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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 serious 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' 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.