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U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

ON: **H.R. 4377, THE "RESPONSIBLY AND PROFESSIONALLY INVIGORATING DEVELOPMENT (RAPID) ACT"**

TO: **HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW**

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BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, COMMERCIAL & ADMINISTRATIVE LAW
OF THE U.S. HOUSE OF REPRESENTATIVES

Hearing on H.R. 4377, the "Responsibly And Professionally Invigorating Development (RAPID) Act"

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Good morning, Chairman Coble, Ranking Member Cohen, and members of the Subcommittee on Courts, Commercial and Administrative Law. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss H.R. 4377, the "Responsibly And Professionally Invigorating Development (RAPID) Act," a bill designed to speed up the permitting process for job-creating infrastructure projects. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today in support of this legislation.

Through the RAPID Act, I believe this Subcommittee has a golden opportunity to clear the way for new jobs in this country. With more than 23 million Americans unemployed, underemployed, or having given up looking for jobs, it is time to clear away government impediments and help the private sector grow the economy and create millions of new jobs without raising taxes or increasing the deficit. Republicans, Democrats and the business community all agree that we should remove the red tape that slows down too many construction projects. President Obama pledged to clean up red tape in his 2012 State of the Union address, and the President's Council on Jobs and Competitiveness has called for strong action to simplify regulatory review and streamline project approvals. The RAPID Act would be the strong action needed to speed up the permitting process and allow important projects to move forward, allowing millions of workers to get back to work. Permit streamlining has traditionally drawn bipartisan support and transcended political parties for decades, but little progress had been achieved until several recent narrow fixes that achieved big results.[1]

[1] Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), December 2008 ("Concern about streamlining the EIS preparation process transcends political party"). As described in Section III of this testimony, streamlining provisions in SAFETEA-LU and the American Recovery and Reinvestment Act have yielded positive results.

I. Defining the Problem

The Hoover Dam was built in five years. The Empire State Building took one year and 45 days. The New Jersey Turnpike needed only four years from inception to completion. Fast forward to 2012, and the results are much different. Cape Wind has needed over a decade to find out if it can build an offshore wind farm. Shell Corporation is at six years and counting on its permits for oil and gas exploration in Beaufort Bay. And the Port of Savannah, Georgia has spent thirteen years reviewing a potential dredging project, with no end to the review process in sight.

If our great nation is going to begin creating jobs at a faster rate, we must get back in the business of building things. But we need to figure out how to do it without years and years of permit delays related to our complex regulatory process that allows almost anyone to stall or stop any project.

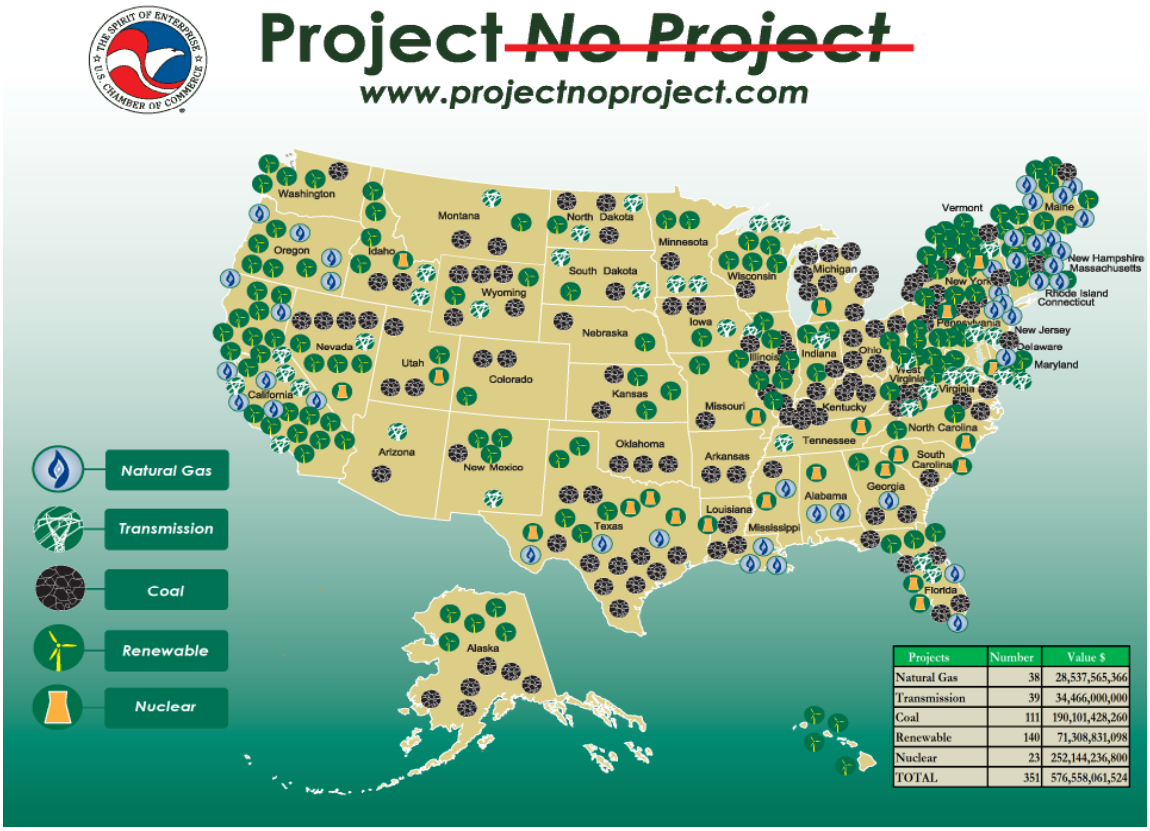
A. The *Project No Project* Inventory and its Significance

In 2009, the Chamber unveiled *Project No Project*, an initiative that assesses the broad range of energy projects that are being stalled, stopped, or outright killed nationwide due to "Not In My Back Yard" (NIMBY) activism, a broken permitting process and a system that allows limitless challenges by opponents of development. Results of the assessment are compiled onto the *Project No Project* Website (http://www.projectnoproject.com), which serves as a web-based project inventory and request for public input. The purpose of the *Project No Project* initiative is to understand potential impacts of serious project impediments on our nation's economic development prospects, and it is the first-ever attempt to catalogue the wide array of energy projects being challenged nationwide.

The information collection process for *Project No Project* has been a multi-year effort. All data was obtained by Chamber staff via publicly available sources, and each project contains a profile on the Website that has been written by one of the Chamber's lawyers. The profiles generally give a concise history of the project and assess its prospects going forward. Each project profile contains a series of hyperlinks to original information sources, as well as a "last updated" date stamp. All projects have been audited internally via a multi-step process. The site is truly the first of its kind; while industry-specific catalogs exist (e.g., the Sierra Club's "Beyond Coal" inventory of coal-fired power plants it seeks to close), to the Chamber's knowledge no one has ever tried to compile a technology-neutral inventory of challenged power generation projects along the lines of *Project No Project*. The entire site received a comprehensive update in early 2011, and it is a clear illustration of the projects in March 2010 that had funding but could not secure a permit.

Through *Project No Project*, the Chamber found consistent and usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower,

29 ethanol/biomass and 1 geothermal project. Since some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to forty-nine states:



Full descriptions for each project are available on the *Project No Project* Web site.

The results of the inventory are startling. One of the most surprising findings is that it is just as difficult to build a wind farm in the U.S. as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified are renewable energy projects. Often, many of the same groups urging us to think globally about renewable energy are acting locally to stop the very same renewable energy projects that could create jobs and reduce greenhouse gas emissions. NIMBY activism has blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other long delay mechanisms, effectively bleeding projects dry of their financing.

B. The Economic Study

When we set out to compile the *Project No Project* inventory, we expected to find 50, or even 100 projects. The fact that we (quite easily) topped 350 is absolutely shocking. More amazing is that we did not include oil and gas exploration projects or pipeline projects, which undoubtedly would have increased our totals. It became clear

from our research that the nation's complex, disorganized regulatory process for siting and permitting new facilities and its frequent manipulation by NIMBY activists constitute a major impediment to economic development and job creation. Which gave rise to the next question: how much money exactly is sitting on the sidelines due to this problem?

To answer this question, we commissioned an economic study, *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, which was produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr., Ph.D, of Widener University. An electronic copy of the study can be accessed at http://www.projectnoproject.com/progress-denied-a-study-on-the-potential-economic-impact-of-permitting-challenges-facing-proposed-energy-projects/. The Chamber asked Pociask and Fuhr to examine the potential short- and long-term economic and jobs benefits if the energy projects found on the *Project No Project* web site were successfully implemented. Like the *Project No Project* inventory itself, this study appears to be the first of its kind.

Pociask and Fuhr performed an input-output analysis, consistent with methodology used by the U.S. Department of Commerce.[2] The values they arrive at include not only the direct investment for each project, but also indirect and induced effects. As investment is deployed and energy projects are built over a series of months and years, the economy benefits by the direct purchasing of equipment and services, as well as the hiring of workers and contractors. These activities spur suppliers and contractors to hire additional employees and to buy more equipment, in order to keep up with demand. In effect, the direct benefit of investment spawns indirect benefits in the economy. In addition to the direct and indirect benefits from investment, the income paid to workers will be used to make various household purchases, which creates additional economic benefits known as induced effects.

As Pociask and Fuhr explain in their study, the combination of direct, indirect and induced effects represents the total economic benefit from the initial investments. Essentially, as a dollar of investment (or spending) is made, increased economic output cascades along various stages of production, employees spend their additional earnings, and the economy ends up with more than one dollar of final product. This phenomenon is referred to as the *multiplier effect*. These direct, indirect and induced benefits can be measured in terms of their effect on U.S. Gross Domestic Product (GDP) – the most comprehensive measure of final demand – and they can be reflected in terms of their effects on jobs and employment earnings.

Their study has produced several significant and insightful findings. For example, Pociask and Fuhr find that successful construction of the 351 projects identified in the *Project No Project* inventory could produce a $1.1 trillion short-term boost to the economy and create 1.9 million jobs annually during the projected seven years of construction. Moreover, these facilities, once constructed, continue to generate jobs once

[2] "Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMSII)," Economic and Statistics Administration and Bureau of Economic Analysis, U.S. Department of Commerce, Third Edition, March 1997, in particular the case study described on page 11.

built, because they operate for years or even decades. Based on their analysis, Pociask and Fuhr estimate that, in aggregate, each year of operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs.

The Chamber recognizes that moving forward on all the projects is highly unlikely. There simply would not be enough materials or skilled labor to construct all 351 projects at the same time, and to do so in a cost-effective manner. To address this problem, the study includes a sensitivity analysis, which examines the jobs and economic data if only some projects were approved. Table 1 below shows the results of this sensitivity analysis.

Table 1. What If Some Of These Projects Were Approved?

Projects Approved	Total GDP ($B in PDV)	Employment Earnings ($B in PDV)	Annual Jobs (in Thousands)
Only Largest Project in Each State			
Investment Effect	$449	$144	572
1-year Operations	$50	$12	272
Only Nuclear Projects			
Investment Effect	$411	$132	468
1-year Operations	$44	$11	267
Only Renewable Projects			
Investment Effect	$151	$49	447
1-year Operations	$17	$4	78
Only Transmission Projects			
Investment Effect	$64	$213	106
1-year Operations	$1.4	$0.3	7
All 351 Projects			
Investment Effect	$1,093	$352	1,880
1-year Operations	$145	$35	791

While it is unreasonable to think that all 351 projects would be constructed, even a subset of the projects would yield major value. As Table 1 shows, the construction of only the largest project in each state would generate $449 billion in economic value and 572,000 annual jobs. The key is that, as our current energy plants retire, we must build ***something***; unfortunately, however, right now we are building very little.

C. How did the Environmental Review Process Get So Out of Hand?

The mandate to conduct environmental reviews comes from section 102 of the National Environmental Policy Act of 1969 (NEPA), which requires Federal agencies to include a "detailed statement" evaluating the environmental impacts of major Federal actions, along with potential alternatives, unavoidable effects, impacts on long-term

productivity, and resource commitments for all covered projects.[3] When NEPA was enacted more than forty-two years ago, regulatory agencies routinely ignored environmental considerations when they wrote rules or undertook projects. NEPA was designed to address this deficiency and force federal agencies to consider the environmental consequences of their actions. The law itself was therefore a welcome – and necessary – new component of the federal decision-making process.

It is worth remembering, however, that Congress did **not** intend the consideration of environmental impacts to curtail or significantly delay federal action. NEPA's "detailed statement" provision (the requirement to prepare an Environmental Impact Statement or EIS) was not included in the version of NEPA initially passed by the House, but was subsequently inserted in conference from the Senate-passed version of the bill.[4] In the conference report, the conferees expressed the clear expectation that the NEPA review process would impose only a minor delay on federal agency action. Specifically, they stated:

> The conferees do not intend that the requirements for comment by other agencies should unreasonably delay the processing of Federal proposals and anticipate that the President will promptly prepare and establish by Executive order a list of those agencies which have "jurisdiction by law" or "special expertise" in various environmental matters. With regard to State and local agencies, it is not the intention of the conferees that those local agencies with only a remote interest and which are not primarily responsible for development and enforcement of environmental standards be included.
>
> The conferees believe that in most cases the requirement for State and local review may be satisfied by notice of proposed action in the Federal Register and by providing supplementary information upon the request of the State and local agencies. (To prevent undue delay in the processing of Federal proposals, the conferees recommend that the President establish a time limitation for the receipt of comments from Federal, State, and local agencies similar to the 90-day review period presently established for comment upon certain Federal proposals.)[5]

It is safe to assume that if the Congress that passed NEPA in 1969 saw how long it takes to perform an EIS today, it may not have voted as overwhelmingly in favor of passage. In December 2008, Piet and Carole A. deWitt performed what appears to be the only true quantitative analysis of the time required to complete an EIS.[6] Through an exhaustive *Federal Register* search, they found that between January 1, 1998 and December 31, 2006, 53 federal executive branch entities made available to the public 2,236 final EIS

[3] 42 U.S.C. § 4332.
[4] House Report No. 91-765, December 17, 1969.
[5] *Id.* at 8-9 (emphasis added).
[6] Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), December 2008.

documents; the time to prepare an EIS during this time ranged from 51 days to 6,708 days (18.4 years).[7] The average time for all federal entities was 3.4 years, but most of the shorter EIS documents occurred in the earlier years of the analysis; EIS completion time increased by 37 days each year.[8] The U.S. Forest Service, Federal Highway Administration, and Army Corps of Engineers were responsible for 51 percent of the EISs performed during the deWitt study period.[9]

This sad reality is a long way from the intent of NEPA's framers – specifically, that the new law would chiefly be administered and enforced efficiently by the federal agencies themselves, with substantial oversight from the White House Office of Management and Budget (OMB). CEQ believed in 1981 that federal agencies should be able to complete most EISs in 12 months or less.[10] Moreover, the framers also assumed that agencies would be afforded broad discretion in determining how to implement the law, and an agency's NEPA decisions would not be second-guessed by a court. Supporting this key point is the fact that NEPA does not explicitly provide a right of judicial review, and the legislative history of the statute is silent on the right of private action to enforce NEPA. Moreover, in 1970 the judicial standing requirements for third parties who did not participate in an agency action (i.e., neither the project applicant nor the agency) were sufficiently stringent to preclude most environmental group plaintiffs.

For these reasons, few people expected the courts to take the primary role in interpreting and enforcing NEPA. Within ten years, however, several key developments ensured that the courts would become the arbiters of NEPA, and that environmental reviews would become costly, complex and time-consuming undertakings.

- **The courts interpret a right of judicial review of actions under NEPA (1971).** In the first major NEPA case in 1971, ***Calvert Cliffs Coordinating Comm. v. AEC***,[11] the U.S. Court of Appeals for the D.C. Circuit found that an agency's compliance with NEPA is reviewable, and that the agency is ***not*** entitled to assert that it has wide discretion in performing the procedural duties required by NEPA. Judge Skelly Wright wrote that "[NEPA] contains very important procedural provisions – provisions which are designed to see that all federal agencies do in fact exercise the substantive discretions given them. These provisions . . . establish a strict standard of compliance." In Judge Wright's view, the courts have a duty to actively assist environmental plaintiffs in their NEPA claims against agencies. By 1977, in ***Shiffler v. Schlesinger***,[12] the Court of Appeals for the Third Circuit found that "it is now clear that NEPA does create a discrete procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions **and a right of action in adversely affected parties to enforce that obligation**." (emphasis

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Council on Environmental Quality, "NEPA's Forty Most Asked Questions," 46 Fed. Reg. 55 at 18026-18038 (1981).
[11] 449 F.2d 1109 (D.C. Cir. 1971).
[12] 548 F.2d 96 (3d Cir. 1977).

added). The Court cited ***Aberdeen & Rockfish R.R. v. SCRAP (SCRAP II),***[13] and noted that ***SCRAP II*** is dispositive of the reviewability of agency compliance with NEPA section 102.

- **The courts find that agencies have very limited discretion in determining how to meet their NEPA obligations (1971).** In ***Citizens to Preserve Overton Park v. Volpe***,[14] the Supreme Court considered a challenge to the Department of Transportation's decision to route an Interstate highway through a park. The Court noted that "[a] threshold question – whether petitioners are entitled to any judicial review – is easily answered. Section 701 of the Administrative Procedure Act [] provides that the actions of "each authority of the Government of the U.S. is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." The Court found no evidence that Congress sought to prohibit judicial review or restrict access to judicial review. The Court also found that the Secretary's decision did not fall within the exception for action "committed to agency discretion" because this is a very narrow exception to be used in the unusual situation where there is no law to apply. The Court noted that "the existence of [NEPA and other environmental review requirements] indicates that protection of parkland was to be given paramount importance." In the wake of the ***Overton Park*** decision, it was clear that agency actions involving NEPA would be carefully scrutinized by the courts. Indeed, the courts became the most important interpreter of NEPA's requirements and established procedural norms that all agencies were obliged to follow.

- **The courts find that third-party environmental groups have standing to sue on NEPA claims (1972).** In ***Sierra Club v. Morton***,[15] the Supreme Court found that an environmental group had not adequately alleged that it or its members' activities would be affected by a proposed action of the U.S. Forest Service, thereby failing to satisfy the requirements for judicial standing. Although the Court held that the group had not met the standing requirements, the Court gave the group clear instructions on how it could satisfy the standing requirement. The Court noted that:

  > The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members used Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.

  The environmental group amended its complaint following the Court's decision, and, with adequate allegations of individualized impact on the group, was able to

[13] 422 U.S. 289, 319 (1975).
[14] 401 U.S. 402 (1971).
[15] 405 U.S. 727 (1972).

satisfy the standing requirement. Following this case, environmental group plaintiffs had a relatively simple task establishing standing in NEPA and other environmental cases. Moreover, during the 1970s, the Justice Department generally declined to vigorously contest standing by environmental groups in cases involving NEPA and other statutes.

- **CEQ issues first NEPA regulations (1977).**
  President Carter signed Executive Order 11,991 in May of 1977, which required the Council on Environmental Quality (CEQ) to issue regulations instructing federal agencies specifically how to comply with NEPA. CEQ issued the regulations in November of 1978.[16] (see 40 C.F.R. §§ 1500.1 – 1508.28). Among other things, this rule required agencies to incorporate the review requirements of NEPA into each agency's existing regulations. Section 1500.6 requires agencies to interpret the provisions of NEPA as a supplement to the agency's existing authority and as a mandate to view its traditional policies and missions in the light of NEPA's national environmental objectives. In other words, agencies were instructed to give environmental objectives at least equal weight relative to other agency policies and missions. The NEPA rule contained many prescriptive elements (e.g., agencies are required to explore and objectively evaluate **all** reasonable alternatives, agencies must obtain information about reasonably foreseeable significant adverse impacts, unless the overall cost of obtaining the information is "exorbitant"). In the wake of the prescriptive NEPA rule, federal agencies erred on the side of over-inclusive environmental reviews, and began the trend of giving environmental objectives **greater** weight than any other agency policy or mission.

- **Congress passes the Equal Access to Justice Act (1980).** Because NEPA contains no citizen suit provision, it does not allow citizens to recover their attorney fees and costs when they prevail in a suit against an agency. This made NEPA suits a somewhat costlier and riskier proposition for environmental groups in the 1970s. In 1980, however, Congress passed the Equal Access to Justice Act (EAJA), which allows environmental plaintiffs to recover their fees and costs when they sue an agency and prevail. Under EAJA, a plaintiff must show that the agency was not substantially justified in its interpretation of the law. In the NEPA context, EAJA gave courts additional license to second-guess the validity of agency decisionmaking, while giving environmental plaintiffs new incentives to bring NEPA lawsuits against the agencies. For their part, agencies became hesitant to act and more likely to perform additional reviews as a way to protect themselves from lawsuits. While an agency could expose itself to significant legal risk by acting without having conducted extensive reviews, the agency would suffer no harm by overstudying a planned action.

As a result of these significant developments, within fifteen years of NEPA's enactment, environmental groups gained unrestricted access to the courts, along with a statutory

[16] 43 Fed. Reg. 55,990 (November 28, 1978)

presumption that their environmental objectives take precedence over other agency goals, together with powerful financial incentives to bring NEPA lawsuits against the agencies. As national environmental groups gained experience and success with NEPA claims, they began working with local environmental groups and law school legal clinics to leverage their expertise into more and more lawsuits. As a leading NEPA researcher has noted:

> The House Committee on Resources' NEPA task forces (US House of Representatives, Committee on Resources, 2006) and the Congressional Research Service (2006) have suggested that the threat of litigation is a major cause for the long EIS preparation process. The task forces and the Congressional Research Service noted that NEPA litigation is not a major component of all federal litigation, but they have implied that the threat of litigation and the potential for adverse judicial decisions can have a much greater effect than the actual number of lawsuits.[17]

Congress remained largely on the sidelines while the courts assumed the task of interpreting and expanding the scope of NEPA in the 1970s. As the amount of time required for agency approvals of actions began to grow longer and longer due to lawsuits, it became clear that NEPA challenges had become a serious obstacle to all development projects. One of the notable examples was the Trans-Alaska Pipeline project. On April 1, 1970, four months after enactment of NEPA, the U.S. District Court in the District of Columbia enjoined the Department of the Interior from issuing a construction permit for the pipeline until the project could be studied under NEPA's new review requirements. The 3,500 page, 9-volume final environmental impact statement was completed in March 1972. Although the District Court was satisfied with the impact statement and lifted its injunction, the Court of Appeals reversed, holding that although the impact statement met the requirements of NEPA, it did not satisfy the requirements of the Mineral Leasing Act. The Supreme Court refused in April 1973 to hear an appeal of the case. Hearings on the project included many calls for additional environmental reviews. Impatient with the prospect of additional delays from NEPA reviews, Congress passed legislation declaring that the pipeline project fully complied with NEPA and the Mineral Leasing Act. Shortly afterwards, on the heels of the October 1973 Arab oil embargo, the Trans-Alaska Pipeline Act approving the pipeline was quickly and overwhelmingly passed by the House and Senate. President Nixon signed the bill into law on November 16, and work on the pipeline began two months later.

The Trans-Alaska Pipeline project was a pointed example of Congress asserting control over an environmental review process that was threatening to go out of control and compromise vital national objectives. Although instances of such direct congressional intervention in the NEPA process are unusual, Congress clearly understood early on that endless rounds of litigation over the adequacy of NEPA reviews was damaging the nation's ability to move forward. In 1980, when the Regulatory Flexibility Act – which was directly modeled after NEPA – was enacted, it was specifically

[17] Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), at 172, December 2008.

designed to be implemented by the agencies themselves with oversight by OMB.[18] Like NEPA, the RFA as it was written in 1980 had no provision for affected citizens to challenge an agency's noncompliance with the law:

> (a) [A]ny determination by an agency concerning the applicability of any of the provisions of [the RFA] to the agency shall not be subject to judicial review.
> (b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review.[19]

With the RFA, Congress clearly wanted to avoid creating a flood of lawsuits that would paralyze federal agencies the way that NEPA lawsuits had. The strategy worked: unlike NEPA, the courts played a relatively limited role in interpreting and enforcing the RFA. Even thought the RFA was modeled directly on NEPA, the role of the courts made a tremendous difference in how agency decisionmaking occurs under the respective law. Unlike the 1970's courts' aggressive efforts to interpret a NEPA super-mandate, a private right of judicial review, and standing for citizens, the courts have not been eager to expand the narrow jurisdictional boundaries of the RFA. Moreover, the experience with the Information Quality Act (IQA), section 515 of Public Law 106-554 (2001), is similar to that of the RFA. The courts have declined to interpret the IQA to contain a private right of judicial review.[20]

The result of NEPA's dramatic expansion: a system so bogged-down by administrative procedure and litigation that it simply can't work quickly.[21] Although this result was not intended by Congress when it enacted NEPA, over thirty years, the modest requirements of NEPA became an all-consuming super-mandate that overwhelms large-scale projects. As the U.S. Court of Appeals for the D.C. Circuit recently noted in a somewhat different context, "[t]he law tends to snowball. A statement becomes a holding, a holding becomes a precedent, a precedent becomes a doctrine, and soon enough we're bowled over at the foot of a mountain, on our backs and covered in snow."[22] And when the government actually needs to funnel money quickly into infrastructure to create jobs, the delay built into complying with NEPA can present real problems. That is precisely what happened in the case of the 2009 stimulus.

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[18] 5 U.S.C. §§601- 612.

[19] Pub. L. No. 96-354, § 611, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 611). As the Office of Advocacy explained in a 1982 pamphlet, *The Regulatory Flexibility Act*, "[t]he Act as finally passed tries to strike a balance between minimizing opportunities for stalling the regulatory process while still assuring judicial pressure for agency compliance." Office of Advocacy, *The Regulatory Flexibility Act* (October 1982) at 16.

[20] *See, e.g., Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006).

[21] The near-certainty that a project's permits will be litigated caused one company, Shell, to actually **file a lawsuit against its own project** so that it didn't have to wait until the last day of the statute of limitations for its opponents to file suit. *See* http://www.alaskajournal.com/Alaska-Journal-of-Commerce/AJOC-February-26-2012/Shell-files-pre-emptive-strike-seeks-approval-of-process-on-spill-plan/.

[22] *AKM LLC v. Secretary of Labor, et al.*, No. 11-1106, 2012 U.S. App. LEXIS 6940, at *12 (D.C. Cir. Jan. 20, 2012).

II. NEPA and the Recovery Act: A Cry for Help

During debate on the 2009 economic stimulus bill, the American Recovery and Reinvestment Act ("Recovery Act"), the Chamber called attention to the fact that our nation's flawed permitting process in effect ensures that no project will ever truly be "shovel-ready." Senators Barrasso and Boxer worked together to secure an amendment to the bill requiring that the NEPA process be implemented "on an expeditious basis," and that "the shortest existing applicable process" under NEPA must be used.

The Barrasso-Boxer amendment, which became Section 1609 of the Recovery Act, had a huge impact. According to CEQ data, 192,707 NEPA reviews were required for Recovery Act projects; 184,733 of them were satisfied through the use of categorical exclusions.[23] 7,133 reviews went through an EA and received a finding of no significant impact (FONSI).[24] Only 841 required an EIS, the longest available process under NEPA.[25]

This is both good and bad news. It is good because policymakers were able to find a way to avoid protracted NEPA reviews and got the money out quickly. However, it is bad because it means the government avoided the big, complex projects that would have required an EA or EIS—i.e., the ones that create a lot of jobs—because the environmental review would have taken too long.

Categorical exclusions are, by definition, categories of actions "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency."[26] By committing 96 percent of the available stimulus funds to projects that qualified for categorical exclusions,[27] the Administration was committing only to projects so benign that they had ***no environmental impact whatsoever***. This is directly at odds with the spirit of NEPA, which seeks to provide a balance between environmental protection and economic development.

The Chamber does not wish to engage in a debate over the number of jobs created by the Recovery Act. However, it is certainly worth pointing out that only 3.7 percent of the projects funded by the Recovery Act were of the size and complexity to merit an EA, and 0.4 percent qualified for an EIS. Ignoring NEPA will not fix NEPA, it will only

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[23] The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, *available at* http://ceq.hss.doe.gov/ceq_reports/reports_congress_nov2011.html.
[24] *Id.*
[25] *Id.*
[26] 40 C.F.R. § 1508.4.
[27] To be clear, NEPA applied to almost everything covered by the Recovery Act. CEQ reports that only 4,280 projects were categorized as "NEPA not applicable," meaning departments and agencies act in a ministerial capacity to distribute funds and do not control the use of the funds or are acting under statutes for which their actions are exempted from NEPA review.

deter developers from taking on large job-creating projects. The RAPID Act will specifically help move these larger projects along.

III. Permit Streamlining: A Bipartisan Solution

There have been very few issues that have found agreement within the 112th Congress, let alone Congress and the White House. But increasing the efficiency of the permitting process for infrastructure projects is a concept Republicans, Democrats and the business community all agree is needed.

26 bills have been introduced in the 112th Congress that streamline NEPA in some way, shape or form. These bills have applied to roads, rails and bridges, oil and gas exploration and production, renewable energy, transmission lines, forests and other projects. They have been introduced by both Republicans and Democrats, and several have enjoyed bipartisan support.

Over the past year, President Obama and his administration have taken several important steps designed to increase the efficiency of the federal permitting process. In 2011, the President's Council on Jobs and Competitiveness developed—in consultation with the Chamber and a wide range of stakeholders—a set of common-sense initiatives to boost jobs and competitiveness. Chief among these initiatives was a set of ideas to "simplify regulatory review and streamline project approvals to accelerate jobs and growth."[28] Recommendations included early stakeholder engagement, reduced duplication among local, state and federal agency reviews, and improved litigation management.[29]

On August 31, 2011, President Obama issued a Presidential Memorandum instructing agencies to (1) identify and work to expedite permitting and environmental reviews for high-priority infrastructure projects with significant potential for job creation; and (2) implement new measures designed to improve accountability, transparency, and efficiency through the use of modern information technology. In October 2011, the Administration selected 14 infrastructure projects and seven transmission lines for expedited permitting and review.[30] In December 2011, CEQ issued draft guidance in accordance with the Presidential Memorandum, CEQ issued final guidance in March 2012. As explained in the following section, CEQ's guidance largely resembles the concepts in the RAPID Act.

Finally, in his State of the Union address on January 24, 2012, the President took his boldest step yet, announcing that he would "sign an Executive Order clearing away the red tape that slows down too many construction projects."[31] In the months since, the

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[28] "Interim Report of the President's Council on Jobs and Competitiveness, *available at* http://www.jobs-council.com/recommendations/streamline-regulations-that-hurt-job-creation/.

[29] *Id.*

[30] *Available at* http://www.whitehouse.gov/the-press-office/2011/10/11/obama-administration-announces-selection-14-infrastructure-projects-be-e.

[31] *Available at* http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address. President Obama's exact remarks were: "In the next few weeks, I will sign an executive order

administration has taken steps to streamline oil and gas permitting[32] and the siting of wind projects,[33] but has not yet issued the Executive Order described by the President in his State of the Union address.

The Chamber is grateful for the President's strong support for permit streamlining. But more must be done, and the RAPID Act is the proper path forward.

III. The RAPID Act: Modeled After Existing Law

The RAPID Act is very wisely modeled after an existing law that works: Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU). The structure of the RAPID Act is strikingly similar to Section 6002, and many of its best provisions—schedule requirements, concurrent reviews, and the statute of limitations—are identical to Section 6002.

SAFETEA-LU was signed into law by President George W. Bush on August 10, 2005. The bill received six months of extensive committee and floor debate in both houses of Congress. The final version passed the House by a 412-8 vote and the Senate by a 91-4 vote. Of the four members of this Subcommittee serving at the time—Reps. Smith (R-TX), Coble (R-NC), Gallegly (R-CA), and Conyers (D-MI)—all voted for passage of the bill.

Section 6002 of SAFETEA-LU contains two key components: (1) process streamlining and (2) a statute of limitations. The process streamlining component does not in any way circumvent any NEPA requirement; in fact, the statute explicitly provides that "[n]othing in this subsection shall reduce any time period provided for public comment in the environmental review process." Section 6002 designates DOT as lead agency for all SAFETEA-LU projects and requires early participation among the lead agency (DOT) and other participating agencies. It requires federal agencies to conduct NEPA reviews concurrently (rather than sequentially), requires early identification and development of issues, and sets deadlines for decisions under other federal laws. The goal of the process streamlining provision was not to escape NEPA, but merely to facilitate interagency and public coordination so that the process could be sped up. The second key element in Section 6002 is a 180-day statute of limitations to "use it or lose it" on judicial review. Without such a provision, the prevailing statute of limitations is the default six-year federal statute of limitations for civil suits.

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clearing away the red tape that slows down too many construction projects. But you need to fund these projects. Take the money we're no longer spending at war, use half of it to pay down our debt, and use the rest to do some nation-building right here at home."

[32] On April 3, 2012, the Department of the Interior announced it would automate the approval process for applications of permits to drill. Interior estimates it will reduce approval times from 298 days to 60 days.

[33] On April 2, 2012, the administration announced a Memorandum of Understanding (MOU) with several states to coordinate wind permitting on the Great Lakes. Participating in the Memorandum of Understanding (MOU) are the states of Illinois, Michigan, Minnesota, New York and Pennsylvania, as well as 10 federal agencies, including CEQ, DOE, the Army Corps of Engineers, U.S. EPA, and the Fish and Wildlife Service. Ohio, Indiana and Wisconsin did not sign the MOU.

Section 6002 is working, and working well. A September 2010 report by the Federal Highway Administration found that just the process streamlining component of Section 6002 has cut the time to complete a NEPA review in half, from 73 months down to 36.85 months. The 180-day statute of limitations is cutting back on a typical NIMBY practice of waiting until the very last day to file a lawsuit against a project. Because the impact of waiting until the last day for filing of suits is to delay projects as long as possible, this tactic is particularly effective with a six-year statute of limitations. Even with the 180-day statute of limitations, groups still wait until the last week or last day to file, so that the project is delayed as long as possible. A good example of this happening is the Maryland InterCounty Connector[34] highway project.

IV. The RAPID Act is Effective Permitting Reform

The RAPID Act takes the most effective elements of Section 6002—concurrent reviews, deadlines, the statute of limitations—and applies them to all infrastructure projects. The RAPID Act almost exclusively relies upon concepts that are part of existing law and that have been shown to work in other contexts, such as SAFETEA-LU. Like Section 6002, the RAPID Act takes no rights away from agencies or the public to participate in the environmental review process.

Important reforms made by the RAPID Act include:

- Early designation of a lead agency, participating agencies and cooperating agencies when multiple agencies are involved in a NEPA review;
- Acceptance of state "little NEPA" reviews where the state has done a competent job, avoiding needless duplication of state work with the federal NEPA review;
- Imposition of a duty on agencies to involve themselves in the process early and comment early, with a failure to do so serving as a measure of procedural default;
- A reasonable process for determining the scope of alternatives, so that the NEPA review does not turn in to a limitless quest to evaluate millions of infeasible alternatives;
- Consolidation of the process into a single EIS and single EA for a NEPA project, except as otherwise provided by law.
- Allowance of the project sponsor to participate in the preparation of environmental documents and provide funding—a reform made recently by California in state permit streamlining reforms;
- A requirement that each alternative include an analysis of employment impacts;
- Creation of a schedule for the EIS or EA, including deadlines for decisions under other Federal laws;

[34] http://www.washingtonpost.com/wp-dyn/content/article/2006/11/01/AR2006110103155.html. The final Record of Decision was issued on May 29, 2006. Sierra Club and Environmental Defense gave notice of intent to sue on November 2, 2006, and filed the lawsuit on December 20, 2006.

- Reasonable fixed deadlines for completion of an EIS or EA; and
- Reduction in the statute of limitations to challenge a final EIS or EA from six years down to 180 days.

The RAPID Act is a practical, industry-wide approach that makes the same changes to NEPA that the Obama Administration is currently doing on a case-by-case basis. Consider the 14 projects the White House announced it would streamline on October 11, 2011. Those projects are being expedited through a combination of improved coordination or cooperation among agencies, a process for dispute elevation and resolution, and a schedule for document reviews. The RAPID Act requires these same concepts: early coordination, concurrent reviews, prompt identification of the lead agency, early invitation of participating agencies, a schedule for completion of the review, and a predictable 180-day statute of limitations.

Because the RAPID Act changes the procedure for administering an environmental law, there will likely be groups that decry the bill as an affront to environmental protection. But the fact remains that the RAPID Act makes only procedural changes. It amends the Administrative Procedure Act, not the organic NEPA statute. The bulk of the bill has been enacted in other contexts and has proved successful without impeding the rights of any private citizen.

The 180-day statute of limitations—which, again, is part of SAFETEA-LU and is working—fixes what is essentially a loophole in the system, the six-year statute of limitations to challenge final NEPA action. Consider that a challenge to a final regulation (which in most circumstances has a much greater impact on the public than a single project) is limited to 60 days; why then does a challenge to a different final agency action, an EIS, require six years? The RAPID Act harmonizes judicial review of NEPA decisions with review of other final agency actions under the Administrative Procedure Act.

Most importantly, though, the RAPID Act addresses the common problem that *Project No Project* identified: that project delays cost money and jobs. To those that question why deadlines are needed for completion of a project, the response is simple and clear: they are needed to create jobs. *Project No Project* showed that in the energy sector alone, one year of delay translates into millions of jobs not created. The Chamber believes creation of millions of jobs is worth forcing our government to work a little faster. The RAPID Act accomplishes this goal.

V. The RAPID Act is a Codification of March 2012 CEQ NEPA Guidance

The RAPID Act contains a set of principles that members of both parties can agree upon. In many ways, the RAPID Act is a codification of principles set forth in CEQ's March 2012 guidance on NEPA efficiency. Consider the similarities:

March 2012 CEQ Guidance	RAPID Act
CEQ recommends that agencies begin preparing for an EIS in the early stages of development of a proposal. For actions initiated at the request of a non-Federal entity, CEQ recommends that agencies begin the EA or EIS process no later than receipt of a complete application.	Subsection (f)(2) requires prompt identification of the lead agency, which then has 45 days from receipt of the project initiation notice to initiate the environmental review and invite participating agencies. Subsection (f)(1) requires the project sponsor's notice to include a description of the project, general location, and a statement of any anticipated Federal approvals.
CEQ recommends that Federal agencies, should guide applicants to gather and develop the best possible information before submitting an application, and notes that several agencies require the applicant to prepare and submit an environmental report to help inform and prepare the agency's NEPA analysis and documentation, and facilitate review.	Subsection (c)(1) allows the project sponsor, upon request, to prepare any environmental document under NEPA required in support of any project or approval by the lead agency, provided that the lead agency provides guidance to the project sponsor, independently evaluates the document, and approves or adopts the document prior to using it in the review.
CEQ recommends that the lead agency can solicit cooperation as early as possible from other agencies with jurisdiction or expertise on particular environmental issues. Those cooperating agencies can work with the lead agency to ensure that one NEPA review process informs all relevant decisions.	Subsection (e)(2) requires the lead agency to identify, as early as practicable, in the environmental review for a project, any other agencies that may have an interest in the project, and requires invitation of such agencies to become participating agencies in the environmental review for the project. Agencies have 30 days to respond to the invitation, which can be extended by good cause.
CEQ recommends that a lead agencies use scoping to identify and eliminate from detailed study the issues that are not significant or that have been covered by prior environmental review.	Subsection (g)(1) requires, as early as practicable but no later than during scoping for a project requiring the preparation of an environmental impact statement, the lead agency to consult with participating agencies and determine the range of alternatives to be considered for a project.
CEQ recommends that the lead agency preparing an EA or an EIS invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and "other interested persons."	Subsection (h)(1)(A) requires the lead agency to establish a plan for coordinating public and agency participation in and comment on the environmental review for a project or category of projects to facilitate the expeditious resolution of the review.
CEQ encourages Federal agencies to collaborate with Tribal, State, and local governments to the fullest extent possible	Subsection (d)(2)(A) requires, upon the request of a project sponsor, the lead agency to adopt an environmental study

to reduce duplication, unless the agencies are specifically barred from doing so by some other law, and strongly recommends taking every reasonable opportunity to ensure that those reviews run concurrently rather than consecutively.	document that has been prepared for a project under state laws and procedures as the environmental impact statement or environmental assessment for the project, provided that the lead agency determines that the state laws and procedures under which the environmental study document was prepared provide environmental protection and opportunities for public involvement that are substantially equivalent to NEPA.
CEQ recommends that Federal agencies seek efficiencies and avoid delay by attempting to meet applicable non-Federal NEPA-like requirements in conjunction with either an EA or an EIS wherever possible.	Subsection (i)(4) sets deadlines for decisions under other Federal laws relating to project. If the decision is required before issuance of a ROD or FONSI, the deadline is 30 days; for all other decisions, 90 days.
CEQ recommends concurrent reviews (rather than sequential) whenever appropriate.	Subsection (e)(7) requires concurrent Federal reviews and implementation of administrative, policy, and procedural mechanisms to enable the agency to ensure completion of the NEPA process in a timely, coordinated, and environmentally responsible manner.
CEQ recommends that agencies consider adoption or incorporation by reference of materials prepared by other agencies with certain expertise, where it would be more efficient.	Subsection (d) requires that the EA or EIS be adopted by all Federal agencies making approvals for the project, and that, where available, secondary and cumulative impact analyses prepared under NEPA for projects in the same geographic area be used.
CEQ recommends that agencies provide a reasonable and proportionate response to comments on a draft EIS by focusing on the environmental issues and information conveyed by the comments.	Subsection (e)(8) requires commenting agencies to limit their comments to areas of their own expertise, and the lead agency is not required to respond to issues raised by commenting agencies that are outside the scope of that agency's expertise.
CEQ notes that its regulations encourage Federal agencies to set appropriate time limits for individual actions and provide a list of factors to consider in establishing timelines.	Subsection (h)(B) requires the lead agency to set a schedule for completion of the review, and sets forth a list of factors to consider in establishing timelines.
CEQ notes that it is entirely consistent with the purposes and goals of NEPA and with the CEQ Regulations for agencies to determine appropriate time limits for the EA process.	Subsection (i) sets deadlines for the preparation of an EIS or an EA, which can be extended if good cause is shown or if a different deadline is agreed to by agreement of interested parties.

VI. Conclusion

As *Project No Project* shows, trillions of dollars and millions of American jobs can be created if projects can complete their permitting on a timely basis. NIMBY activism has blocked projects of all shapes and sizes through tactics such as organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other long delay mechanisms, effectively bleeding projects dry of their financing.

The RAPID Act restores Congressional intent and allows environmental reviews under NEPA to function as designed. It sets forth a common-sense procedure for completion of environmental reviews—one that already works in the transportation context and has enjoyed broad, bipartisan support. And the RAPID Act does not remove or modify any public citizen's right or ability to participate in the NEPA process.

If enactment of the RAPID Act could have the same impact on energy, forest management, and intermodal projects that SAFETEA-LU Section 6002 has had on transportation projects, Congress will have done wonders to create jobs and boost our economic recovery. The Chamber strongly supports passage of the RAPID Act and stands ready to work with the Subcommittee to move the bill through Congress. Thank you for the opportunity to testify today. I look forward to answering any questions you may have.