural areas but rural road fatalities accounted for 54 percent of all road-related fatalities. In 2014, more than 16,000 people were killed on local roads across the U.S. — a fatality rate greater than 1.5 fatalities per 100 million vehicle-miles of travel, according to the National Highway Traffic Safety Administration. This is almost three times the fatality rate of the Interstate Highway System. In this same year, the overall cost of crashes on local roads was well over \$100 billion, accounting for fatalities, decreased quality of life due to injuries and economic costs (medical, insurance and property loss). Recognizing this important issue, on July 13, 2015, Secretary of Transportation Anthony Foxx signed a resolution reflecting the need to improve safety on county-owned roads and affirming that the U.S. Department of Transportation will work with the National Association of Counties (NACo) to improve road safety in America's communities. This resolution underscores the important role that local elected officials play in improving road safety in their communities. Although the administration may have changed, the importance of ensuring communities are served by safe, reliable roadways has not. However, addressing critical rural road safety needs cannot be accomplished under the current landscape of cumbersome environmental red tape, which causes project delays and drives project costs way up. Plainly stated, these federal impediments hamper our ability to rehabilitate our infrastructure in a timely manner necessary to save lives.

#### **Emergency Work Challenges**

I would like to provide the committee of an example of the type of issues these federal impediments can create. On Christmas Day 2015, many Alabama counties, including Elmore County, were impacted by torrential rains which resulted in a 100-year flood event. A portion of the county sustained severe damage that closed several roads.

Our largest damage site was on Holley Mill Road in the northeast portion of the county. A fifty-plus year old, 14-foot equivalent diameter plate arch pipe failed under the immense water pressure generated by the storms. The failure created a chasm in the roadway, sending several hundred yards of roadbed downstream. After the road was properly blocked off and traffic control devices installed to warn the public of the closure, our county team began evaluating the necessary replacement to get the road back in service. Within days after the event, we had completed our hydraulic analysis of the site and ordered the appropriate size structure to make the necessary repair.

Our county team met with state and federal officials within two weeks of the disaster. After meeting with them we were made aware that the Federal Emergency Management Administration (FEMA) was not recognizing a provision placed in the 2015 surface transportation authorization bill, the Fixing America's Surface Transportation Act, or FAST Act, exempting emergency work from environmental reviews. That same day, we contacted the United States Fish and Wildlife Service (USFWS) and the United States Army Corp of Engineers (USACE). The

county received approvals and clearances from these two federal agencies the next day. By this time the pipe order had arrived on the county yard and was ready for installation. We were 22 days out from the disaster at this point.

On day 23, we were told that all of the information we sent to our state and federal emergency management administration partners, regardless of the clearances and approvals we had received, were going to have to go through a full FEMA review. No work could proceed without the county risking reimbursement for what we believed would be roughly a \$250,000 to \$300,000 repair. We were forced to immediately halt our project, despite the fact that it was vital to restoring services to our county.

On day 53 of the road closure resulting from this federally imposed delay, we were given approval to move forward with our work and a project worksheet was finalized another eight days later at a cost of approximately \$378,000. The county completed all of the work in 57 calendar days with our own forces at a final cost of near \$225,000.

You may be thinking, “Well, that’s fast for approvals compared to other environmental horror stories we hear”. The real issue is that every day we delayed work, our citizen’s economy and our environment were negatively impacted. Each day that passed without action to approve permits due to a protracted federal review process cost our county time and money, and our citizens had to spend detouring and avoiding the damaged site. Each day also resulted in more sediment washing downstream because federal clearance was not authorized for the work.

Simply put, the expedient response of local government to restore travel to the public in times of disaster should not be hampered by cumbersome federal reviews and approvals. This is especially true when all the work is being performed in existing rights-of-way and is replacing a preexisting structure. These interventions by the federal government impairs our ability to assist our residents at times when they are most vulnerable. This clearly should not be the case

Federal agencies should be true resource and partner to counties in working with local communities to recover after a disaster rather than imposing burdensome regulations on critical post-disaster repairs.

In 2013, the United States Government Accountability Office (GAO) found that inefficient use of federal funds can occur when the cost of complying with federal requirements is high relative to a project's cost. While the Federal Highway Administration (FHWA) has taken steps to improve the efficiency of federal-aid projects, it has not explored or issued guidance targeted to local agencies on how they can maximize administrative flexibilities, despite internal and external recommendations to do so. Some local agency officials GAO interviewed stated they do not pursue federal funding for projects under certain dollar thresholds because the cost involved outweighs the benefits; however, others choose to do so due to a lack of funding alternatives. In times of emergencies, most counties are not afforded the luxury of deciding whether or not to request federal funds – they are a necessity.

Working through these issues and delays has given me the experience and perspective necessary to identify possible solutions to make this partnership more effective and less costly to local governments, while at the same time not sacrificing safety or established environmental protocols.

#### **Potential Solutions- Establish Exemptions and Empower All Levels of Government**

These examples point to some of the challenges we face in local government. I offer the following **two recommendations** for ensuring we can provide our citizens the best possible services given our limited resources.

The Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) set a precedent by identifying a category of low risk projects appropriate for Categorical Exclusions [23 CFR Part 771.117 (c) and/or (d)]. In addition, MAP-21 established financial thresholds categorically excluding projects from environmental reviews, provided that the projects receive less than \$5,000,000 in federal funds. The FAST Act reinforced these principles.

**First, we would like to recommend that Congress build on the principles introduced in MAP-21 and furthered in the FAST Act by creating an exemption from all federal requirements if the project receives less than \$5,000,000 in federal funding.** The state and local governments would apply the appropriate state or local standards and specifications to their projects and follow state law to bid for, award and execute their projects. State and local governments could also perform work under force account, provided there is a substantial cost savings to the public by doing so. No state or federal oversight would apply to these projects, which will ensure more funding makes it to tangible projects. Low risk projects as defined in the FAST Act could easily be grouped into this exemption, but strong consideration should be given to defining bridge replacement projects where no major relocation occurs as an exempt action as well.

What would be the impacts of this type of change?

First, more of our fuel tax will reach the public in the form of tangible road and bridge projects. Quite simply, we are currently seeing gas tax money go to meeting duplicative federal regulations as opposed to the project itself. While cutting out these duplicative regulations will not solve gas tax funding issues, this approach shows our citizens that we are doing everything possible to be efficient with the resources we have been entrusted to manage.

Second, local and state governments can best evaluate the needs of their communities and the appropriate project scope that provides the greatest benefit to the communities.

Third, the various federal agencies can focus their efforts on moving large scale highway projects through the process and refocus their efforts on being resources to the state and local governments to meet the needs of our communities.

Lastly, the public wins. More resources are directed to projects that they can see, use, and reap the benefits from through an improved quality of life – all while improving our transportation network, which serves as the backbone for our nation's economy.

This only works if the federal government has enough faith in states and counties to ensure public safety for their citizens. While I have no doubt the intentions of the federal government are to protect the public, there must be a realization that states have that same interest.

The FAST Act and MAP-21 both included provisions exempting emergency repair work when federal assistance is involved, but they do not go far enough, as there are still a multitude of project types that are susceptible to review regardless of the scale of its undertaking. For example, the Holley Mill Road project mentioned above could have been completed quicker for less money. More importantly, the bureaucratic delays of this project placed lives in danger. **Creation of an exemption that removes all federal requirements from emergency repairs to any transportation facility damaged by a disaster would expedite restoration of services to our citizens, lower the costs of repairs and refocus federal resources to be available to support and assist with recovery efforts.**

#### **Closing**

In closing, counties stand ready to work with our federal partners to achieve our shared goals of strengthening transportation networks, improving public safety and advancing our economic competitiveness. We need a strong, reliable federal partner that allows us to practically address the needs of our constituents.

Thank you again, Chairmen. Ranking Members and members of the Subcommittees, for the opportunity to testify today. I would be pleased to answer any questions.

Mr. FARENTHOLD. Thank you very much, and we'll get to the questions after everybody has given their testimony. Mr. D'Angelo, you're recognized for 5 minutes.

#### STATEMENT OF WAYNE D'ANGELO

Mr. D'ANGELO. Thank you. Thank you, Chairman——

Mr. FARENTHOLD. You need to get that mic really close to your mouth. In our budget consciousness, we got budget mics. And turn it on.

Mr. D'ANGELO. There it is. Okay. That's better. We're talking with our hands a little bit here, so I apologize if I knock the mic. I am very happy to be here. I'm thankful for the invite. I have the privilege of testifying on behalf of the Steel Manufacturers Association, the leadership of which is sitting behind me today. And they have the privilege of representing steel mills, which account for over 75 percent of domestic steelmaking capacity. SMA members are not just steelmakers, they're recyclers. Through the use of electric arc furnaces, SMA members make steel from a feed stock of over 90 percent recycled scrap, millions of tons of scrap that would otherwise be disposed of in landfills. So they don't make roads or bridges or pipelines, but they will take this Nation's aging infrastructure, aging bridges and rebar, and turn it into the infrastructure of tomorrow, and that's pretty cool. And I can tell you that SMA members, SMA's leadership, and the 60,000 men and women that SMA companies directly employ are immensely proud of that fact, and that's why I'm here today.

And I'm here talking about statutes like NEPA and ESA. So U.S. steel mills have a list of regulatory requirements that is far longer than my arm, and I'm not talking about those. I'm talking about NEPA and ESA, two statutes which most environmental managers don't have to worry about because steel mills are stationary sources and they generally don't have to interact with Federal agency action that would implicate those statutes.

And if we think about that, that's kind of a big deal because this is an industry that is fighting one heck of a fight against international competition, and fighting against nations that don't have the environmental health and safety controls that we do, and they're not here talking about those controls that they're faced with, but those controls, which American infrastructure and American government action are faced with. And those barriers, we identify as NEPA and the ESA, and the reason they are barriers is because we as a Nation have chosen to erect them as barriers to infrastructure development. NEPA, for instance, started with a very commonsense notion that we should look before we leap. We should consider the implications of our actions before we take those actions, actions like Ms. Demings spoke about. But we have sort of lost sight of the underlying purpose of NEPA, and that's to get to an action.

We have heard about all the horror stories, how long it takes to get to a final environmental impact statement. These environmental impact statements take years and years, cost millions of dollars, and are thousands of pages. We have to ask ourselves, are we asking questions that are providing the answers we need? Or

is this the information we need for rational, informed decision-making? Or are we simply armoring ourselves against litigation? Now, some environmental groups will cheer this analysis paralysis, but real world environmentalists, like Ms. Plaskett talked about, and like my clients understand, that you need infrastructure development to further environmental protection.

We have also weighted down our environmental analysis with more and more searching analyses that have really protracted decisionmaking, and there's no better example of this than the ESA. Again, considering the potential impacts on threatened and endangered species is a really good idea, and the ESA was a great idea for Congress. Now, that made a lot of sense when we were dealing with 70 to 80 of the most threatened and iconic species in America. It makes a lot less sense when we're dealing with 2,400 species and a list that grows every single year. How did we get there? It's not because thousands more species have been pushed to the brink of extinction in the past 40 years. It's because a couple of litigious groups have learned to game the statute, exploit inflexible deadlines, co-opt the services listing agenda, and rob the listing services of the ability to prioritize species and conservation.

The listing services, I have some sympathy for them, but they've also overreached themselves. They've passed rules just this past year with respect to how they designate critical habitat. Right? Critical habitat, again, that's an important concept that we should consider it, but when we are now designating critical habitat where the species has never been, and if you put it there, could not now survive, we have ceased to ask questions that are relevant to this analysis. Same thing with environmental analyses. The ESA requires critical habitat be accompanied by an environmental analysis, and yet through rule, Fish and Wildlife Service determined that they can up sign all of the costs away from critical habitat analyses through a bookkeeping trick, and they're free to ignore all types of critical—all economic costs in making their decisions. They are doing precisely what Congress admonished against, and that is, designating critical habitat as far as the eye can see, and the mind can conceive.

Now I recognize here I'm out of time. I just want to make one further point. None of this helps conservation. This hurts conservation. SMA is proud of their role in furthering environmental standards, and I'm glad to answer any questions. I appreciate the opportunity to be here today.

[Prepared statement of Mr. D'Angelo follows:]



**Statement of Wayne D'Angelo**

**Partner, Kelley Drye & Warren, and  
Counsel to the Steel Manufacturers Association**

**Joint Hearing:  
House Subcommittee on Interior, Energy, & Environment  
House Subcommittee on Intergovernmental Affairs**

**March 1, 2017**



Chairman Farenthold, Chairman Palmer, members of the Subcommittee on the Interior, Energy, and Environment, and the Subcommittee on Intergovernmental Affairs – thank you for the invitation to appear before you today.

I am Wayne D'Angelo, Partner at Kelley Drye and Warren, and counsel to the Steel Manufacturers Association, or "SMA". The SMA appreciates the opportunity to participate in this discussion of the regulatory barriers to infrastructure development. And we are encouraged that the Subcommittees recognize SMA as a stakeholder in this dialogue.

SMA represents North American steel producers, primarily in the electric arc furnace, or "EAF", segment of the steel industry. While SMA members do not construct the roads, bridges, or railways that carry people home from their jobs or the pipelines or transmission lines that bring energy into those homes, they supply the steel that makes those investments possible. In fact, SMA members account for over 75 percent of domestic steelmaking capacity.

And importantly, SMA members meet this capacity using over 90 percent recycled content. Each year, SMA members recycle millions of tons of ferrous scrap that might otherwise be disposed of in landfills or as litter. So, while SMA member companies will not remove or replace America's aging bridges or overpasses, they will recycle the rebar, beams, and other support structures that were built by our parents and grandparents, and use it to meet the infrastructure needs of our children and grandchildren.

SMA members are proud to produce the steel America needs to develop its infrastructure; proud to meet those needs through recycling and a commitment to environmental stewardship; and proud of the employees that help them compete in a challenging business environment.

SMA members are heavily regulated across multiple jurisdictions and through many statutes. Steel mills must meet extensive permitting, costly control requirements, and voluminous recordkeeping and reporting requirements under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, Emergency Planning and Community Right to Know Act, and Occupational Safety and Health Act – to name a few.

Complying with regulations under these statutes is incredibly costly and, because many of the EAF steel industry's foreign competitors do not need to

meet similar standards for environmental health and safety, these costs can threaten the competitiveness of American mills.

SMA welcomes a conversation about these regulations, but, because these regulatory costs occur regardless of whether our members are making steel for infrastructure, or automobiles, or consumer products, we will leave that conversation to another day. Instead, SMA would like to talk about the regulatory burdens that are specific to infrastructure. Again, these are generally not regulatory costs imposed on SMA members directly, but the barriers that restrict the steel industry's access to affordable domestic energy and which mire down the infrastructure development projects that SMA members supply. Indeed, SMA is here today representing both the suppliers to, and users of, domestic infrastructure.

### **Environmental Regulatory Barriers**

In recent years, we have observed two statutes in particular being used to impose significant barriers to infrastructure development: the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). These statutes, alone and in conjunction with each other, are the source of considerable project delays, increased costs, and the abandonment of some infrastructure development projects altogether. In reality, these adverse outcomes have less to do with the statutes themselves and more to do with how they have been applied and even misused.

NEPA was enacted in 1969, and it requires, among other things, federal agencies to consider the potential environmental impacts of, and alternatives to, major federal actions before the actions take place. NEPA represents the logical principle that we must look before we leap. That is a principle that made sense in 1969 and which still make sense today.

That principle makes decidedly less sense when NEPA's analytical requirements become viewed as tools to stop development or when the universe of federal actions and the breadth of potential future impacts under examination expand to such an extent that the federal approval process ceases to function effectively and the product of that examination borders on speculation.

So too with the ESA. Congress was correct to include within Section 7 of the ESA a requirement that federal agencies consult with the Fish and Wildlife

Service (“FWS”) or National Marine Fisheries Service (“NMFS”) on activities that may adversely impact listed species or critical habitat. Again, looking before we leap make sense, but it was a lot easier when listed species were limited to 70-80 of the most imperiled and iconic species. It is a lot less manageable now that FWS and NMFS are managing over 2,400 listed species, subspecies, and distinct population segments.

Consultation was similarly manageable when critical habitat was designated only for those areas deemed essential for the species for food, cover, or breeding purposes. Consultation is not manageable now that the Listing Services – by rule – effectively eliminated the ESA’s economic and biological constraints on designating critical habitat.

In a series of rules promulgated between 2013 and 2016, the Listing Services claimed discretion under the ESA to designate critical habitat in areas where the species has never been and could not now survive. Critical habitat can be designated if “any benefit” can be theorized for the species now, or in the future. And because the listing agencies – by rule – effectively eliminated the ESA’s required economic considerations, the Listing Services have been free to designate critical habitat as far as the eye can see and the mind can conceive – precisely what Congress admonished against. In 2014, for instance, the Listing Services designated over 317,500 square miles as critical habitat for the loggerhead turtle – larger than any state except Alaska.

These are not the only changes that increased the burden and complexity of Section 7 consultation under the ESA. The Listing Services have also lowered the bar for finding adverse impacts to species and habitat, and inappropriately changed the requirements for mitigating impacts.

There is no question that these changes have been a barrier to infrastructure development. As the number of listed species grow and the size of critical habitat designations expand, more and more permits, authorizations, and funding decisions are held up, modified, or even abandoned in the consultation process. Environmental Impact Statements for even modest federal actions now take (on average) well over four years to complete and cost millions of dollars.

The real question is whether this use of the ESA is meaningfully contributing to the conservation of threatened or endangered species. The answer, unfortunately, is that we are not meeting the ESA’s requirements to recover

threatened and endangered species. Fewer than 2% of species have been delisted based on their recovery.

This sad statistic is based on many factors including a biologically unsupportable effort to list more and more species and designate larger and larger areas as critical habitat without planning for and funding the recovery of species. The Listing Services have, through litigation, lost their ability to prioritize species conservation. They have failed to engage the states as partners in conservation, alienated landowners and land-use industries, and resigned themselves to processing listing petitions that feed the sue-and-settle cash register for far too many groups. The result is a system which fails both the regulated community and the species it was designed to protect.

### **Conclusion**

We can do better, and the SMA hopes that hearings like these help further a long overdue conversation. The SMA does not believe we should abandon the deliberative processes required by NEPA and the ESA, nor do we believe it is wise to cease all consideration of the environmental consequences of federal actions. The SMA believes that we can reign in the environmental review process and make it more effective at the same time.

We can, and should, take steps to protect the environment for future generations while at the same time recognizing the obligation to meet the energy and infrastructure needs of a growing population. SMA members stand ready to help strike this balance by recycling the infrastructure of yesterday into the infrastructure of tomorrow.

As suppliers of high quality, durable steel products made almost entirely of recycled materials, SMA members are key stakeholders in this important conversation about removing the barriers to infrastructure development. On behalf of the SMA, I wish to express my genuine appreciation to Congressmen Farenthold and Palmer for recognizing SMA as a key stakeholder and for inviting me to participate in today's hearing. Thank you.

Mr. FARENTHOLD. Thank you, Mr. D'Angelo. Mr. Loris, you're recognized for 5 minutes.

#### STATEMENT OF NICK LORIS

Mr. LORIS. Well, thank you and good morning. I want to thank the distinguished members of the two subcommittees for this opportunity to examine environmental barriers to infrastructure development. My name is Nick Loris, and I am the Herbert and Joyce Morgan fellow at the Heritage Foundation. The views in this testimony I express are my own and should not be construed as representing any official position of the Heritage Foundation.

America has a clean, healthy environment, as well as safe, high-quality infrastructure. However, we can improve upon both. Infrastructure investment and protecting the environment are certainly not mutually exclusive. Environmental policies that respect the rule of law, protect private property rights, and transition power to the States will drive economic growth and responsible stewardship. On the contrary, perpetuating the status quo, or increasing the Federal Government's regulatory overreach hinders infrastructure investment, creates perverse incentives, and centralizes power in Washington, all for little to no meaningful direct environmental benefit.

Our country's major environmental policies and regulations are long outdated and in dire need of reform. My written testimony identifies several environmental roadblocks, and I will briefly discuss four of them. As discussed, one major roadblock is NEPA, a statute that has evolved to serve as a tool to significantly delay and obstruct investment in job creation. As we have heard, the average time to complete an environmental impact statement for highway projects increased from 2.2 years in the 1970s to 8.1 years in 2011. Currently 148 energy and transit projects are in NEPA review with nearly \$230 billion in stalled investment.

Some of the major problems with NEPA include differing interpretations of NEPA requirements, failed interagency coordination or a lead agency, a lack of hard deadlines, administrative bottlenecks, and the inclusion of assessing manmade climate change's impacts on these projects.

Reforming NEPA will not compromise public health or safety but instead remove duplication and establish a more streamlined efficient process. In fact, the Obama administration recognized this when effectively waiving NEPA requirements for projects funded by the American Recovery and Reinvestment Act. Another issue is the social cost of carbon, which allows regulators to artificially inflate the environmental cost of a project.

The Federal Government relies on three statistical models to calculate the alleged monetary cost of manmade climate change to society, which is defined as the economic damage that one ton of carbon dioxide emitted today will cause over the next 300 years. Not only is this calculation wasteful in terms of time and resources, these models the government uses to calculate the SCC are useless for cost benefit analysis and for regulatory rulemaking. Subjecting the models to reasonable alternative inputs, such as changes to the discount rates and equilibrium climate sensitivity, which estimates

the warming impact of a doubling of CO<sub>2</sub> emissions shows just how different the results can be. For example, in one of these models, using a 7 percent discount rate instead of 3, combined with an updated equilibrium climate sensitivity, decreases the social cost of carbon by \$34 per ton, a 102 percent decrease.

Furthermore, attempts to forecast economic damages centuries into the future significantly strains the credibility of these models, but the use of SCC has significant real-world policy implications, including for infrastructure development.

Yet another problem is the EPA's 2015 regulation for ground level ozone, where the new standard is so stringent it approaches background levels in several areas and will force many new areas into nonattainment. These standards would have a direct adverse impact on the construction of all types of economic activity, including roads and other infrastructure, all for diminishing marginal environmental benefits.

Perhaps most oppressive are the requirements for nonattaining regions to offset emission increases with cuts in emissions elsewhere, which means potentially redirecting funds or canceling infrastructure projects.

The reality is that national average ozone levels have fallen 32 percent since 1980 and are on track to continue to decrease. The Federal Government should not continue to move the goalposts as States continue to meet the attainments of the 1997 and 2008 standards. Withdrawing the 2015 standard would unlock economic activity at the State and local level, and prevent the threat of sanctioned Federal highway funds or other penalties.

Lastly, policymakers should examine and reform environmental roadblocks to privately funded energy infrastructure investments, not just examine traditional infrastructure projects. Federal ownership of land and resources, time-consuming leases, permitting and environmental review stages needlessly slow energy infrastructure development. A few years ago, the U.S. Chamber of Commerce compiled a list of 351 energy projects stalled by environmental barriers. The authors estimate that the investment phase of these projects would generate \$577 billion in direct investment over a 7-year construction period. And importantly, regulatory reform will benefit all energy sources and technologies as nearly 40 percent of these projects were renewable energy infrastructure.

In conclusion, antidevelopment regulations serve more as tools to protect the desires of special interests than protect the environment. Reforming environmental regulations with a focus on transitioning authority to the States, creating market incentives, and removing costly, ineffective regulations entirely will safeguard the environment at a lower cost and stimulate infrastructure development of all types.

Thank you, and I look forward to your questions.

[Prepared statement of Mr. Loris follows:]

**Examining Environmental Barriers to  
Infrastructure Development**

**Subcommittee on the Interior, Energy and the  
Environment and Subcommittee on  
Intergovernmental Affairs  
Committee on Oversight and Government Reform  
U.S. House of Representatives**

**March 1, 2017**

**Nick Loris**

**Herbert & Joyce Morgan Research Fellow**

**The Heritage Foundation**

My name is Nick Loris. I am the Herbert & Joyce Morgan Research Fellow at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I want to thank the Members of the House of Representatives Committee on Oversight and Government Reform Subcommittee on the Interior, Energy and the Environment and Subcommittee on Intergovernmental Affairs for this opportunity to examine environmental barriers to infrastructure development.

America has a clean, healthy environment as well as safe, structurally sound infrastructure. However, America's major environmental policies are outdated and, consequently, stall infrastructure investment, misalign or create perverse incentives, and centralize power in Washington for little to no meaningful environmental benefit. My testimony will address the environmental policies and regulations that block or delay public and private infrastructure investment for both conventional infrastructure projects but also energy infrastructure.

#### **The State of Infrastructure and Principles for Reform**

The perception that America's infrastructure is crumbling and in a state of despair is not borne out in the data. Bridges in need of extensive maintenance have declined steadily, highway pavement quality has improved, and American airports safely transport more people and products than any other country in the world.<sup>1</sup> Even so, opportunities exist to improve and expand the country's infrastructure needs.

Republicans and Democrats want more infrastructure investment but have different visions as to what projects the taxpayers should pay for and how they should pay for it. President Trump wants to invest \$1 trillion in infrastructure but has yet to put forth a substantive plan. Democrats in Congress have released their own plan that would spend an additional \$1 trillion on infrastructure, financed by an undisclosed tax increase on corporations and top individual income earners.<sup>2</sup>

The tax-and-spend approach is not only wasteful but ignores the fundamental problems with infrastructure policy, mainly that the federal government spends entirely too much on projects that are not federal in nature and fails to reform policies and regulations that drive up the cost of both public spending and private-sector investment. When crafting any new infrastructure legislation, policymakers should adhere to the following principles:

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<sup>1</sup>Michael Sargent, "Building on Victory: An Infrastructure Agenda for the New Administration," Heritage Foundation *Background* No. 4629, November 21, 2016, <http://www.heritage.org/budget-and-spending/report/building-victory-infrastructure-agenda-the-new-administration>.

<sup>2</sup>Democratic Policy and Communications Committee, "A Blueprint to Rebuild America's Infrastructure," January 24, 2017, <https://www.dpcc.senate.gov/files/documents/ABlueprinttoRebuildAmericasInfrastructure1.24.17.pdf> (accessed February 27, 2017).



- **Make** government spending more efficient by limiting spending to projects of national scope and priority;
- **Refrain** from creating new revenue streams for infrastructure funding;
- **Empower** the private sector and **improve** the efficiency of industry through reforming the tax code, eliminating regulations and policies that benefit special interests and privatization;
- **Reform** and **eliminate** regulatory obstacles that will stretch both public spending and private-sector investments further; and
- **Unleash** free enterprise in the energy sector, resulting in increased resource production but also more energy infrastructure.

There is a long list of necessary policy and regulatory changes Congress and the Trump Administration should adopt to stimulate infrastructure investment. This testimony, however, will focus on the major environmental roadblocks.

#### **The State of the Environment and Principles for Reform**

Similar to complaints of a crumbling infrastructure, the public is often under the perception that America's environmental state is deteriorating. On the contrary, through innovation and investment in new technologies, as well as through legislation, air and water quality have improved significantly in the United States. Pollutants known to cause harm to public health and the environment are declining; in fact, the aggregate emissions of six common pollutants decreased 69 percent during 1970–2014.<sup>3</sup> According to the Environmental Protection Agency's (EPA's) latest air quality trends report,<sup>4</sup> the following pollutants decreased from 1990 levels:

- 77 percent decrease in carbon monoxide (CO) 8-hour;
- 99 percent decrease in lead (Pb) 3-month average;
- 54 percent decrease in nitrogen dioxide (NO<sub>2</sub>) annual;
- 47 percent decrease in nitrogen dioxide (NO<sub>2</sub>) 1-hour;
- 22 percent decrease in ozone (O<sub>3</sub>) 8-hour;
- 39 percent decrease in particulate matter 10 microns (PM<sub>10</sub>) 24-hour;
- 37 percent decrease in particulate matter 2.5 microns (PM<sub>2.5</sub>) annual;
- 37 percent decrease in particulate matter 2.5 microns (PM<sub>2.5</sub>) 24-hour; and
- 81 percent decrease in sulfur dioxide (SO<sub>2</sub>) 1-hour.

Despite these air quality improvements, there are plenty of opportunities to make environmental improvements and address challenges. The question is: what are the best means to achieve those gains? The major environmental statutes are ill-equipped to effectively solve environmental challenges the U.S. faces today and, in some instances, result in environmental degradation. The EPA has evolved into a vast command-and-control regulatory regime that impedes the flourishing of a free and vibrant society. The

<sup>3</sup>United States Environmental Protection Agency, "Overview of the Clean Air Act and Air Pollution," <https://www.epa.gov/clean-air-act-overview> (accessed February 25, 2017).

<sup>4</sup>United States Environmental Protection Agency, "Our Nation's Air: Status and Trends through 2015," <https://gispub.epa.gov/air/trendsreport/2016/> (accessed February 25, 2017).

EPA has used ever-expanding authority to implement stringent regulations with increasingly high compliance costs and diminishing marginal environmental returns. These environmental regulatory roadblocks impede infrastructure investment of all types, from roads and bridges to pipelines and transmission lines.

Alternatively, policymakers should not ignore the potential of economic freedom to improve environmental quality. Private property rights incentivize owners to take care of their belongings rather than abuse the land and water. A sound rule of law ensures that polluters cannot violate the rights of others without accounting for externalities or providing just compensation for any damage inflicted. Furthermore, as freer economies develop and become richer, they also tend to be more capable of adopting greater energy efficiency through innovation.

Policy reforms to America's major environmental statutes will not only yield better economic conditions, but also will more adequately protect public health and safety. As my colleague Diane Katz outlined in an environmental primer, policymakers should adhere to the following principles:

- **Shifting responsibility** for environmental regulation from the federal government to the states and the private sector.
- **Finding market alternatives** to command-and-control regulation, such as tradable permits for air emissions and water discharges.
- **Limiting congressional delegation** of regulatory authority.
- **Compensating citizens** for regulatory "takings." The benefits of environmental improvements are enjoyed by the public, but the regulatory costs are routinely imposed on individuals.
- **Codifying** stricter information quality standards for rulemaking, including limits on agency use of co-benefits to justify regulation.
- **Establishing a sunset date** for environmental regulations. To help ensure that obsolete and ineffective rules are taken off the books, sunset dates should be set for all major environmental regulations.
- **Restating and clarifying in law** that the Clean Air Act was never intended to regulate greenhouse gases as air pollutants, and declare in statute that greenhouse gases are not pollutants subject to regulation under the act.
- **Shifting federal land holdings** to states and the private sector.<sup>5</sup>

#### **Reforming Environmental Roadblocks to Infrastructure Investment**

Obstruction to infrastructure investment exists at all levels of government, but several federal regulations delay and obstruct investment and job creation for negligible environmental benefit. Congress should examine and reform the following major environmental regulatory roadblocks to infrastructure investment.

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<sup>5</sup>Diane Katz, "An Environmental Policy Primer for the Next President," Heritage Foundation *Backgrounder* No. 3079, December 14, 2015, <http://www.heritage.org/environment/report/environmental-policy-primer-the-next-president>.

## NEPA

The National Environmental Policy Act (NEPA) requires federal agencies to conduct comprehensive environmental assessments for a wide range of projects, including permitting of infrastructure. The NEPA process commences when a federal agency proposes a major action that could significantly impact the environment. There are multiple steps in the NEPA process beginning with an environmental assessment as to whether the proposed action significantly affects the environment. Categorical exclusions may be granted, which effectively act as a NEPA waiver if it is determined to have no significant environmental impacts. Categorical exclusions do not require an environmental assessment or an environmental impact statement.<sup>6</sup>

Environmental stewardship is critical but the NEPA statute that is nearly fifty years old has evolved to serve more as a tool to delay and obstruct projects unpopular with judicially active special interest groups or biased politicians who ignore scientific and technical logic. In one instance, a mining company waited 17 years for a permit.<sup>7</sup> For highway projects, the average time to complete an environmental impact statement increased from 2.2 years in the 1970s to 8.1 years in 2011.<sup>8</sup> Currently, 148 energy and transit projects are in NEPA review at an estimated cost of nearly \$230 billion dollars.<sup>9</sup>

The Regional Plan Association identified a number of contributing factors to increased NEPA delays, which occur at the federal, state, and local level. Some of the major problems at the federal level include differing interpretations of NEPA requirements, failed interagency coordination, administrative bottlenecks, and outdated requirements that fail to take into account a dynamic, ever-changing environment.<sup>10</sup> Furthermore, the Council on Environmental Quality (CEQ) added steps agencies must adhere to when conducting environmental impact statements, layering more bureaucracy on an already cumbersome process. For example, the CEQ issued final guidance for how agencies should consider global warming impacts in their NEPA reviews, as negligible as they will be.<sup>11</sup>

The Obama Administration recognized that NEPA reviews can be expedited to speed up project investment without sacrificing the environment by effectively relinquishing NEPA requirements for

<sup>6</sup>U.S. Department of Transportation Federal Highway Administration, Environmental Review Toolkit, "NEPA Documentation: Categorical Exclusion," <https://www.environment.fhwa.dot.gov/projdev/docuce.asp> (accessed February 23, 2017).

<sup>7</sup>Testimony of Laura Skaer, Executive Director, Northwest Mining Association, before the Committee on Resources, U.S. House of Representatives, NEPA Task Force, April 23, 2005, <http://www.nwma.org/Issues/NEPA%20Testimony.doc> (accessed February 23, 2017).

<sup>8</sup>Regional Plan Association, "Getting Infrastructure Going: Expediting the Environmental Review Process," June 2012, <http://www.rpa.org/library/pdf/RPA-Getting-Infrastructure-Going.pdf> (accessed February 23, 2017).

<sup>9</sup>Curtis Arndt, "Regulatory Burdens and the Supply of Infrastructure Projects," American Action Forum, February 23, 2017, <https://www.americanactionforum.org/research/infrastructure-regulatory-burdens/> (accessed February 27, 2017).

<sup>10</sup>Ibid.

<sup>11</sup>"Fact Sheet: White House Council on Environmental Quality Releases Final Guidance on Considering Climate Change in Environmental Reviews," The White House, August 2, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/08/02/fact-sheet-white-house-council-environmental-quality-releases-final> (accessed February 6, 2017).

projects funded by the American Recovery and Reinvestment Act, better known as the stimulus package. The Administration granted more than 179,000 categorical exclusions for stimulus projects because, as then–Energy Secretary Steven Chu said, it was necessary to “get the money out and spent as quickly as possible” and “[i]t’s about putting our citizens back to work.”<sup>12</sup> The same logic applies to other publicly funded infrastructure projects as well as privately funded ones.

Both Congress and the CEQ have attempted to streamline the NEPA process. Most recently, the Fixing America’s Surface Transportation Act or FAST Act expedites the environmental review for some large infrastructure projects, but several reforms lack the proper enforcement mechanisms, and the reforms fail to address the root problems of project delays.

Reforming or repealing NEPA will not compromise environmental stewardship but instead provide an opportunity to remove duplication with state environmental standards and establish efficient and effective means to protect public health and safety. With the exception of full repeal, reforms to NEPA should include:

- Eliminating greenhouse gas emissions analysis from the review process,
- Narrowing the review to only major environmental issues,
- Mandating time limits,
- Establishing functional equivalence of a NEPA analysis through federal and state statutes that already require an environmental impact analysis, and
- Requiring NEPA to incorporate previous analyses into similar projects.<sup>13</sup>

#### **Social Cost of Carbon**

The federal government uses the social cost of carbon (SCC) to calculate the climate benefit of abated carbon dioxide emissions from regulations or the “climate cost” of infrastructure projects. When President Obama first took office, he created an Interagency Working Group to calculate the alleged monetary long-term damage of CO<sub>2</sub> emissions in a given year. A few years later, the working group increased that cost to \$36 per ton in 2015.

Not only is the analysis a waste of time and resources, federal and state regulators can use SCC to justify stalling or rejecting an infrastructure project. The agency estimates the amount of CO<sub>2</sub> that would be emitted into the atmosphere over the lifetime of that project, multiplies that figure by \$36, and generates a “global warming cost” to justify the obstructing the project. In fact, a Colorado judge

<sup>12</sup>Kristen Lombardi and John Solomon, “Obama Administration Gives Billions in Stimulus Money Without Environmental Safeguards,” *The Washington Post*, November 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112804379.html> (accessed February 6, 2017).

<sup>13</sup>Diane Katz and the Honorable Craig Manson, “The National Environmental Policy Act,” in The Heritage Foundation, *Environmental Conservation: Eight Principles of the American Conservation Ethic*, [http://thf\\_media.s3.amazonaws.com/2017/EnvironmentalConservation/Chapter5-The-National-Environmental-Policy-Act.pdf](http://thf_media.s3.amazonaws.com/2017/EnvironmentalConservation/Chapter5-The-National-Environmental-Policy-Act.pdf) (accessed February 23, 2017).

rejected a coal mine expansion because the regulators failed to take into consideration the social cost of carbon.<sup>14</sup>

The EPA uses three statistical models, known as integrated assessment models, to estimate the value of the social cost of carbon, which is defined as the economic damage that one ton of carbon dioxide emitted today will cause over the next 300 years. But these models are inadequate tools for policy analysis and regulatory rulemaking. Subjecting the models to reasonable inputs for climate sensitivity and discount rates dramatically lowers the figure for the social cost of carbon.

Discount rates are important to for projecting costs and benefits well into the future. People generally prefer benefits earlier instead of later and costs later instead of earlier. Hence, it is necessary to normalize costs and benefits to a common time. For example, if a 7 percent discount rate makes people indifferent to a benefit now versus a benefit later (e.g., \$100 today versus \$107 a year from now), then 7 percent is the appropriate discount rate to use. But discount rates also demonstrate how sensitive the social cost of carbon is to the discount rate.<sup>15</sup> For example, with regard to analyzing the Clean Power Plan climate regulations on existing power plants, when changed from a 3 percent discount rate to a 5 percent discount rate, the EPA's \$20 billion in projected climate benefits decreases to \$6.4 billion—less than the EPA's egregiously low projection of \$8.4 billion in compliance costs.

The models also rely on equilibrium climate sensitivity (ECS) to calculate the cost. ECS is an attempt to quantify the earth's temperature response to CO<sub>2</sub> emissions, answering the question: How does the earth's temperature change from a doubling of CO<sub>2</sub> in the atmosphere? Recent peer-reviewed literature estimates that the equilibrium climate sensitivity is lower than the studies the EPA relied on, which are now more than a decade old.<sup>16</sup> Using more up-to-date ECS literature also significantly lowers the value of SCC.<sup>17</sup> According to one model, using a 7 percent discount rate combined with more updated equilibrium climate sensitivity distribution decreases the SCC by \$34 per ton (more than a 102 percent decrease) and in some instances, has a high probability of being negative (meaning there is a social benefit of increased carbon dioxide emissions).<sup>18</sup>

Furthermore, attempts to forecast economic damages centuries into the future strains credibility when moving to the real world of policy implementation. These models are not credible tools for policy analysis. Congress and the Trump Administration should prohibit estimates of the social cost of carbon in any regulatory analysis.

#### Nuisance Litigation

<sup>14</sup>Phil Taylor, "BLM Crafting Guidance on Social Cost of Carbon—Internal Memo," Greenwire, April 15, 2015, <http://www.eenews.net/stories/1060016810> (accessed February 23, 2017).

<sup>15</sup>U.S. Environmental Protection Agency, *Regulatory Impact Analysis*, pp. ES-22, Table ES-9.

<sup>16</sup>Paul Knappenberger and Patrick Michaels, "Climate Models' Tendency to Simulate Too Much Warming and the IPCC's Attempt to Cover That Up," Cato Institute, October 10, 2013, <http://www.cato.org/blog/climate-models-tendency-simulate-too-much-warming-ipccs-attempt-cover> (accessed February 25, 2017).

<sup>17</sup>Kevin Dayaratna and David Kreutzer, "Unfounded FUND: Yet Another EPA Model Not Ready for the Big Game," Heritage Foundation *Backgrounder* No. 2897, April 29, 2014, [http://thf\\_media.s3.amazonaws.com/2014/pdf/BG2897.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/BG2897.pdf).

<sup>18</sup>Ibid.

Another major hurdle to infrastructure development is nuisance litigation through citizen suit provisions in many of the major environmental laws. Groups can sue government agencies and others under citizen suit provisions where they believe laws like the Endangered Species Act and Clean Water Act have not been followed in permitting projects. These provisions have been abused because the consequences of suing are relatively small for plaintiffs compared to the outsized costs to companies and taxpayers for the resources diverted to excessive litigation and lost economic activity from legitimate projects that are objectionable to a small group of people. Extreme environmental organizations often use the courtroom as a “defeat by delay” strategy to make infrastructure projects so expensive and time consuming as to discourage investment or block legitimate activity altogether.

Ironically, nuisance litigation has also had costly environmental impacts in addition to unnecessarily complicating other activities. For example, the National Park Service (NPS) published a plan to manage flooding in the Yosemite Valley in 2000 after years of debate, only for two small environmentalist groups to sue in an attempt to prevent these management plans. After seven years of litigation, the courts finally permitted the NPS to proceed with a small portion of the plan that dealt with road repair and sewer pipes leaking into wetlands, work which was prevented to that point because of the ongoing lawsuits.<sup>19</sup>

Citizen suit provisions are an important piece of environmental laws. However, reform is necessary to prevent their abuse. Congress should clarify requirements for legal standing (such as requiring proof of a connection to and harm from the challenged action), and require bonds be posted by plaintiffs seeking to block activities in order to reduce abuse and curb defeat by delay tactics that harm private parties and taxpayers.<sup>20</sup>

#### **The Endangered Species Act**

Environmental activists have used the Endangered Species Act (ESA) to block infrastructure and economic development across the country. For instance, environmental organizations used the American burying beetle to thwart the construction of the Keystone XL pipeline. The ESA has largely been an ineffective conservation tool, but the act has been effective in blocking economic development and creating perverse incentives and unintended consequences when landowners avoid dealing with endangered species.

The list of “endangered” and “threatened” species continues to grow in the United States and worldwide and has increased more than tenfold since the ESA’s creation in 1973. As of February 2017, Fish and Wildlife Service (FWS) reported 1,652 U.S. species on the list and another 676 foreign species.<sup>21</sup> Meanwhile, there are only 47 delisted species, because they have been “recovered,” a mere 2 percent

<sup>19</sup> Allan K. Fitzsimmons, *Reforming Federal Land Management: Cutting the Gordian Knot* (Lanham, MD: Roman & Littlefield Publishers, Inc.), 2012, p. 4.

<sup>20</sup> Robert Gordon and Diane Katz, eds., *Environmental Policy Guide: 167 Recommendations for Environmental Policy Reform* (Washington, DC: The Heritage Foundation, 2015).

<sup>21</sup> U.S. Fish and Wildlife Services, Environmental Conservation Online System, Listed Species Summary (Boxscore), as of February 23, 2017, <http://ecos.fws.gov/ecp0/reports/box-score-report> (accessed February 24, 2017).

of all listed species. Furthermore, though the FWS lists 47 recovered species, it is a mistake to attribute all of their recoveries to the ESA. There have been reporting errors regarding population and population trends or other policy changes that resulted in species recovery.<sup>22</sup>

On the other hand, only 10 species listed are now extinct and therefore proponents of the ESA will argue that the act has commendably prevented extinction. As dubious as the results may be, clearly defined problems exist with the ESA as currently structured such as delayed economic investment, threatened private property rights, perverse incentives that destroy habitat protection, and the federal government's inability to quickly adapt to a constantly changing environment.

The unintended consequences created by the ESA have been documented for years. Plenty of anecdotal evidence exists where landowners have managed their land and destroyed habitats to avoid dealing with endangered species. Michael Bean of the Environmental Defense Fund identified this problem in a speech more than two decades ago saying that landowners' actions are "fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints."<sup>23</sup> Several studies have examined landowners' preemptive habitat destruction. For instance, Dean Lueck of the Indiana University Maurer School of Law and Jeffrey A. Michael of Towson University and North Carolina State University examined individual forest plots occupied by red-cockaded woodpeckers. They found that private landowners logged timber that was close to colonies of the woodpeckers well before the timber mature so the birds could not nest, reducing the available habitat.<sup>24</sup>

Congress and the Trump Administration should implement wholesale reforms to the ESA. Structural reforms such as fixing the consultation process and ensuring compliance with relevant information quality guidelines would go a long way to reducing some of the bureaucratic obstacles, but Congress should also shift reliance and authority to the states. States have their own conservation programs and will be more effective managers because they are accountable to the people who will directly benefit from wise management decisions or be marginalized by poor ones.<sup>25</sup> Furthermore, Congress should explore ways to protect private property rights and incentivize conservation, which would yield better economic and environmental results.<sup>26</sup>

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<sup>22</sup>Jonathan Adler, "Perverse Incentives and the Endangered Species Act," Resources for the Future, August 4, 2008, <http://www.rff.org/blog/2008/perverse-incentives-and-endangered-species-act> (accessed February 27, 2017).

<sup>23</sup>Brian Seasholes, "Frequently Asked Questions on Endangered Species Act Reform," The Reason Foundation, October 28, 2014, <http://reason.org/studies/show/frequently-asked-questions-on-endan> (accessed February 24, 2017).

<sup>24</sup>Dean Lueck and Jeffrey A. Michael, "Preemptive Habitat Destruction Under the Endangered Species Act" (April 2000), <https://ssrn.com/abstract=223871> or <http://dx.doi.org/10.2139/ssrn.223871> (accessed February 24, 2017).

<sup>25</sup>Jack Spencer, Romina Boccia, and Robert Gordon, "Environmental Conservation Based on Individual Liberty and Economic Freedom," Heritage Foundation *Backgrounder* No. 2758, January 8, 2013, [http://thf\\_media.s3.amazonaws.com/2013/pdf/bg2758.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/bg2758.pdf).

<sup>26</sup>Randy T. Simmons, "Property Rights and The Endangered Species Act," Institute for Research on the Economics of Taxation Studies in Social Cost, Regulation, and the Environment No. 9 (April 2002), <http://iret.org/pub/SCRE-9.PDF> (accessed February 24, 2017).

### Ozone Standards

In October 2015, the EPA set a new standard for ground level ozone (one of six major air pollutants regulated by the EPA) to nearing background levels; the standard is currently being contested by states in court. The EPA's more stringent ozone standard is a threat to publicly and privately funded infrastructure projects as it is expensive to meet tighter standards with smaller margins of tangible benefits. The new standards would have a direct, adverse impact on the construction of new industry, roads, and other infrastructure. Perhaps most oppressive are requirements for non-attaining regions to offset ozone-creating emissions from new or expanding industry with cuts in emissions elsewhere. Offsets turn economic growth into a zero-sum game and force investment away from non-attaining areas by making it harder to attract or expand new business.<sup>27</sup>

On behalf of its 6,000 member companies and organizations, the American Road and Transportation Builders Association warned of the negative impacts a more stringent standard would have on the "construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems."<sup>28</sup> Counties forced into non-attainment could lose transportation funding and the penalties could also adversely impact privately funded projects that require federal permit approvals.<sup>29</sup>

Even if the federal government does not implement automatic sanctions, conformity lapses also result in withdrawn funding or delay federal and non-federal infrastructure spending. A conformity lapse occurs when the Federal Highway Administration deems a transportation improvement plan (TIP) submitted by the metropolitan planning organization (MPO) to be insufficient in meeting the upward threshold of emissions.<sup>30</sup> As required by the Clean Air Act, MPOs must demonstrate their transportation plans conform to State Implementation Plans, which means "activities will not cause or contribute to any new violations of the National Ambient Air Quality Standards (NAAQS); increase the frequency or severity of NAAQS violations; or delay timely attainment of the NAAQS or any required interim milestone."<sup>31</sup> Though certain projects are exempt from conformity and the EPA has implemented a grace period, more stringent standards present difficult compliance challenges and would likely increase

<sup>27</sup> According to Michael Walls, Vice President of Regulatory and Technical Affairs for the American Chemistry Council, "Nonattainment areas are very difficult places to expand or improve business of any size, due to more expensive and restrictive regulations. It's likely that facilities would expand only if they shut down some part of their operation or they came up with some significant additional investment, or if they were required to buy increasingly expensive offsets." Frank DiCesare, "Lawmakers Tackled EPA Ozone Proposal," Frank DiCesare, "Lawmakers Tackled Ozone Proposal," *American Press*, August 23, 2014, <http://www.americanpress.com/news/local/Lawmakers-tackled-EPA-ozone-proposal> (accessed February 6, 2017).

<sup>28</sup> American Road and Transportation Builders Association, Comment to the Environmental Protection Agency, Re: National Ambient Air Quality Standards for Ozone, March 17, 2015, <http://www.artba.org/wp-content/uploads/2015/04/ARTBA-Comments-Re-Docket-No-EPA-HQ-OAR-2008-0699.pdf> (accessed February 26, 2017).

<sup>29</sup> The United States Chamber of Commerce, "Grinding to a Halt: Examining the Impacts of the New Ozone Regulations on Key Transportation Projects," <http://www.energyxxi.org/sites/default/files/Grinding-to-a-halt-9-18-compressed.pdf> (accessed February 27, 2017).

<sup>30</sup> James E. McCarthy, "Transportation Conformity Under the Clean Air Act," Congressional Research Service, May 21, 2015,

<sup>31</sup> U.S. Department of Transportation, Federal Highway Administration, Transportation Conformity Brochure, [https://www.fhwa.dot.gov/environment/air\\_quality/conformity/con\\_broc.cfm](https://www.fhwa.dot.gov/environment/air_quality/conformity/con_broc.cfm) (accessed February 27, 2017).



conformity lapses. Resolving conformity lapses are costly, time-consuming and divert infrastructure investment from where it may be most needed. For instance, Atlanta had to divert nearly \$700 million away from highway construction toward transit and bicycles to meet the emissions limits.<sup>32</sup>

National average ozone levels have fallen 32 percent since 1980 and are on track to continue decreasing.<sup>33</sup> Withdrawing the 2015 standard would unlock economic activity at the state and local level even as progress is made as states continue to meet attainments of the 1997 and 2008 standards.

#### **Unleashing American Energy Potential Will Stimulate Infrastructure Investment**

Infrastructure spending needs are not limited to transportation and telecom infrastructure. Policymakers should not ignore opportunities to expand privately funded energy infrastructure investments. They should include reforms that eliminate open access to natural resource extraction, remove government-imposed obstacles that obstruct power generation, electricity grid modernizations, and export facility construction, as well as pipeline and transmission line expansion as part of any infrastructure package.

Opening access to resource exploration and implementing regulatory reform will spur private-sector investment in new infrastructure and spur job creation across the country. In fact, in 2011 the U.S. Chamber of Commerce compiled a list of 351 projects stalled by time-consuming permitting processes, unnecessarily slow environmental reviews, nuisance lawsuits, changes to zoning laws, and Not in My Back Yard (NIMBY) resistance. Although the study is a few years old, the long list of projects demonstrates the sheer magnitude of potentially lost economic opportunities for investments in energy infrastructure. The authors estimate that the “invest phase” of the projects, which includes planning and construction, would generate \$577 billion in direct investment over a 7-year construction period.

Importantly, regulatory reform will benefit all energy sources and technologies. Out of the 351 projects identified, 140 of the stalled projects are renewable energy infrastructure, including 89 wind power, 29 biomass, 10 solar power, seven hydropower, four wave, and one geothermal project. Oil and natural gas transportation and storage expansion presents another opportunity for increased direct investment in infrastructure. Despite the politicization of recent pipeline projects, such as Keystone XL and Dakota Access, pipelines are the safest mode of transporting oil, natural gas, and other petroleum products. The United States has more than 500,000 miles of crude oil, petroleum, and natural gas pipelines, and another 2 million miles of natural gas distribution pipelines.<sup>34</sup> Not only do pipelines pose the least threat to accidents, injuries, or fatalities, they also pose the smallest environmental risk.<sup>35</sup>

<sup>32</sup> The United States Chamber of Commerce, “Grinding to a Halt: Examining the Impacts of the New Ozone Regulations on Key Transportation Projects,” <http://www.energyxxi.org/sites/default/files/Grinding-to-a-halt-9-18-compressed.pdf>

<sup>33</sup> U.S. Environmental Protection Agency, “Air Trends: Ozone Trends,” <https://www.epa.gov/air-trends/ozone-trends> (accessed February 6, 2017).

<sup>34</sup> Diana Furchtgott-Roth, “Pipelines Are Safest for Transportation of Oil and Gas,” Manhattan Institute *Issue Brief* No. 23, June 2013, [https://www.manhattan-institute.org/pdf/ib\\_23.pdf](https://www.manhattan-institute.org/pdf/ib_23.pdf) (accessed February 6, 2017).

<sup>35</sup> *Ibid.*

Oil and gas infrastructure includes more than pipelines, however. Rail and marine vessels are necessary and important modes of transport as is investment in new roads and road maintenance because of high-volume heavy-duty vehicle traffic. The increased oil and gas production as a result of the shale boom in the U.S. consequently increased infrastructure investment. According to a December 2013 analysis from IHS Economic Consulting, U.S. oil and gas infrastructure increased from \$56.3 billion in 2010 to \$89.6 billion in 2013.<sup>36</sup> The study projects a total of \$890 billion in direct investment for oil and gas infrastructure and storage over the 2014–2025 timeframe.<sup>37</sup>

The \$890 billion projection is for the business-as-usual case, assuming no significant changes in policy or regulation. Free-market reforms that open access to energy resources currently off limits and reduce duplicative and ineffective regulations that increase production costs would increase energy production and subsequently increase infrastructure investment. In fact, the IHS analysis projects that a 20 percent increase in oil and gas production from the baseline case would yield a total of \$1.15 trillion in oil and gas infrastructure and storage direct spending, a 29 percent increase, or an additional \$260 billion, over the baseline scenario.<sup>38</sup>

A 20 percent increase in resource production is by no means out of reach for American energy companies. Domestic petroleum production in 2015 was about 50 percent higher than the projection the Energy Information Administration (EIA) made for 2015 in 2008.<sup>39</sup> Natural gas production in 2015 was about 40 percent higher than the EIA's 2008 projection.<sup>40</sup> The comparative pessimism on the part of the EIA was largely due to not fully appreciating the impacts of smart drilling technology and hydraulic fracturing (fracking) at that time. Even at a time where oil prices are much lower than 2008, reforms that open access to untapped resources and reduce the regulatory burden on oil and gas activities could achieve a 20 percent increase (or higher) in production.

#### Energy Reforms

Reforming obstructionist federal laws and regulations that are duplicative to state regulations, provide little to no environmental benefit, or serve as a guide to filing lawsuits will encourage more infrastructure investment. State and local laws and regulations that also contribute to delays in investment and policy reform at all levels of government should follow the same themes. The environmental review and permitting process of infrastructure projects should respect the rule of law and protect private property rights, not serve as tools for anti-development and litigation.<sup>41</sup>

<sup>36</sup>IHS Global Inc., "Oil and Natural Gas Transportation and Storage Infrastructure: Status, Trends, and Economic Benefits," December 2013, <http://www.api.org/~media/Files/Policy/SOAE-2014/API-Infrastructure-Investment-Study.pdf> (accessed February 6, 2017).

<sup>37</sup>Ibid.

<sup>38</sup>Ibid.

<sup>39</sup>U.S. Energy Information Administration, "Annual Energy Outlook 2008," June 2008, <https://www.eia.gov/oiaf/archive/aeo08/index.html> (accessed June 20, 2016), and U.S. Energy Information Administration, "Annual Energy Outlook 2016," July 7, 2016, <http://www.eia.gov/forecasts/aeo/> (accessed February 6, 2017).

<sup>40</sup>Ibid.

<sup>41</sup>Steve Pociask and Joseph P. Fuhr Jr., "Progress Denied: A Study on the Potential Economic Impact of Permitting

Policymakers should address the following to increase resource exploration and production, which will consequently spur more privately funded energy infrastructure investment.

#### **Open Access to Domestic Resource Production**

A critical component to achieving increased domestic energy production is to open access to onshore and offshore resources restricted by the federal government. The Trump Administration should open all federal waters and federal lands that are not part of the national park system or congressionally designated wilderness areas to exploration and production for all of America's natural resources.

Rather than abiding by antiquated five-year leasing programs that are inflexible to constantly changing market dynamics, Congress should require the Department of the Interior to conduct lease sales if the private sector can safely pursue energy exploration and production. Congress and the Administration could also streamline the permitting and environmental review processes and limit judicial activism, but the most appropriate reform that would yield more effective results for both energy production and environmental stewardship is to transition management authority of resource development on federal lands to the states.<sup>42</sup>

In fact, Heritage analysis shows that lifting needless and duplicative restrictions on energy production will increase employment by an average of 700,000 jobs through 2035. Along with the jobs comes \$3.7 trillion in additional gross domestic product (GDP) that translates to an additional \$40,000 of income per family of four by 2035.<sup>43</sup>

#### **Approve the Keystone XL Pipeline and Streamline Pipeline Infrastructure Permitting**

The recent growth in domestic oil and gas production—sometimes in nontraditional areas, such as North Dakota—has resulted in transportation delays. Expanding natural gas distribution and exporting more natural gas, whether it is to Mexico, Canada, or elsewhere, also will necessitate additional pipeline infrastructure.<sup>44</sup>

The Trump Administration's easiest decision may be to approve the Keystone XL pipeline. Keystone XL is environmentally responsible, will not contribute significantly to climate change, will boost the economy, will increase the supply of oil to America's Gulf Coast refineries, and will provide much needed energy

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Challenges Facing Proposed Energy Projects," U.S. Chamber of Commerce, March 10, 2011, [http://www.projectnoproject.com/wp-content/uploads/2011/03/PPN\\_EconomicStudy.pdf](http://www.projectnoproject.com/wp-content/uploads/2011/03/PPN_EconomicStudy.pdf)

<sup>42</sup>Katie Tubb and Nicolas Loris, "The Federal Lands Freedom Act: Empowering States to Control Their Own Energy Futures," Heritage Foundation *Background* No. 2992, February 18, 2015, <http://www.heritage.org/environment/report/the-federal-lands-freedom-act-empowering-states-control-their-own-energy-futures>.

<sup>43</sup>David Kreutzer, Nicolas Loris, and Kevin Dayaratna, "Time to Unlock America's Vast Oil and Gas Resources," Heritage Foundation *Background* No. 3148, September 1, 2016, <http://www.heritage.org/environment/report/time-unlock-americas-vast-oil-and-gas-resources>.

<sup>44</sup>U.S. Energy Information Administration, "Natural Gas Explained: Natural Gas Pipelines," U.S. Department of Energy, November 30, 2015, [http://www.eia.gov/energyexplained/index.cfm?page=natural\\_gas\\_pipelines](http://www.eia.gov/energyexplained/index.cfm?page=natural_gas_pipelines) (accessed February 6, 2017).

infrastructure. The Trump Administration invited TransCanada, the builder of the pipeline, to re-apply for a permit

Streamlining the environmental review and permitting processes for new pipelines will ensure timely, economically rational and environmentally responsible infrastructure investment. However, taxpayers should not subsidize those investments, and Congress should eliminate any federally imposed cost-socialization requirements through which regulatory agencies support expensive, uneconomic projects by spreading the costs to citizens who derive little, if any, benefit from those projects. Additionally, Congress should be mindful of protecting private property rights and respect the state authority to control local and regional needs.

#### **Re-engage Yucca Mountain**

Nuclear power provides 20 percent of the nation's electricity. The nuclear industry provides thousands of jobs and billions of dollars in economic activity, including exports. However, political mishandling of nuclear waste management is a major barrier to the current and future nuclear industry, as well as timely management of defense-related waste.<sup>45</sup>

The federal government has devoted significant resources to a long-term repository at Yucca Mountain, which the Obama Administration tried to close for political reasons rather than safety or technological objections. The Trump Administration should fund and extend the key license support contracts to complete its review of the Yucca Mountain facility. Funds currently exist for this purpose, paid for by nuclear power utilities and their rate payers in the Nuclear Waste Fund which currently has \$37.4 billion available to be appropriated for nuclear waste management.<sup>46</sup>

Regardless of what ultimately becomes of Yucca Mountain, the scientific community and global experience have supported deep geologic storage as critical to any waste management plan.<sup>47</sup> Congress and the Trump Administration should then address fundamental problems with the current approach to management, in particular including establishing industry responsibility for managing waste, competitive pricing, and giving Nevadans more control over any nuclear waste facility there.<sup>48</sup>

#### **Expand Access to Energy Exports**

<sup>45</sup> Katie Tubb and Jack Spencer, "Real Consent for Nuclear Waste Management Starts with a Free Market," Heritage Foundation *Backgrounder* No. 3107, March 22, 2016, <http://www.heritage.org/research/reports/2016/03/real-consent-for-nuclear-waste-management-starts-with-a-free-market>.

<sup>46</sup> Office of Inspector General, "Department of Energy Nuclear Waste Fund's Fiscal Year 2016 Financial Statement Audit," U.S. Department of Energy, Audit Report OAI-FS-17-04, December 2016, p. 10, <https://energy.gov/sites/prod/files/2016/12/f34/OAI-FS-17-04.pdf> (accessed February 6, 2017).

<sup>47</sup> Jack Spencer and Nicolas Loris, "Yucca Mountain Remains Critical to Spent Nuclear Fuel Management," Heritage Foundation *Backgrounder* No. 2131, May 1, 2008, [http://www.heritage.org/research/reports/2008/05/yucca-mountain-remains-critical-to-spent-nuclear-fuel-management?\\_ga=1.263318668.1261244218.1479835039](http://www.heritage.org/research/reports/2008/05/yucca-mountain-remains-critical-to-spent-nuclear-fuel-management?_ga=1.263318668.1261244218.1479835039).

<sup>48</sup> Jack Spencer, "Nuclear Waste Management: Minimum Requirements for Reforms and Legislation," Heritage Foundation *Issue Brief* No. 3888, March 28, 2013, <http://www.heritage.org/environment/report/nuclear-waste-management-minimum-requirements-reforms-and-legislation>.

Congress and the Trump Administration should remove government impediments to liquefied natural gas (LNG) exports and coal export terminals. Regarding LNG exports, companies must obtain approval from both the Federal Energy Regulatory Commission and the Department of Energy (DOE) before exporting natural gas. A facility is automatically authorized if the recipient country has a free trade agreement (FTA) with the U.S. In the absence of an FTA, the DOE can arbitrarily deny a permit if it believes the volume of natural gas exports is not in the public's interest.<sup>49</sup> The decision to export natural gas should be a business decision, not a political one. The U.S. trades regularly with a number of non-FTA countries, and natural gas should be treated like any other globally traded good.

With respect to coal, export terminals should go through the proper environmental review and permitting stage, but opponents of coal production want the Army Corps of Engineers to consider a cumulative, programmatic environmental impact statement (EIS). This comprehensive review would assess the environmental impacts and greenhouse gas emissions not only from the actual terminal, but also from the mining, rail transportation to the terminal, and end use of the coal. Adding these extra layers of regulatory review would create more fodder for groups that want the coal to stay in the ground, and it sets a dangerous precedent for exports of goods and services that environmental activists feel have too large of an environmental footprint. The Trump Administration should prohibit agencies from conducting cumulative EISs.

#### **Conclusion**

Whether it is traditional infrastructure or energy infrastructure, these shovel-ready job projects should not be held up for years in regulatory paralysis or through litigation. Any infrastructure proposal must come with substantial regulatory environmental reform. Reforming environmental regulations with a focus on transitioning authority to the states, creating market incentives, and removing costly, ineffective regulations will improve the environment at a lower cost.

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<sup>49</sup>Nicolas D. Loris, "Energy Exports Promote Prosperity and Bolster National Security," Heritage Foundation Background Paper No. 2931, July 23, 2014, <http://www.heritage.org/research/reports/2014/07/energy-exports-promote-prosperity-and-bolster-national-security>.

Mr. FARENTHOLD. Thank you very much, Mr. Loris. I'll now recognize myself for the first round of questioning for 5 minutes.

Mr. Beyer, you're an engineer, and in your testimony, you told the testimony of actually having to do a full review of just doing a topcoat on an existing road. As an engineer, by topcoating that road, you're not taking any more land. You're not endangering any more species. I assume the runoff is going to be constant whether you've got an inch or two, the road is an inch or two higher or an inch or two lower. Is there any environmental impact at all? I assume there's got to be some. Can you tell me what that sort of change makes?

Mr. BEYER. Chairman Farenthold, that's a very good question, and I believe it was Ranking Member Demings that mentioned categorical exclusions in her discussion. And there are categorical exclusions for those activities. But even with the categorical exclusions, the other oversight that is involved to get to the point where you are categorically excluded makes that process much more lengthy, and that's when I'm referring to the 9 months to 12 months to get that project out there. In terms of the environmental impacts, we're preserving the road that is there, the impacts that we are mitigating by preserving that road, sealing that road up, allows for smoother traffic. It allows for shorter trips. It takes away from the citizens having damaged vehicles, things of that nature, all things that actually would create more environmental problems if it wasn't done. That's just one example. I'm just trying to show you that a simple project like that gets bogged down and then how that translates to the larger ones.

Mr. FARENTHOLD. All right. And you also spoke about some infrastructure that was damaged as a result of a natural disaster. I assume that the procedures and techniques for building a road or a bridge in 2017 are substantially different than in the 1950s when maybe some of this infrastructure was originally developed. Does replacing infrastructure from the '40s or '50s with infrastructure designed to today's technical standard using today's technical process actually make them more or less environmentally friendly?

Mr. BEYER. First of all, I will admit that I wasn't around in the '50s when those were being built, so from what I've seen in my experience, yes, sir, they are much different in the construction processes. One of those examples about the emergency repairs, though, we're sitting there waiting for approvals with a roadway that is wide open that has 20 foot embankments going down into a live stream that is carrying silt and sediment downstream, and we can't get in there to work because we don't get a clearance. So we're actually doing more damage to the environment by waiting than we are by going in there and doing our actions.

The other thing is we have got several hundred yards of material that we're laying downstream in the channel that we're sitting there looking at with the Federal officials, and they're all worried about whether or not, with all due respect, whether I'm going to hurt a yellow-bellied salamander or something like that, and you've got the whole roadway sitting down there in the channel. If they were there, they're down there with the debris. So realistically, that doesn't make much sense to us when we're trying to get services back to our citizens, sir.

Mr. FARENTHOLD. All right. Super. Mr. Loris, you work at the think tank, and you study this a lot. There's some concern that all these delays would go away if we would just hire more people to do the reviews and create a bigger Federal bureaucracy to deal with that. Do you think that's the case?

Mr. LORIS. No, I don't think so. In a lot of respects, we have tried to do that, and we have seen increasing bottlenecks, lack of coordination. I think it fails to address the real roots of the problem, which is so much meddling through Federal Government and through this alphabet soup of agencies that there is a lack of coordination. So I think we need to, in fact, go the opposite approach and not hire more Federal workers, but devolve a lot of these responsibilities down to the State who are more responsive to these things.

Mr. FARENTHOLD. So as part of the NEPA review process, there are a wide variety of Federal agencies that review this. Part of the changes that the Transportation Committee made in the recent transportation bills is to try to streamline that and get some of these reviews going concurrently. Is that working, or are we seeing situations where all the agencies but one don't like it, and then you've got to go back to square one? How is that working—

Mr. LORIS. I think, at most, it's a Band-Aid for a bullet hole. It really fails to address, again, these problems that so many agencies can still effectively stall, and without real, hard deadlines, if you have one agency that's capitulating to the needs of a special interest group, or someone who opposes the project, it can still delay the project. So I know they tried to make reforms in the FAST Act to streamline the NEPA process, but it really doesn't address those fundamental needs that would go a long way towards reducing those timelines.

Mr. FARENTHOLD. All right. Well, I see my time has expired. I'll now recognize the Ranking Member, Ms. Plaskett, for 5 minutes of questions.

Ms. PLASKETT. Thank you, Mr. Chairman, and thank you to the witnesses again for being here. This is, to me, a really important topic. I'm very concerned about impediments to communities being able to grow, being able to sustain themselves, and recognizing that there has to be a balance. Everyone here on this panel agrees on the importance of infrastructure. Mr. Beyer, you probably stated it best in your testimony when you said finding the balance between regulations and reality is key. I agree with that wholeheartedly. The economy of the Virgin Islands is heavily reliant on protecting its natural resources. For an example, we had, some years ago, the EPA, their Petroleum Refinery Initiative mandated that all U.S. refineries install best available control technologies, BACT—you know, I'm not a scientist, but this is what they tell me—to reduce greenhouse gasses emission by 20 percent.

In the U.S. Virgin Islands, this developed a consent decree between the EPA and our then-oil refinery at the time, Hovensa, that required the refinery to install a \$700 million emissions control equipment. Shortly after signing that consent decree, Hovensa announced its closure in the Virgin Islands. We had the second largest oil refinery in the Western Hemisphere. After they left, we, on the island of St. Croix, our unemployment skyrocketed to 18 per-

cent. So these are things that are very dear to our hearts, we're very concerned about.

Mr. D'Angelo, you also seem to recognize there is a need for a balance, and you testified that the Steel Manufacturers Association does not believe we should abandon the deliberative process required by NEPA and ESA. Is that correct?

Mr. D'ANGELO. Yes, that's correct.

Ms. PLASKETT. And as someone who's familiar with the process, what value does the SMA believe the deliberative process should be adding?

Mr. D'ANGELO. Well, I think as Congress intended in developing NEPA and the ESA, we want to look before we leap. We want to consider our actions, and we want to be able to involve stakeholders. But I question what stakeholder is going to be involved 8 years down the line and read thousands and thousands of pages of EIS, and how are stakeholders helped simply where these processes become used as barriers to development, and they're used as paperwork exercises as opposed to ways to make reasonable, wise, informed decisions that avoid impact, but also, let important projects go forward. That's the balance. It has less to do with NEPA or ESA. Right? Those were great ideas. Those were important ideas, and they were necessary, and they're necessary today. The problem is that we got a little bit far away from our purpose.

There was a couple groups that figured out that these are really, really powerful tools, and if you don't like infrastructure and if you don't want development, then you can invoke processes that will mire down any prospect of growth.

Ms. PLASKETT. So right now, and I'm not undervaluing that, I believe that there are those in the agencies that that is their mandate. One of the other things I'm concerned with in some of these agencies, however, is the understaffing, and we in the Virgin Islands and many people on the East Coast have really experienced that, that they can't move fast enough between the projects. I talked in my opening testimony about the differences between the West Coast and the East Coast in terms of the personnel that's assigned.

Mr. Beyer, you being part of that southeast region in Alabama, do you believe that there are inadequate staffing levels in the southeast region which add to the delay in the development process?

Mr. BEYER. I think that the focus is off target, and that if their focus was on the larger projects and getting those through the process instead of some of the more simple, realistic projects that are the bread and butter of State and local government, I think that would address a good bit of your problem. When they're spending time on the simple examples I gave you instead of focusing on the larger capacity projects that are impacting communities and things of that nature, I think their efforts could be better used there.

Ms. PLASKETT. So even with the shift in those, you think that would solve the problem entirely, that there wouldn't still be a problem of staffing issues?

Mr. BEYER. I think it would go a long way to solving that problem, yes, ma'am.



Ms. PLASKETT. Okay. I know that in the Virgin Islands, we believe that, yes, there is maybe too many hands that are involved; the process takes too long. But we have had instances as well where I think a large part of the issue for us has been that they have not been able to deploy people appropriately to the issues, to the projects that we would like to have, and I think that that's the thing that we are concerned with, is striking that balance between having the process move along smoothly, but ensuring that we have the right individuals to take that place.

Thank you, Mr. Chairman.

Mr. FARENTHOLD. Thank you. I'll now recognize the chairman of the Subcommittee on Intergovernmental Affairs, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman. Mr. Beyer, you had direct experience in seeing the interaction between Federal and local levels of government in that emergency situation with the Christmas flood back in 2015. Can you expand on how further control can be delegated to the States in the local level in both emergency and nonemergency infrastructure development, how that would impact your ability to respond?

Mr. BEYER. Yes, Congressman. Number one, there's a duplication of efforts from the Federal and the State levels, and that is the most noticeable change that could be made, is to shift those responsibilities down. But even further than that, there is a lot of this work that occurs in the existing right of ways and existing roadways that we have that as, especially in Alabama where we have 67 county engineers, professional engineers, you know, we're charged with that as a responsibility when we get our professional license. We are charged to look after the environment, and to make the most expedient and efficient use of the taxpayer dollars to protect the environment and traveling public. But I don't want you all to get it wrong that everybody that we deal with at the Federal or State government are problems. We have a lot of good people that are out there that help us. That example I gave you about the flood, if we didn't have a very good FEMA person on the ground with us that helped us navigate through their red tape, we would have been longer than those 30 days getting those approvals.

So I think—that's where I see the balance is, you know, there are certain things that reach a level where the Federal Government should be involved on the oversight of the environmental part. But most of the stuff that we deal with on a day-to-day basis, or in those disasters, are not something that rises to that level. The example I gave you is one of those. An example that does rise to that level, when we got hit in 2011 with tornados in our State, one of the most massive destructive days in our State's history, we had a large amount of debris that was dumped in one of the largest and greatest reservoirs in our State, Lake Martin, and we had to have the Federal help to get that cleaned up. I mean, you had houses and debris all scattered through that lake, and we had to rely on the Corps of Engineers to help us navigate that. That is one of those examples. A 14-foot diameter plate arch pipe going out and leaving a 200-foot hole in the ground that we need to get back open with water services and sewer and other things that were affected, that doesn't really necessarily rise to it, so I guess that kind of goes

back to the comments about focusing the resources in the appropriate manners.

Mr. PALMER. One of the things that I'm concerned about is the cost imposed in terms of road construction, road repair, and in your testimony, you made the point that you pay, on average, two times of the cost of a similar project funded solely with local funds. It's \$160,000 per mile for a Federal project versus \$80,000 per mile for local projects. And we're trying to ramp up the infrastructure improvement in the United States. And what I want to ask you is, in what ways can the regulatory and statutory burdens imposed by the Federal Government be reduced so that counties and State projects can go forward? How will that help the infrastructure development?

Mr. BEYER. That's a very good question as well, Congressman. I think one of the misnomers in the discussion of a categorical exclusion is that that responsibility for oversight on that project is pushed down to the State level to view the operations of the projects until it's audited. The categorical exclusion process clears you through the environmental process, but now the State is sitting there with all these Federal requirements that they have to ensure are met. And by doing that, they add cost to the project, and in a lot of cases, they don't understand the outdated reasons for the regulations themselves. So you have levels of regulations that add to the cost. You mentioned 25 percent being added to the cost just in administrative. That is a very good number in our State from what we see from our State Department of Transportation. Then you also have the levels of you have the contractors that are bidding these jobs that add costs to them handling the administration of dealing with the regulations as well. On average, when we take local bids for our projects, those numbers I gave you, \$80- to \$160,000 are very accurate in terms of what we see. Some of it also has to do with the extra things we have to do because it has Federal money tied to it for a project. That overlay project, there's all sorts of things we'll have to do that are ancillary to it that don't allow the money to go as far.

Mr. PALMER. In your written testimony last night, you talked about the lack of trust between the Federal Government and the local agencies and implied that the people with the money don't trust the people down the line that they have the capability to handle it. And I think you quoted Ralph Waldo Emerson that said distrust is expensive.

Mr. BEYER. Yes, sir.

Mr. PALMER. I think that's true. And, Mr. Chairman, I hope as we go through this process, this is not an attack against Federal agencies. I think we have confidence that the agencies can do the job. We also need to transfer that confidence down the line to the State and local government and reduce these regulatory burdens as much as possible while also protecting the environment. I yield back.

Mr. FARENTHOLD. Thank you very much, Mr. Palmer. I'll now recognize Ms. Demings, the Ranking Member of the Subcommittee on Intergovernmental Affairs, for her first round of questions.

Mrs. DEMINGS. Thank you so much, Mr. Chairman. In my opening statement, I talked about impact on communities, and it's been

stated, or suggested, that the Federal Government can be a roadblock to economic development in those communities, so we're trying to find balance to protect but also to move forward. Building America and keeping America moving is important. The steelworkers who are here today help to do that. But I represent communities. You do, too, as well, Mr. Beyer, and so we have to balance the impact to those communities with keeping our country moving forward.

Mr. D'Angelo, you talked about stakeholders, look before you leap. When you think about people who have been displaced in various communities, who are the stakeholders that should be at the table because I think we always do better when we include people who are directly impacted in communities in the decisionmaking process? Who are the stakeholders and what do you really mean by "look before you leap" today?

Mr. D'ANGELO. Well, that's a great question. I think the stakeholders are the people that are impacted by these decisions, and those are the people that are local, that will benefit or be hurt by the potential infrastructure projects and others. Those that are going to be stakeholders in building that, that will provide jobs. I think there's a wide range of stakeholders, and I think good decisionmaking requires casting the net far and wide with who we talk to, and the kind of input the Federal Government receives. And so when I'm talking about looking before we leap, we want to have an understanding of the impacts, and we want to understand alternatives, right? Are there ways we can mitigate an adverse impact? Is there some glaring thing that we can identify if we stop, pause, take a breath, and say here's how we see this project going. Is there a better way to do it, right? But then, we're going to weigh it against the benefits of those projects and those stakeholders for the benefits. Communities are not benefited when trucks and cars are forced to idle in inner cities. If we have ways that we can move people more efficiently, if we have ways that we can mitigate how much people pay for energy, these are considerations as well.

So that's what I mean by looking forward. It's shocking that NEPA came out in 1969, and that was the first time that we ever had the thought of doing that. I'm glad we do, but I want to rein it in to where it's actually providing information that's useful for the decisionmaking.

I'll give you an example. We do, with greenhouse gasses, right, and so, the CEQ came out last year with guidance that says we have to examine life cycle analysis of greenhouse gas emissions with respect to projects under NEPA analysis, and that's all well and good. But there's no project in America that is going to change climate change, right? Climate change is the input of billions and billions of sources all over the world. And so if we are able to assign some number to a particular project, a discrete project, and spend lots and lots of time doing that, what value is that returning for the community, for the stakeholders? I'm glad we look at these things, but I just don't know if that is returning the type of important information in most of these projects.

Mrs. DEMINGS. Mr. Loris, in your testimony, you talked about how hiring additional personnel actually caused more bottleneck,

which I find a little strange. Could you give me an example of a project where that happened, or some examples of that?

Mr. LORIS. Well, I think you can just look at the trends and the average timeframe in which these projects failed to get through the NEPA process.

Mrs. DEMINGS. So you're seeing that as a direct result of hiring additional staff. I'm trying to understand that.

Mr. LORIS. I think so. I mean, if you have growing bureaucracies that fail to address the real roots of the problem where you don't have a lead agency, where you're not mandating time limits, if anything, it's certainly not helping address the problem. Maybe you're perpetuating the status quo, but as we have seen even with increases in staff, they've failed to address and reduce the frames to move through the NEPA process.

Mrs. DEMINGS. Thank you, Mr. Chairman. I yield back.

Mr. FARENTHOLD. We'll now recognize the gentleman from Florida, Mr. Ross, for 5 minutes.

Mr. ROSS. Thank you, Mr. Chairman. Mr. D'Angelo, I want to go straight to you, because you hit on something, and I think my colleague, Ms. Demings also talked about it, when you talk about the stakeholders. But I think what we're seeing here, and I think something very crucial and very important in order to maintain the investment that we want to have an infrastructure in this country is going to be the cost of capital. The stakeholders there that are going to provide the capital necessary in order to make that investment to be able to build our roads and rebuild our bridges and streamline what it is we need to have done. Now the return on investment, and this is why it's important that I think that we get this straight under NEPA, what's the deadline for completing the permitting process under NEPA?

Mr. D'ANGELO. There are no deadlines.

Mr. ROSS. There are none. So if I'm an investor, and I want to be able to invest what capital I have to get a return, where am I going to put it? Am I going to put it in infrastructure subsidies—companies? Or am I going to go somewhere where there's a guaranteed return on my investment? So would it not be advantageous just for the simple sake of the cost of the investment necessary for our infrastructure, to have a timeline, a deadline, on the permitting process?

Mr. D'ANGELO. It absolutely would. I mean, these analyses will grow to fit whatever timeframe is given. If there's no timeframe given, they will grow and grow.

Mr. ROSS. It will perpetuate adversarial involvement, will it not?

Mr. D'ANGELO. Correct.

Mr. ROSS. Which leads me to my next question. It has to do with sue and settle. And, Mr. Loris, I'm going to ask you about this, because you kind of hit on this, lawsuit reform. What's there to prevent somebody from just interjecting in the permitting process for the mere sake of nothing but to want to settle a case? And is that not what we see happening under NEPA?

Mr. LORIS. That's exactly right. I honestly don't have too much to add to that except for these lawsuits that are supposed to be for ordinary citizens that are overtaken by these environmental activists organizations who negotiate and settle behind closed doors to

get to a predetermined outcome without really addressing the needs of the public citizens who, in a lot of respects, would want these projects.

Mr. ROSS. And in my experience as a litigator, it has been that at times my clients would settle for the cost of defense, regardless of principle. And I think we're seeing that also in NEPA. So how do we address that?

Let's talk about standing. What standing does somebody have other than the fact that they have to be a citizen of the United States in order to interject themselves in a lawsuit. Is that it?

Mr. LORIS. Largely. And then you have folks, again like the Sierra Club who are—you know, that have that standing and the taxpayers will fund part of this litigation. And so it's this never ending cycle where you have—you know, those are the folks who really control the message.

Mr. ROSS. And under the NEPA process right now there's no loser pays in the attorney's fees arena, is there?

Mr. LORIS. No.

Mr. ROSS. So would that not give some sense of rationale before someone files lawsuit, at least to the extent there may be merit to their claim that they should have to bear the cost if they lose their suit?

Mr. LORIS. Yeah. There's no real stakeholder input where—you know, you're effectively giving them all the opportunities to get what they want with zero risk.

Mr. ROSS. In the 112th Congress 6 years ago, I filed what was then called the RAPID Act. It has been refiled by my colleague Tom Marino in the 113th and the 114th Congress. I hope that it is refiled again.

But what it does is it allows for a 4.5 year timeline in order to have the permitting process. It allows for 18 months for an environmental assessment. It requires that anybody who objects do so during this process so that they then have standing at the end of the day, and that there's a statute of limitations that allows for them to respond within, in order to have their complaints.

My question to you is is this something that would not be embraced, not only by environmentalists. Because let's face it, if they have an issue, they need to be at the table the sooner the better so that issue can be addressed.

But is it not also something that I think would be absolutely necessary in order for those that seek to invest in our infrastructure but also those at the county level, at the State level and the Federal level who are in the permitting process?

Mr. LORIS. Absolutely. The lack of deadlines is a huge problem, and allowing or establishing those would give a yes or no answer one way or the another. And then you would actually have some regulatory certainty. And with so many projects in limbo, are being held up by timeless delays. One way or another, it should benefit both the economic interests of the private producers as well as those environmental activists who think these projects shouldn't move forward.

Mr. ROSS. And lastly, Mr. Beyer, is there much duplication in the permitting process from one agency, say a State agency to a Fed-

eral agency in that they are doing the same thing but requiring different timelines, although they may have same standards?

Mr. BEYER. Yes, sir.

Mr. ROSS. And would not that duplication, at least being resolved, assist in expediting the process?

Mr. BEYER. Yes, sir.

Mr. ROSS. Thank you and I yield back.

Mr. FARENTHOLD. Thank you very much.

We now recognize the gentleman from Tennessee, Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman.

And first of all, I want to thank both you and Chairman Palmer for calling this very important hearing.

This is my 29th year in the Congress. During all of that time my main committee has been the Transportation and Infrastructure Committee and we have tried as hard, as much as we possibly could, or as hard as we could to come up with ways to accomplish environmental streamlining. It has been the most difficult problem that we've worked with.

During that time, I've chaired three different subcommittees of that committee and I will never forget that during the 6 years I was chairing the Aviation Subcommittee at one hearing we heard the people from the Atlanta airport testify that the longest run—the then longest runway at the Atlanta airport took 14 years from conception to completion. It took only 99 construction days and they did those in 24 hour days, around the clock construction so they completed the work in 33 days, but it took them 14 years from conception to completion. And it was almost entirely environmental rules, and regulations and red tape.

I chaired the Highways and Transit Subcommittee. We had hearings and they told—the Federal highway people said they had two major studies so they took an average. One study said 13 years, one study said 15 years, for a new highway construction project. And these weren't cross country projects, these were six or nine mile projects. And it was all environmental stuff.

I chaired the Water Resources Environment Subcommittee and the Maersk SeaLand people came to us at one point and told us of a way—they had done a major project at the Norfolk port. They worked a deal with all the environmental agencies, because they knew it would take so long. They said, let us do your work for you and they did. And they completed this project in 7 years. They said it would have taken probably twice as long if they hadn't been able to negotiate that agreement to do all the work for those agencies to their satisfaction first.

The problem was—and I led a congressional delegation in Vietnam a few years ago, it was booming. And I asked them, I said, you know, I asked them about starting a business over there, they said, oh, if you want to start a business over there now, you just go out and start it.

The problem is this, we have more competition—we got so far ahead because we had so many socialist and communist countries around the world that they actually followed those systems for many years and they destroyed their economies. Now even some of these former communist countries are allowing a lot of free enter-

prise, free markets in their countries. And we've got more competition around the world than we ever had before.

And in most of those countries, especially the Asian countries, they are doing these infrastructure projects in a third or half the time that we are. We can't keep doing that. We have made some progress in some of our more recent highway bills and so forth. We are doing better than we were a few years ago, but we still have such a long ways to go.

And I've noticed through the years that all these environmental radicals seem to come from very wealthy or very upper income families. And I'm not sure they realize how many poor and lower income and working people they have harmed by causing hundreds of thousands, maybe several million jobs to go to other countries and also in driving up the prices and the cost of everything that we have in this country.

And so this is a very, very important project—or topic. And we need to do much more to get this under control or this country is not going to have the future that we want it to have.

And I appreciate you gentlemen coming here to testify. I appreciate this hearing here today. And I thank you very much. And I yield back the balance of my time.

Mr. FARENTHOLD. Thank you, sir. And we'll—seeing nobody who has not yet asked questions, we'll start a second round of questions and go back—I guess we'll go to Ms. Plaskett since we have gone a long time on our side. So you're recognized for 5 minutes.

Ms. PLASKETT. Thank you. Thank you very much for that.

What a gentleman you are, Mr. Chairman. I appreciate that.

Listen, I have been listening to a lot of the testimony and I couldn't agree with the vast majority of what has been said. Mr. Ross, my colleague across the aisle, I agree with him on a lot of the delays that are taking place. I have testimony here that I would like unanimous consent to enter into the record. One is from Kevin Rames who is a partner and principal of a law firm in the Virgin Islands on Saint Croix, discussing one particular project, Amalago Bay Resort, Williams and Punch.

And then the other is from Miss Alicia Barnes who had been the former commissioner of the Government of the Virgin Islands, Department of Planning and Natural Resources, was the director of energy office and is now the managing owner of the Rittenhouse Consulting, LLC.

Mr. FARENTHOLD. Without objection they will be entered into the record.

Ms. PLASKETT. Thank you. And both of those testimonies—thank you, Mr. Chair—speak to what we've been talking about here, the difficulties and the processes, the length of time that investors who—you know, in the Virgin Islands we are competing not with even other American jurisdictions that have EPA, that have NOAA, that have National Marine Fisheries and Army Corps of Engineers. We are competing with other Caribbean islands who don't have anywhere near the types of restrictions and environmental protections and such that the United States have. And we can't keep up. We can't compete.

On the one project Amalago Bay resort is to build a project on the island of Saint Croix because we haven't had a new hotel built

on the island of Saint Croix in 30 years. How do you have as your major function tourism if you have not been able to build a hotel and the one project that you have has taken over 10 years just in permitting?

That's mind boggling and it's hurtful to the people of the territory. Because while we understand the importance of elkhorn coral and others, it provides for our protein, our fishes and others. I can't eat coral and my children can't eat coral. And the children of the Virgin Islands need employment and need something sustainable.

But another issue that I wanted to talk about and wanted to ask you questions about was the notion of the one size fits—first come, first served basis, one size fits all approach that is being done with some of these agencies. Currently projects for environmental review are prioritized on a first come, first served basis. That means that a small residential dock on Key West will come before a large dredging project that would have brought millions of dollars and hundreds of jobs to the Virgin Islands.

Mr. BEYER, have you experienced problems getting key projects prioritized? And do you have any suggestions for how we can assure that crucial projects, that jurisdictions identify, can to the front of the line?

Mr. BEYER. We have experienced times where we have had trouble getting responses back and getting an answer back from the different Federal agencies. I can't speak to the fact of did I get behind a smaller project or a bigger project, but we have seen delays in that. And I know that our State DOT specifically has actually put money into funding slots at the different resource agencies to be able to prioritize our project.

Ms. PLASKETT. So you prioritized them at the State level?

Mr. BEYER. No, I think the Federal agency still prioritizes them. What I'm saying is they put in money to pay for a resource agent that will—

Ms. PLASKETT. Got you.

Mr. BEYER. —actually help expedite their projects as they come in so that still is only paying for a slot.

Ms. PLASKETT. Right, okay.

Mr. BEYER. In a State.

Ms. PLASKETT. So what that comes down is to the other jurisdictions putting money into the Federal Government too. And that doesn't make any sense. We all know that doesn't make any sense.

So, but you know, with the prioritization and they always say that, you know, they are taking them one at a time, they are working on them, they are pushing them through. They at least in our—when I've had phone calls or our governor had phone calls they always come back to the fact that they don't have enough. I'm concerned, and I know some on our panel may not be, that the hiring freeze is going to exacerbate the problem.

I understand that a quarter of NOAA's staff are going to be eligible for retirement by 2019. And although we have a culture that needs to be changed as well in some of these agencies, and the fact that environmental groups may come and exert a lot of influence, I can only imagine the backlog that will swell with unsustainable proportions if this were the case.



There's room for improvement in the current process. We're hoping that you all can give us some of those answers, streamlining the process, prioritizing review of economic significance. And more importantly, enabling these agencies to serve the public through adequate funding and the staffing. I think that this is an area where a hiring freeze would not be best for the people and formulaic budget cuts is not the way to go in this area.

But I want to thank you very much, Mr. Chairman, and I yield back.

Mr. FARENTHOLD. Thank you very much. We'll now go to Mr. Palmer for his second round of questions.

Mr. PALMER. Just a few questions, Mr. Chairman. I appreciate you allowing us to have a second round.

Mr. Beyer, on average how long does it take to—do you have to wait to ensure that projects are NEPA compliant.

Mr. BEYER. A simple project like I was talking about with a resurfacing and all that, you know, you're taking 6 to 9 months to get through that process up to a year.

The other examples I gave you, we've been at it 12 to 18 months on those two projects in just the environmental approval process, and those are talking about slivers of right away around intersections that have little to no impact on species, the residents or anything like that to put in needed safety improvements.

Mr. PALMER. The courts have put a hold on the Waters of the U.S. rule. And it looks like that's not going to be implemented. But under those rules there would have been major restrictions on—and new regulations on ditch water. How would that have impacted, particularly for rural roads, the cost of building or, maintaining, or repairing those roads?

Mr. BEYER. Well, first of all we are very happy that the Waters of the U.S. has been stayed. That would have pretty much shut down county government in terms of being able to provide citizens the service that they need. I mean, if we have to go out there and every time we clean a ditch out we have to go through a permit process to do that. And I know they try to say they operate under—they operate under permits that are general permits, but there's still regulatory involvement there that we have to submit documentation on. All that money that we're spending is less money that we are putting out there to benefit the citizens of our county.

Mr. PALMER. One other thing that the EPA is doing and that the Federal Highway Administration is doing, is imposing emissions rules.

One of the issues was the ozone rule, and is particularly problematic for southern States. So, a big problem for us. It could have a very negative impact on economic development. One of the problems I've got with this is they keep changing the goal post and it has a tremendously negative impact on planning. For instance, EPA has proposed a new ozone rule, which frankly we had a hearing and I questioned Administrator McCarthy about it. The technology doesn't exist at the moment to achieve this new rule.

But it was also interesting, I think this was either in February or March of 2015 or 2016, I think it was 2015. I also asked her when they send the implementation guidelines to the States for the 2008 rule and they had just sent them.

So when you have Federal agencies, EPA, or any other agency, imposing these rules and then not sending the implementation guidelines, that has to have a very negative impact on your ability to plan and to get investments, even private sector investments for infrastructure.

Would you want to comment on that?

Mr. BEYER. Yes, sir, I will. The last round of ozone requirements did not touch our metropolitan planning organization, but we were borderline with that. And it would have had extreme impacts on the way that we were able to plan, whether it was on the transit side or whether it was on the highway side. And we were fortunate enough we didn't get impacted by them, but you're exactly right, the way that the documentation and the guidance was put out there, it was very problematic, it caused a lot of discernment for a year or so in the planning process as we were going through the development of our TIP.

And so yes, sir, you're exactly right, it's very problematic for that to occur.

Mr. PALMER. Well, I appreciate again the witnesses being here and Chairman Farenthold's willingness to hold this hearing as a joint subcommittee and I yield back.

Mr. D'ANGELO. Mr. Palmer, if I could speak very quickly on the NAAQS issue as well, stationary sources, the Clean Air Act is one of the major drivers of regulatory costs for steel mills. And the new ozone standard has been set to a level that is near background levels. And we know, EPA has the data, that there's been non attainment in the West and in other places by virtue of emissions, from my industry's competing mills in China and elsewhere. And—

Mr. PALMER. Since Mr. D'Angelo brought that up I'll share something else with you from that hearing that we had with Administrator McCarthy.

I asked her if it was true that they had just earlier that year sent the implementation guidelines to the States on the new ozone rule? And she said, yes. I said, is it also true that there is an internal memo in EPA that indicates that if we don't implement the 2015 rule we will be in full compliance in 10 years and she said, yes.

And I take note of the fact that not only are our foreign competitors dumping their steel products into the United States, they are also dumping their pollution.

I yield back.

Mr. FARENTHOLD. Thank you very much.

We'll now recognize the ranking member Mrs. Demings for 5 minutes.

Mrs. DEMINGS. Thank you so much, Mr. Chairman.

Mr. Beyer, you're here representing the National Association of Counties. And I believe your county is Elmore County in Alabama. I believe you said it is 82,000, the fastest growing county in your State. Is that correct?

Mr. BEYER. Yes, it is one of the faster growing counties.

Mrs. DEMINGS. One of the fastest. Go ahead and take the fastest growing.

Would you say that you probably know your county, and the citizens in your county know the local area, better than the Federal Government?

Mr. BEYER. Yes, ma'am.

Mrs. DEMINGS. And do you agree that local communities should have, I mean as a person who is representing a local community know the needs of that community, know the people, do you believe that your local community should have a say, just as I asked Mr. D'Angelo, in those local projects and what happens and what does not happen?

Mr. BEYER. Absolutely, absolutely. We are the closest government to the people. We can't do anything in our life without being talked to about the road conditions or the condition of the environment. So yes, ma'am between the staff and the County commissions, they are closest to the people and they have a good insight.

Your example about the interstate, that was one thing that I hoping I would get to circle back to, the question.

The local government, you know, we desire that involvement to make sure that we are part of the that process and the planning, so when DOTs and the Federal Government are looking at major projects that effect communities we want to be at the table to help to make sure all the solutions are there on the table.

And I think that is something the national associations have put more on the forefront, but I think we would like to see more and more of that to where the local government gets the citizens involved and I think that takes care of a lot of the issues that we're here to talk about today.

Mrs. DEMINGS. You know for someone who has worked in local government myself, I know how important it is to get those projects done, to serve the people in the most expeditious manner that you can.

But NEPA was created to permit views of local citizens to shape the development of their community and environment. Not having deadlines is—that's another subject for another day. But what role do you believe, looking at the needs of your local community and how it impacts the citizens that you serve, what role should NEPA play?

Mr. BEYER. In my opinion I think NEPA plays a role in the development of those new corridors. I think NEPA developed—should be at play when we are talking about major impacts to people. I mean if you're getting a sliver of land here and there, I don't think that is where the intent of that is.

Now the example you gave with the interstate, I think that is exactly where NEPA is intended for. If the County was to go out and put in a 5 mile brand new road and we were going to impact residences and we were going to impact streams and all that, there is a role for it there.

But I believe a couple of the other witnesses here talked about how the role's expanded to where everything is under a microscope. And instead of focusing those resources on those major impacts, now we're on to every little thing that a Federal dollar touches.

And that, I think, if we can leave you with a message today, that's what I'd like to leave you with. There's places where you don't need that. There's professionals in place to handle that in

dealing directly with the community. But you're exactly right about the major communities and major projects.

And there's some comments about staffing. I think the staffing again, if their focus was on those major projects, instead of a small blue line creek in the northeast part of my county, that has a couple hundred vehicles a day on it, but at the same time it has major utilities running through there, if their focus was on the northern belt line in Birmingham or their focus was on the I-10 corridor in the south part of our State, we'd get things moving along.

Instead they are worried about whether or not, as I said—and I wasn't very very eloquent when I said it—they are worried whether I'm going to bother some little species that may or may not be there in my channel. Or whether I put a rock or two of rip rap in a channel that they deem as being waters of the United States.

There's a focus problem there. If the focus was right, exactly what you said earlier would have been much better handled in terms of how that community was impacted.

So I don't know if I answered your question.

Mrs. DEMINGS. You did, Mr. Beyer. Thank you so much. And thank you to all of the witness who are here today. Mr. Loris?

Mr. LORIS. Yeah, could I just make one comment? I completely echo that sentiment. I think communities should have say in these projects and they are in the best position to do so rather than folks in Washington. I think folks in the Virgin Islands better know the economic and environmental desires better than folks in Washington.

And so having more priorities, you know. That are limited in scope at the national level, but activities that can be best managed at the State and local level, will go a long way to alleviating some of these problems.

Mrs. DEMINGS. Thank you so much. I yield back, Mr. Chair.

Mr. FARENTHOLD. Thank you very much. And I have just got a couple of short questions that I want to wrap up with and follow up on. I think Mr. Ross talked a little bit about sue and settle and loser pays. It's not necessarily loser pays, it's taxpayer pays in most of these cases.

Correct me if I am wrong, Mr. Loris, the way this is set up, any environmental activist group can sue under, pick the statute that we've been talking about today, to either delay a project or get a species and list it on the endangered species act, you name it. And then without going to trial, without a judge making any decision at all, they can go in and negotiate with the regulatory agency and say, all right, we sued you, if you will—we'll use Endangered Species Act, list this animal on the Endangered Species Act and pay our attorneys' fees, we're going to go away.

There may be really no adversarial process in there, and there may be no judge who actually interprets the law and makes a decision. It's just settled between two groups that may have almost identical interests and it's entirely funded by the taxpayer and goes—and skirts the normal regulatory process of public comments and hearings and everything. It's basically done behind closed doors. Is that an accurate representation of what happens?

Mr. LORIS. Yeah, that's correct. And you're leaving out those community stakeholders too who may have an interest seeing these

projects move forward, they may not, but they are left in the dust as well.

Mr. FARENTHOLD. So what would your solution to that be?

Mr. LORIS. Well, there's a few. I think one is Congress needs to reassert its authority in a lot of these major environmental regulations and statutes. I think for too long, too much authority has been ceded to these agencies who can—where now we are relying on unelected bureaucrats to make these decisions and to make these backroom deals.

So I think there's a lot that can be done, you know, clarifying who should have legal standing, requiring bond so that taxpayers aren't on the hook to pay for these lawsuits are just two simple reforms that could go a long way in making sure that it's not these environmental organizations who are antidevelopment, keep it in the ground, are the ones making the decisions with the regulators.

Mr. FARENTHOLD. Thank you very much. And Mr. D'Angelo, it is a little outside the scope of what we're doing here, but you touched a little bit about the environmental regulations that effect your clients building of new plants and operation of existing plants.

There is a big dialogue now going on in our government about bringing jobs back to the United States, making us competitive again. How do our environmental regulations compare with the rest of the world? I assume that we're easier to deal with in some areas and far harder to deal with in other areas.

Where would you say we are and where do we get the biggest bang for the buck repairing it where we continue to protect the environment but bring jobs to the United States?

Mr. D'ANGELO. Thank you, chairman. That's a great question. The steel industry is one of the most heavily regulated industries in the world. A lot of the—the majority of the cost comes from the Clean Air Act. So they are—steel mills are regulated both as an individual source and because of where they are, through National Ambient Air Quality Standards. States play a role with that. Federal Government plays a role. There's even local impacts.

To ask how our environmental health and safety regulations compare to those in other countries primarily where the steel industry competitors lie, it's not an overstatement to say that there is no comparison. The steel we make here is made in the most clean, sustainable way. And if you care about climate change, you care about making your steel here as opposed to a factory in some other country that doesn't have these controls, putting it on a ship and covering it in diesel to get it all the way across the planet to be used in our infrastructure projects. The best and cleanest steel and most heavily regulated steel comes from right here.

I would also like—if I could have an indulgence, talk about the ESA sue and settle because I worked on some of these. It is not hard how these groups do it. There's two in particular, Center for Biological Diversity and WildEarth Guardians. They know that the ESA has an inflexible deadline, after you file a petition the clock starts.

In 12 months if the agency has not responded to that petition, they have a lawsuit. Twelve months, means 12 months. Every court in the Nation has said that. It's not one of these issues where agencies get discretion, because you can't interpret it any other

way, and so they lose every single time. And so when one of the cases comes up, they sit down with their lawyer, in this case DOJ. And DOJ says they got you dead to rights and so they give it away. And who walks away? Two organizations walk away with all—with the listening agenda. They pick exactly what species come and what order they go in. And those species are not ranked according to proximity to extinction or risk. They are ranked according to wholly distinct, policy priorities of two organizations. These are not people in our communities.

Ms. Plaskett, I am familiar with many of the coral issues. Center for Biological Diversity filed a petition to list, one single petition to list 82 separate species of corals. Now you can imagine the lack of rigger with one petition going to 82 species. And the National Marine Fisheries Service decided to list many of those. The discussion of which is mere paragraphs for any individual corals, right.

And Ms. Plaskett, I have heard her speak on that. She's an advocate—she shows what the real world impacts are, what the real folks in her community— And I think it's sad. The 12 month deadline made sense until organizations started gaming it. And that doesn't help in any way and it doesn't help conversation—conservation, excuse me. Listing everything under the sun is not going to help conservation.

It is putting something on a list. There's been this aura built around it, but it doesn't do anything. We need to actually fund conservation, and we're not letting our services do that.

Mr. FARENTHOLD. Thank you. And I think Mr. Palmer has one more question. Did you all have anything else you wanted before—Mr. Palmer, I'll recognize you to wrap it up.

Mr. PALMER. Thank you, Mr. Chairman. I just really have a statement in regards to something that you brought up, and Mr. Loris responded to, and that's the problem with sue and settlement and dissent decrees and continuing to expand the universe, as you pointed out Mr. D'Angelo, if Federal agency, if they are sued, if they litigate the case and they get a judgment, the judgment is limited to the remedy for the problem.

But if we enter into a consent decree or—as we do with the sue and settle cases, the judge appoints a special master or a control group and they determine whether or not the remedy has ever been achieved and those can go on for years.

So I think it's something that would warrant further consideration, Mr. Chairman, and look forward to working with you and others on these issues.

I really think it has been a good hearing. And again, I want to thank the witnesses for their participation. I yield back.

Mr. FARENTHOLD. Thank you very much. And I too would like to thank you all for being here and your testimony.

I would like to ask for unanimous consent that members have 5 legislative days to submit questions for the record. And without objection that's so ordered.

If there's no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 11:32 a.m., the subcommittees were adjourned.]

## **APPENDIX**

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MATERIAL SUBMITTED FOR THE HEARING RECORD



## K. A. RAMES, P.C.

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### MEMORANDUM

To: Committee on Oversight and Government Reform Subcommittee on Interior  
From: Kevin A. Rames, Esq.  
Vice President – Development  
William & Punch, LLC a U.S. Virgin Islands Limited Liability Company  
Re: *Examining Environmental Barriers to Infrastructure Development.*  
Date: March 1, 2017

I am writing to request the assistance of your Committee in addressing what appears to be an unwarranted and unreasonable bottleneck - even paralysis - in the federal permitting of an economic development project of utmost importance to the island of St. Croix and the United States Virgin Islands.

The project is the planned development of the **Amalago Bay Resort**, a five-star destination resort including a mixed-use hotel, condominium and timeshare resort and casino, an Audubon-certified golf course, and a Blue Flag-certified marina on the west end of St. Croix (the "Project"). The Project will be an important catalyst for the economic revitalization of the Town of Frederiksted and all of St. Croix, including the generation of needed jobs and revenue that will benefit the entire Territory, and will spur the development of a more sustainable and environmentally-sound tourism industry.

The Project is urgently needed. A new hotel has not been built on St. Croix in nearly 30 years. The St. Croix economy is still recovering from the economic damage caused by the Great Recession and the 2012 closure of the HOVENSA refinery, which had been the Territory's largest private employer and the mainstay of the St. Croix economy for 50 years. As a result of that closure alone, nearly 2,000 persons lost their jobs; annual tax revenue fell by over one hundred million dollars, and hundreds of millions of dollars more in annual economic activity disappeared.

Once construction starts, the Amalago Bay Project will create hundreds of needed new jobs and will have a tremendous multiplier impact throughout the St. Croix economy, including the important construction and hospitality sectors.

The Virgin Islands has been increasingly concerned that the federal regulatory process that has dragged on for nearly a decade is effectively off-track. Since 2007, the Project's developer, William and Punch, LLC ("W&P"), has been involved in a protracted federal



environmental permitting process that has reached a critical decision point which, depending on the outcome, could either allow the Project to proceed or further delay (possibly for several more years) or kill the Project.

In December 2007, W&P applied to the U.S. Army Corps of Engineers ("USACE") for a permit under Section 404 of the Clean Water Act ("CWA"). (In a combined application, W&P also applied to the Virgin Islands Coastal Zone Management ("CZM") Commission for a CZM permit. The local CZM permitting process was completed long ago, and the CZM permit has been ready to be issued for some time upon USACE issuance of the federal permit.) The purpose of the combined application is to obtain federal approval to build an inland marina for the Project and implement a beach re-nourishment program that will allow W&P to create a turtle nesting sanctuary at the Project site.

Because USACE is responsible for administering the CWA Section 404 program, that agency has the federal lead in reviewing the application, but other federal agencies play an advisory role under the federal Endangered Species Act ("ESA"). The major cause of the permitting delays is the involvement of the **National Marine Fisheries Service ("NMFS") of the National Oceanic and Atmospheric Administration ("NOAA")**, which has a consultative role in determining whether the Project complies with the ESA. It has been nearly nine years since W & P submitted its joint application to USACE and the CZM Commission. W&P has been diligent and responsive to agency requests and concerns, including developing and submitting additional information as well as making changes to its planned development to eliminate or mitigate any potential adverse impacts. As a result, and during this time:

- (1) In February 2012, the CZM Commission approved the Project, subject to 36 special conditions that it has imposed on the Project and which W & P has agreed to adhere to or implement;
- (2) In early 2014, U.S. Fish & Wildlife Services completed its review of the Project and issued its Biological Opinion, which includes several conditions that W & P will adhere to or implement; and
- (3) In early 2014, USACE informed W&P that it had completed its review of the Project and was ready to issue a favorable permit to W & P once NMFS completed its review of the Project and issued its Biological Opinion.

In contrast to those agencies' progress, NMFS still has not provided any indication when it will complete its review of the Amalago Bay Project and continues to unreasonably delay the project. After several missed deadlines and promised milestones, NMFS issued its long-awaited decision document (a Biological Opinion) in draft form on June 16, 2015. In the draft Biological Opinion, NMFS proposes to find that the project could have a significant adverse impact ("destruction or adverse modification" ("DAM")) of 33 acres of "critical habitat" for Elkhorn coral. In his June 16, 2015 cover letter to the draft Biological Opinion, NMFS' Regional Administrator, Roy Crabtree, stated that "NMFS decided to share the draft Opinion with the USACE in order to work together with the applicant to develop a Reasonable and Prudent Alternative (RPA) to the proposed action that will not result in the destruction or adverse modification (DAM) of ... critical habitat." However, more than eighteen months has passed after that letter, and NMFS still has not shared with W&P a draft list of RPAs for discussion.

W&P and its technical consultants strongly disputed NMFS' findings in the draft Biological Opinion. The draft Biological Opinion is flawed due to material mistakes and discrepancies. For example, NMFS apparently confused locations and thus erroneously found an alleged "essential feature" for a critical habitat of Elkhorn coral near the project, mischaracterized habitats, ignored projections of long-term benefits in reducing sedimentation, and failed to consider numerous substantial mitigation measures already provided for in the CZM permitting process. W&P identified these flaws in July 28, 2015 and December 16, 2015 letters to NMFS and the USACE. Neither USACE nor NMFS have responded in writing to the substance of W&P's 2015 correspondence.

In an attempt to help NMFS address the errors in the draft Biological Opinion and develop a schedule for the conclusion of the federal permitting process that will enable the Amalago Bay Resort to move forward, the developer and its technical consultants met with NMFS and USACE on March 29, 2016. A member of the staff of the Governor of the Virgin Islands also attended that meeting to observe the discussions and underscore his Administration's commitment to a fair and prompt consideration of the Project application and the resolution of all outstanding regulatory issues. The developer and its technical consultants made a compelling case to NMFS that the science does not support a finding of a DAM of an "essential feature" for a critical habitat for Elkhorn Coral. The frustrating irony is that NMFS appears to ignore persuasive evidence that the Project will significantly reduce the amount of existing heavily sediment-laden stormwater runoff that chronically impacts the near-shore benthic area. Thus, the Project will likely promote-and certainly not impair-the development of the claimed "essential feature."

Even if NMFS persists in its position that the Project could negatively impact 33 acres of alleged critical habitat - a mere 0.04% of the St. Croix unit - for Elkhorn coral, W&P has offered to commit to reasonable RPAs that could be incorporated into the Project to mitigate any alleged DAM. To this end, W&P provided NMFS with yet another submission in late May 2016 in which it provided additional information requested by NMFS to confirm the project's significant reduction in the stormwater runoff that currently impacts the near-shore areas. W&P also took the proactive step to propose for NMFS's consideration several development phasing measures and a comprehensive and costly Staghorn and Elkhorn propagation and conservation program, which could serve as possible RPAs. Disturbingly, more than eighteen months has passed since NMFS Regional Administrator Roy Crabtree's June 16, 2015 statement of NMFS' intention to work with USACE and the applicant to develop RPAs, yet NMFS still has not shared with W & P - or, to our knowledge, USACE - a draft list of RP As for discussion.

I understand that NMFS informed W&P in early July that it would complete its review of the additional information contained in W & P's submission and provide a proposed set of RPA's no later than August of 2016. I also understand that USACE expressed its hope at the March 29, 2016 meeting that it would be able to issue the final Section 404 permit before the end of this year

That schedule, however, as in the past, has been ignored. Instead, NMFS hired an engineering consultant, Horsley Whitten Group, to critique the developer's Storm Water Protection Plan and its Erosion and Sedimentation Control Plan, demanding that it be

recalculated and redrafted based upon federal rainfall data rather than U.S. Virgin Islands official rainfall data, a distinction without a significant difference. This is common occurrence. Instead of moving forward with the completion of its review, NMFS asks for yet more supplemental information. This shell game has gone on for years.

A decade of delays in this critical project is inexcusable.

St. Croix is in grave need of a catalyst that will revive its economy and enable the people of St. Croix to embark on a new path that will help it emerge from the vestiges of the industrial and agricultural periods that have dominated its economy for centuries. I firmly believe W & P's Amalago Bay Project is the right catalyst to bring a transformative change to the economy of St. Croix, and a much needed tangible path to a brighter future for the people of St. Croix.

I am also aware that former Senator Joseph Lieberman, Senator Richard Blumenthal, and the current and past Governors of the Virgin Islands have each contacted or sent correspondence to senior officials in NMFS and USACE to encourage NMFS to complete its review of the Project. NMFS is now approaching the ninth year of a review process for a project that does not adversely impact a single colony of Elkhorn or Staghorn coral. This fact is not disputed by NMFS.

The U.S. Virgin Islands, our economy, and our people deserve better. We respectfully request your assistance in resolving this bureaucratic impasse and allowing the development of the Amalago Bay Resort & Casino to move forward.




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Kevin A. Rames, Esq.  
March 1, 2017

**Statement to the Committee on Oversight and Government Reform - Subcommittee on Interior.**  
**"Examining Environmental Barriers"**

Thank you for the opportunity to submit this statement to the Committee on Oversight and Government Reform - Subcommittee on Interior. I commend you for convening this hearing to "Examine Environmental Barriers." I am the former Commissioner of the Government of the Virgin Islands Department of Planning and Natural Resources and currently own and operate a business development consulting firm that provides professional environmental permitting and compliance technical guidance and services to small and large developers.

Major industrial and marine development projects in the US Virgin Islands (USVI) are subject to a host of environmental permitting and operating regulations administered by the US Environmental Protection Agency (EPA), the Army Corps of Engineers (ACOE), NOAA - National Marine Fisheries Service (NMFS) – Essential Fisheries Habitat (EFH) and Protected Resources Division (PRD), and the US Fish and Wildlife Service. The regulations administered and enforced by the aforementioned agencies often require costly protracted permitting processes that place the USVI at an economic disadvantage in the Caribbean region. Further, the heavy-handed administration and enforcement of some regulations have stymied economic development and has exponentially increased the cost of doing business and development in the USVI.

The USVI and other insular Territories while not major emission sources of greenhouse gases, and thus not contributors to global warming, are experiencing amplified adverse impacts from initiatives and regulations to remedy same. I am supportive of regulations that facilitate sustainable development. However, technocrats within the ranks of the aforementioned federal agencies should exercise a greater degree of professional judgement in the administration of their duties, instead of the blind enforcement of regulations without considering the socioeconomic implications of their actions and/or inactions.

While there are many instances in this regard, highlighted below are some of the most significant.

- EPA's Petroleum Refinery Initiative required all US refineries to install best available control technology (BACT) to reduce greenhouse gas (CO<sub>2</sub>, NO<sub>x</sub>, SO<sub>x</sub>) emissions by 20%. In the USVI this resulted in a consent decree (CD) between the EPA and HOVENSA that required the refinery to install \$700M of emission control equipment. Shortly after signing the CD, HOVENSA announced its closure.
- NOAA-NMFS (PRD) - The listing of 19 additional coral species on the endangered species list increased the permitting time and cost for the ACOE process. The process now calls for costly marine surveys, mitigation plans, monitoring plans, and compensatory mitigation plans. This requires engaging highly skilled and expensive technical expertise to undertake same, prior to filing a permit application. Minor marine works may now require a biological opinion (BO) by NMFS-PRD prior to the issuance of an ACOE permit. The NMFS BO approval process originates in PR then goes to their office in St. Petersburg, FL, where it undergoes three levels of review prior to approval.
- ACOE permitting has become increasingly protracted and costly due to the above, as well as the antiquated federal review process that requires federal agencies such as the EPA and US Fish & Wildlife Service to weigh-in on, and concur with, proposed projects. Additionally, applications are reviewed on a first come first served basis without consideration of economic impact. As a result, a residential dock in Key West may be given priority over a project of economic value to the USVI such as the WAPA/Vitol LPG Conversion Project. The LPG conversion project was projected to reduce utility rates by 30%, at the time residential rates in the USVI were as high as \$0.52/KwH. Notwithstanding, despite numerous pleas for an expedited review, the permitting process was not prioritized or processed with a sense of urgency.

- Coral Reef Task Force and Caribbean Fisheries Management Council recommended policies impose catch limits and seasonal closures on local fisheries impacting the local fishing industry. Backdoor tactics such as invoking the listed coral species are employed to justify these actions. It is heartbreaking because as noted by one of my former colleagues from American Samoa, "Persons are not fishing to become rich, but simply as a means of sustenance."

Powerful environmental lobbyist advocate for the protection and preservation of the environment. I too am an advocate for environmental stewardship. However, advocacy in this regard must be reasonable and balanced and should not be at the expense of the livelihoods of Virgin Islanders.

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1. Mr. Loris, in your submitted testimony, you referenced a court case involving a project expansion and lack of use of the social cost of carbon (SCC). Specifically, you stated, “In fact, a Colorado judge rejected a coal mine expansion because the regulators failed to take into consideration the social cost of carbon.” Would you please provide some background on this proceeding and how the SCC came into play here?

Arch Coal received initial consent from the Bureau of Land Management (BLM) but no final go-ahead in 2012 to build temporary roads on the 30 square mile lease in Gunnison County for the expansion of its West Elk coal mine. The company planned to build six miles of new road for new drill pad. In 2014, federal Judge R. Brooke Jackson overturned the BLM’s consent in favor of environmental activist organizations and struck down approval for the coal mine expansion.<sup>1</sup> Judge Jackson claimed that the Bureau of Land Management and the Forest Service violated the National Environmental Policy Act when they did not include the social cost of carbon in their assessment for the approval of the roads in the coal mine expansion.<sup>2</sup> The court found the agencies were “arbitrary and capricious.”

In providing an explanation for their omission the agencies wrote, “Regardless of the accuracy of emission estimates, accurately predicting the degree of impact any single emitter of GHGs may have on global climate change or the changes to biotic and abiotic systems that accompany climate change is not possible at this time. As such, the controversy is to what extent GHG emissions resulting from implementation of the Proposed Action may contribute to global climate change as well as the accompanying changes to natural systems. The degree to which any observable changes can or would be attributable to the Proposed Action cannot be reasonably predicted at this time.”<sup>3</sup>

Judge Jackson argued that a tool did exist to estimate the climate effects: the social cost of carbon. Although BLM included climate impacts in its preliminary Environmental Assessment (EA), they omitted them from the Final Environmental Impact Statement (FEIS) because BLM economists argued the use of the social cost of carbon was “controversial” and produced very different results in reasonable changes to inputs in the model.<sup>4</sup> Judge Jackson retorted, “[N]either the BLM’s economist nor anyone else in the record appears to suggest the cost is as

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<sup>1</sup> Dan Elliott, “Expansion Of Colorado’s Largest Coal Mine Clears A Hurdle,” Associated Press, December 4, 2016, <http://denver.cbslocal.com/2016/12/04/expansion-of-colorados-largest-coal-mine-clears-a-hurdle/> (accessed March 29, 2017).

<sup>2</sup> Phil Taylor, “BLM crafting guidance on social cost of carbon -- internal memo,” Greenwire, April 15, 2015, <http://www.eenews.net/stories/1060016810> (accessed March 29, 2017).

<sup>3</sup> High Country Citizens’ Alliance et al. v. United States Forest Service et al., case number 1:13-cv-01723, in the U.S. District Court for the District of Colorado, [http://earthjustice.org/sites/default/files/files/91%20-%20Order%20on%20Merits%20\(2\).pdf](http://earthjustice.org/sites/default/files/files/91%20-%20Order%20on%20Merits%20(2).pdf)

<sup>4</sup> Ibid.

low as \$0 per unit. Yet by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost in its quantitative analysis.”<sup>5</sup>

Perhaps the failure to explain that a zero cost is a legitimate estimate is the fault of the BLM, but evidence does suggest that the cost could very well be as low as zero. In fact, when my colleague Dr. Kevin Dayaratna re-ran the one of the integrated assessment models used to quantify the social cost of carbon, he found that with reasonable changes the results are likely to be overwhelmingly *negative*, suggesting there is a social benefit, not a cost, to increased carbon dioxide emissions.<sup>6</sup> Therefore, no agency should include the use of social cost carbon in any regulatory analysis, as they are baseless tools for establishing credible estimates.

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<sup>5</sup> Ibid.

<sup>6</sup> Kevin D. Dayaratna, Ph.D., “At What Cost? Examining the Social Cost of Carbon,” Testimony before the Subcommittee on Environment and Oversight Committee on Science and Technology U.S. House of Representatives, February 27, 2017, <http://docs.house.gov/meetings/SY/SY18/20170228/105632/HHRG-115-SY18-Wstate-DayaratnaK-20170228.pdf>