Statement of the U.S. Chamber of Commerce

ON: **Hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act)**

TO: **U.S. House of Representatives**
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

DATE: **March 2, 2015**

BY: **William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs**

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM, COMMERICAL AND ANTITRUST LAW

Hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act)

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

March 2, 2015

Good afternoon, Chairman Marino, Ranking Member Johnson, and distinguished Members of the Subcommittee. 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. My statement details the Chamber's strong support for two regulatory reform bills now pending before this Subcommittee, H.R. 348, the "Responsibly and Professionally Reinvigorating Development (RAPID) Act of 2015," and H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015." These two bills embody many of the U.S. Chamber's highest regulatory reform priorities in the 114th Congress. Accordingly, we urge this Subcommittee to send this critical legislation to the House floor.

The U.S. Chamber's Regulatory Reform Agenda

On December 2, 2014, U.S. Chamber of Commerce President and CEO Thomas J. Donohue articulated the urgent need to fix the U.S. regulatory system. He identified four key principles to accomplish real regulatory reform and lead to greater growth, more jobs, and better government. Those principles are:

- **Restore federal agency accountability to the public and Congress.**
- **Ensure greater transparency by agencies in their decision making process and their actions.**
- **Allow improved, meaningful participation by stakeholders.**
- **Guarantee that the federal process to permit major new projects a safe but swift.**

The Chamber specifically supports H.R. 348 and H.R. 712, along with H.R. 185, the "Regulatory Accountability Act of 2015"—which already passed the House on a bipartisan vote—as vehicles to turn these principles into reality. By bringing more predictability and efficiency to the project permitting process and requiring agencies to be

transparent and disclose the sue-and-settle agreements they wish to enter into, these bills address the compelling need to reform the regulatory process itself. These reforms are not intended to steer the regulatory process to specific outcomes, but to ensure that the process is transparent, fair to all, meets the test of common sense, and is compatible with our principles of economic freedom and our strong desire to create good jobs and growth.

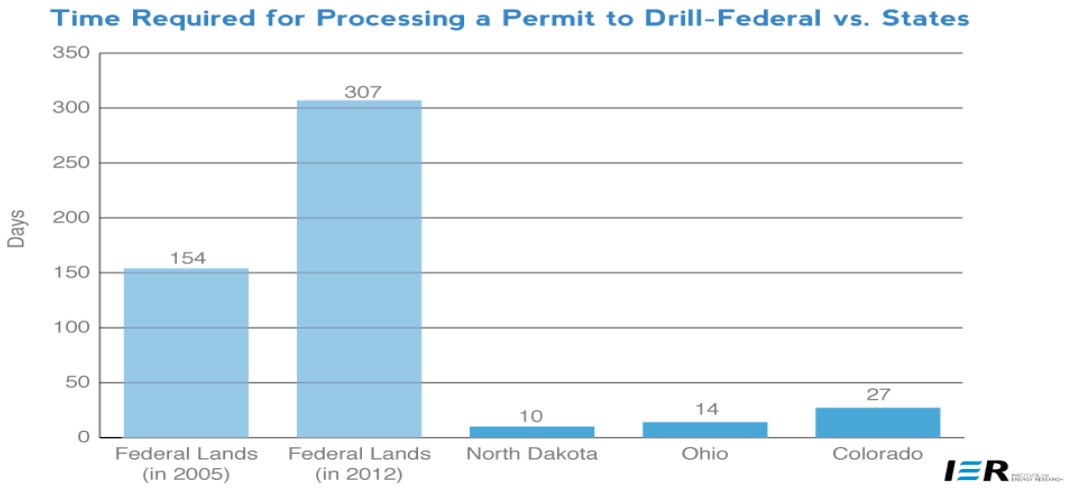
I. H.R. 348, THE "RESPONSIBLY AND PROFESSIONALLY REINVIGORATING DEVELOPMENT (RAPID) ACT OF 2015"

One of the most significant problems plaguing our current regulatory process is the Byzantine maze of approvals and legal challenges that must be navigated before a major development project can be permitted. The RAPID Act is designed to address that problem by, among other things: (1) designating a lead agency that is responsible for managing and coordinating the review process among agencies, and (2) placing time limits on decision making and legal challenges for infrastructure projects without changing the substantive requirements that protect the public.

A. Defining the Problem

The Hoover Dam was built in five years. The Empire State Building took one year and 45 days. The Pentagon, one of the world's largest office buildings, took less than a year and a half. The New Jersey Turnpike needed only four years from inception to completion. Fast forward to 2015, and the results are much different. By contrast, the Cape Wind project has needed over a decade to obtain the necessary permits to build an offshore wind farm. After obtaining federal leases in 2005, it took Shell Corporation seven years to obtain oil and gas exploration permits for the Beaufort Sea. And the Port of Savannah, Georgia spent thirteen years reviewing a potential dredging project.

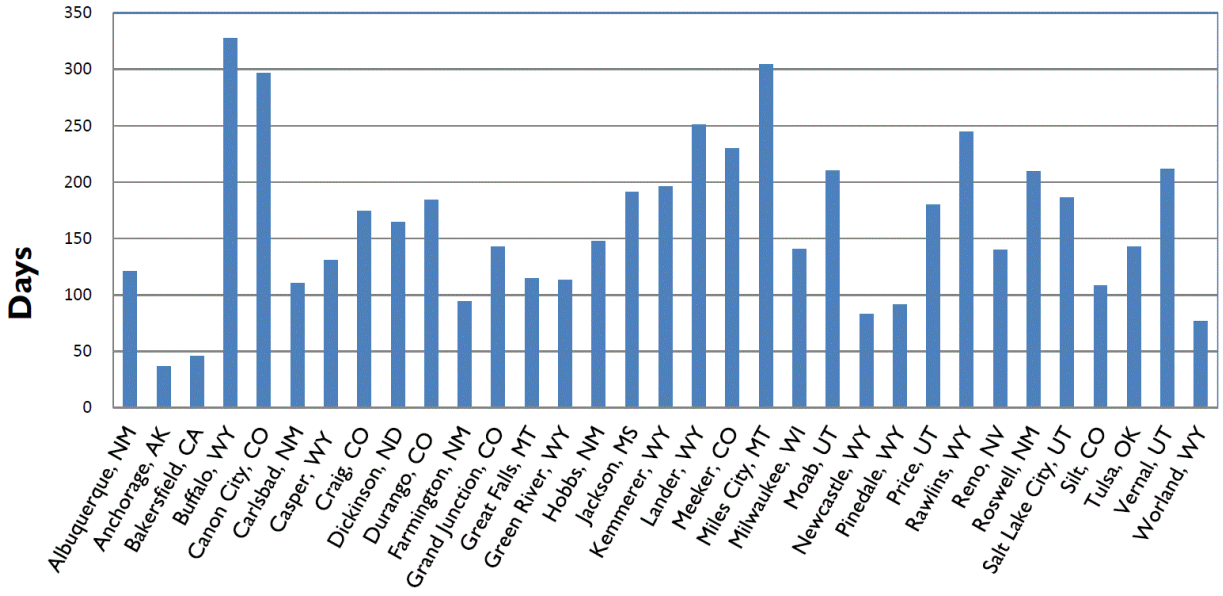
These are not outlier projects – these projects represent the "rule" and not the "exceptions" when it comes to our federal environmental review and permitting process. According to an April 2014 report issued by the U.S. Government Accountability Office (GAO), when there is information available on review times under the National Environmental Policy Act (NEPA), the process is a slow one with the average preparation time for the environmental impact statements (EISs) finalized in 2012 running 4.6 years. This is the highest average since 1997. Similarly, at a February 5, 2013 hearing before the House Subcommittee on Energy and Power, a representative from the Institute for Energy Research testified that it currently takes more than 300 days to process a permit to drill for oil and gas on federal lands onshore. As shown in the chart below, this is in sharp contrast to the time it takes to process a permit for the same drilling activities on private and state lands – less than one month.



In a June 2014 report, the Office of Inspector General of the U.S. Department of Interior reached similar conclusions to IER on the problems with the federal onshore oil and gas permitting process.[1] The DOI's IG concluded that "[i]n assessing the effectiveness and efficiency of the drilling permit process for oil and gas wells … the Bureau of Land Management (BLM) approves thousands of permits each year, but review times are very long."[2] According to the report findings, BLM reported an average of 228 calendar days, or about 7.5 months, to process an application for a permit to drill (APDs) during 2012. The graph below shows the average processing days for APDs in BLM's 33 field offices.[3]

[1] *Available at* http://www.doi.gov/oig/reports/upload/CR-EV-MOA-0003-2013Public.pdf.
[2] *Id.* at 1.
[3] *Id.* at 19.

Appendix 2: APD Average Processing Days



Oil and gas production on federal and tribal lands has averaged $3 billion in annual royalty revenues since 2011. Despite this significant revenue (and the potential for even more), the DOI's IG identified the following problems plaguing the permitting process: (1) neither BLM nor the operators applying for the permits can predict when the permits will be approved; (2) "review(s) may continue indefinitely" because target dates for completing permit applications are neither set nor enforced; (3) "the process at most field offices does not have sufficient supervision to ensure timely completion; and (4) BLM does not have a "results-oriented performance goal" to tackle processing times.[4]

The major cause of these delays in federal permitting is the mandate to conduct environmental reviews of major projects under section 102 of the National Environmental Policy Act of 1969 (NEPA). When federal agencies undertake major actions (including issuing permits), they must evaluate the environmental impacts of the action, along with potential alternatives, unavoidable effects, impacts on long-term productivity, and resource commitments for all covered projects.[5] When NEPA was enacted some forty-six years ago, regulatory agencies routinely ignored environmental considerations when they wrote rules or undertook projects. NEPA was designed to force federal agencies to consider the environmental consequences of their actions. Congress emphatically did **not** intend the consideration of environmental impacts to curtail or significantly delay federal action. 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:

[4] *Id.* at 1.
[5] 42 U.S.C. § 4332.

> 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.
>
> 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.)[6]

NEPA's framers clearly intended 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.[7] 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.

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.

The result of NEPA's dramatic expansion is a system so bogged-down by administrative procedure and litigation that it is gridlocked.[8] Although this result was not intended by Congress, NEPA's modest review requirements were transformed into an all-consuming super-mandate that overwhelms large-scale projects.

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[6] *Id.* at 8-9 (emphasis added).

[7] Council on Environmental Quality, "NEPA's Forty Most Asked Questions," 46 Fed. Reg. 55 at 18026-18038 (1981).

[8] 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/.

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.[9] 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 documents; the time to prepare an EIS during this time ranged from 51 days to 6,708 days (18.4 years).[10] 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.[11] 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.[12]

These delays and inefficiencies in our country's federal environmental review and permitting process are systemic problems that are pervading our country across geographic and industry lines. In the World Bank and International Finance Corporation's most recent "Ease of Doing Business" index, the United States ranks **34th in the world** in the category "Dealing with Construction Permits" (in other words, permitting and building projects). If this ranking and the problems with the permitting system persist, real dollars will be lost, along with good-paying jobs. In July 2014, The Associated General Contractors of America testified at a subcommittee hearing for the House Transportation and Infrastructure Committee that in 2013, $911 billion in public and private investment in the construction of residential and nonresidential structures occurred in the United States.[13] The construction industry contributes significantly to employment and GDP – "[a]n extra $1 billion in nonresidential construction spending adds about "3.4 billion to GDP, about $1.1 billion to personal earnings and creates or sustains 28,500 jobs."[14]

B. The U.S. Chamber's *Project No Project* Inventory and its Significance

In 2009, the Chamber unveiled *Project No Project*, an initiative that catalogued the broad range of energy projects that were delayed or halted because of the inability to obtain permits and endless legal challenges by opponents of development. Results of the assessment are compiled onto the *Project No Project* Website (http://www.projectnoproject.com). The purpose of the *Project No Project* initiative was to understand the impacts of serious project impediments on our nation. It remains the only attempt to catalogue the wide array of energy projects being challenged nationwide.

Through *Project No Project*, the Chamber identified 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

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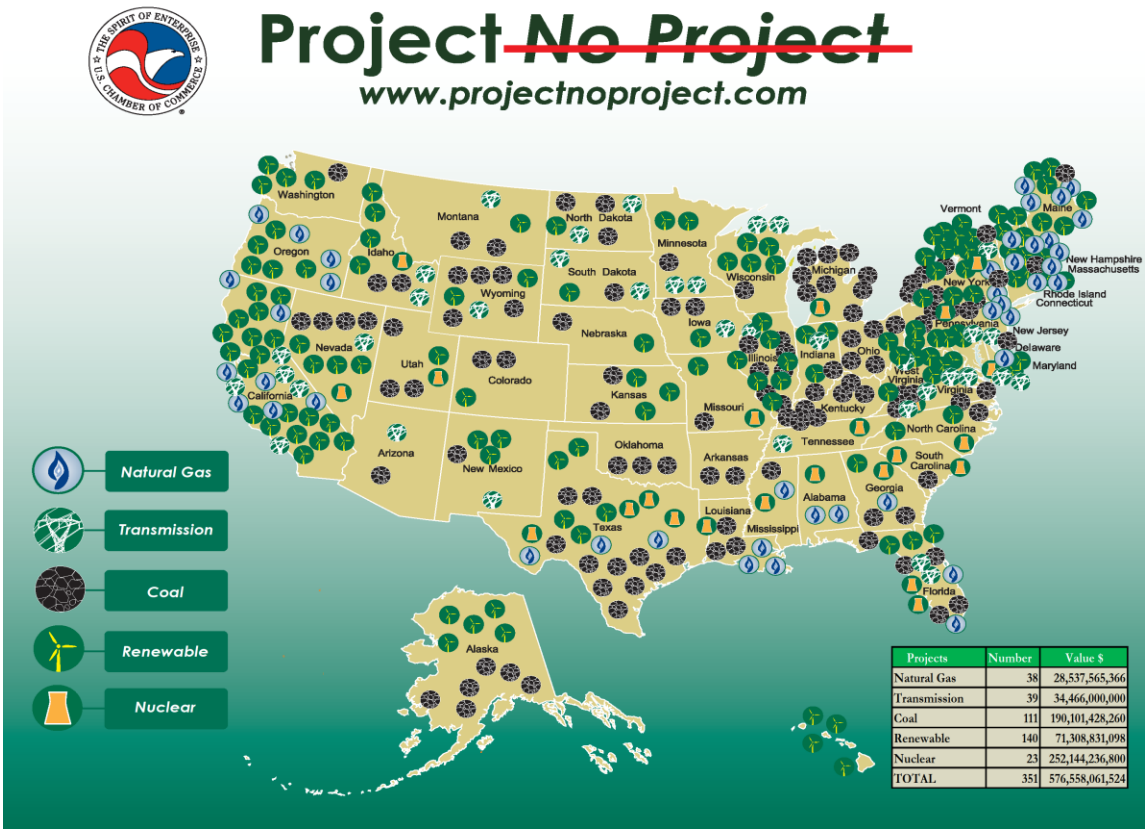
[9] Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), December 2008.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Available at* http://transportation.house.gov/uploadedfiles/2014-07-15-pilconis.pdf.
[14] *Id.* at 9.

energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Given that 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:

The results of the inventory were revealing. One of the most surprising findings is that it has been 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 in our study were 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. Activists have blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other delay mechanisms, thereby effectively bleeding projects dry of their financing.



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

It quickly became clear from our research that the nation's complex, disorganized process for permitting new facilities and its frequent manipulation by opponents constitute a major impediment to economic development and job creation. Which prompted the next question: what are the economic effects of this problem on the economy and job growth?

According to an economic study that we commissioned, the successful construction of the 351 projects identified in the *Project No Project* inventory could have produced a $1.1 trillion short-term boost to the economy and created 1.9 million jobs annually during the projected seven years of construction.[15] Moreover, after these facilities are constructed, they would continue to generate jobs because they operate for years or even decades. According to the study, in aggregate, each year of operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs.

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 that is only going to happen if we figure out how to eliminate inefficiency, duplication and delays in our federal environmental review and permitting process. Otherwise, that process will continue to lead to stalled or even cancelled projects across the country.

C. Broad, Bipartisan Support for Permit Streamlining

Permit streamlining traditionally draws bipartisan support in concept, but little progress had been achieved until relatively recently.[16] Democrats, Republicans, the White House, and the business community all agree that we must remove needless red tape that stalls and often kills major development projects:

- In February 2015, the Administration released its proposed Fiscal Year 2016 Budget, which states that "[t]o further accelerate economic growth and improve the competitiveness of the American economy, the Administration is taking action to modernize and improve the efficiency of the Federal permitting process for major infrastructure projects."[17]

- President Obama pledged to cut "red tape" to help build new factories that use natural gas in his 2014 State of the Union address, and he pledged to speed up "new oil and gas permits" in his 2013 State of the Union address.

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[15] The Chamber-commissioned economic study is titled *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/.

[16] 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 later in this testimony, streamlining provisions in MAP-21, SAFETEA-LU and the American Recovery and Reinvestment Act have yielded positive and substantial results.

[17] *Available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/investing.pdf.

- In May 2014, President Obama issued a "Presidential Memorandum on Modernizing Infrastructure Permitting"[18] and the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement released an "Implementation Plan" for the Memorandum.[19] The goal of the Implementation Plan was to: "[m]odernize the Federal permitting and review process for major infrastructure projects to reduce uncertainty for project applicants, reduce the aggregate time it takes to conduct reviews and make permitting decisions by half, and produce measurably better environmental and community outcomes."[20]

- In September 2013, Vice President Biden visited the Savannah, Georgia port, where the environmental review process for a project to deepen the harbor there had been ongoing since 1999. During his visit, the Vice President was quoted as saying, "What are we doing here? We're arguing about whether or not to deepen this port? … It's time we get moving. I'm sick of this. Folks, this isn't a partisan issue. It's an economic issue."[21]

- In April 2013, Senator Barbara Boxer (CA) was quoted in April 2013 as saying, "[t]he environmentalists don't like to have any deadlines set so that they can stall projects forever…I think it's wrong, and I have many cases in California where absolutely necessary flood control projects have been held up for so long that people are suffering from the adverse impacts of flooding."[22] She also added that she did not think that environmentalists' concerns about potentially rushed permit approvals were "legitimate."[23] The Senator made these comments in support of legislation that would impose deadlines for environmental reviews of water projects.

- Democratic Governor Jerry Brown of California, in his January 24, 2013 State of the State, called upon lawmakers to "rethink and streamline our regulatory procedures" so they are "based upon more consistent standards that provide greater certainty and cut needless delays."

- In March 2012, President Obama issued Executive Order 13604, aimed at "Improving Performance of Federal Permitting and Review of Infrastructure Projects.[24] The Executive Order directs federal agencies to ramp up efforts to improve the federal permitting process by institutionalizing best practices,

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[18] *Available at* http://www.whitehouse.gov/the-press-office/2014/05/14/fact-sheet-building-21st-century-infrastructure-modernizing-infrastructu.
[19] *Available at* http://www.permits.performance.gov/pm-implementation-plan-2014.pdf.
[20] *Available at* http://www.permits.performance.gov/pm-implementation-plan-2014.pdf.
[21] http://www.ajc.com/news/news/breaking-news/vice-president-vows-savannah-dredging-will-happen-/nZyTG/
[22] April 28, 2013 *Los Angeles Times* article by Richard Simon, "Sen. Boxer finds herself at odds with environmentalists." (*Available at* http.latimes.com/news/nationworld/nation/la-na-boxer-environmentalists-20130429,0,1134896.story)
[23] *Id.*
[24] *Available at* http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr.

reducing the amount of time required to make permitting and review decisions, and improving environmental and community outcomes.[25]

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."[26] Recommendations included early stakeholder engagement, reduced duplication among local, state and federal agency reviews, and improved litigation management.[27]

D. The Recovery Act, SAFETEA-LU and MAP-21: Congress Streamlines the Process

During debate on the 2009 economic stimulus bill which became the American Recovery and Reinvestment Act ("Recovery Act"), the Chamber called attention to the fact that our nation's flawed permitting process would ensure that no Recovery Act project would 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 had to 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.[28] 7,133 reviews went through an environmental assessment (EA) and received a finding of no significant impact (FONSI).[29] Only 841 required an EIS, the longest available process under NEPA.[30]

Likewise, a statutory provision Congress passed in 2005 has been another success story for permit streamlining: Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU).[31] The structure of the RAPID

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[25] The Federal Plan for implementing Executive Order 13604 identifies two comprehensive goals: (1) more efficient and effective review of large-scale and complex infrastructure projects, culminating in better projects, improved outcomes for communities, and faster permit decision-making and review timelines; and (2) transparency, predictability, accountability, and continuous improvement of routine infrastructure permitting and reviews. *Available at* https://permits.performance.gov/sites/all/themes/permits2/files/federal_plan.pdf .

[26] "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/.

[27] *Id.*

[28] 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.

[29] *Id.*

[30] *Id.*

[31] Public Law 109-59 (2005).

Act is strikingly similar to Section 6002. Many of its best provisions—schedule requirements, concurrent reviews, and the statute of limitations—are identical to Section 6002. The section contains two key components: (1) process streamlining and (2) a statute of limitations.

The process streamlining component does not in any way circumvent any substantive 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." For the transportation projects covered by SAFETEA-LU, Section 6002 designates DOT as lead agency and requires early participation by 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 completed without endless delays.

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.

Section 6002 has worked, and worked 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.[32]

Further evidence of the success of Section 6002 from SAFETEA-LU is the fact that the successor highway bill – Moving Ahead for Progress in the 21st Century Act (MAP-21) – adopted nearly all of the same process streamlining and environmental review provisions. Like its predecessor, MAP-21 is also leading to positive outcomes in the permitting process.

At a September 18, 2013 hearing of the Senate Environment and Public Works Committee, John Porcari, the Deputy Secretary of the U.S. Department of Transportation, testified that:

> The project delivery provisions found in MAP-21 are in many cases consistent with the Administration's broader efforts. The provisions on programmatic mitigation of environmental impacts, eliminating duplicate reviews, integration of planning and environmental reviews, and assistance to affected Federal and State agencies will help us to move infrastructure projects from concept to completion more efficiently. This will ensure the best value for every taxpayer dollar and reduce undue regulatory

[32]Federal Highway Administration, *Integrating Freight into NEPA Analysis* (Sept. 2010), available at http://ops.fhwa.dot.gov/publications/fhwahop10033/index.htm.

> burden in delivering transportation projects, while achieving measurably better environmental outcomes.[33]

The DOT Deputy Secretary added that changes to the statute of limitations provision through MAP-21 "ha[d] reduced litigation risk for over a dozen projects thus far."[34] These are concrete and measurable successes resulting from federal permitting reform efforts, many of which share the same hallmarks as the RAPID Act.

E. The RAPID Act Delivers Effective Permitting Reform

The RAPID Act takes the most effective elements of SAFETEA-LU and MAP-21—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 and MAP-21.

- 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 an equivalent process, 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, or be precluded from raising subsequent objections;
- 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;
- 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 shorter statute of limitations—which, again, has worked as part of SAFETEA-LU and MAP-21—closes 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

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[33] http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=2826fe72-3218-404f-aea6-4578cbb44324

[34] *Id.*

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.

II. H.R. 712, THE "SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2015"

A. Background

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements approved by a judge as a technique to shape agencies' regulatory agendas. Recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups. The Chamber set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. After an extensive effort, the Chamber was able to compile a database of sue and settle agreements and their subsequent rulemaking outcomes. The overwhelming majority of sue and settle actions between 2009 and 2012 occurred in the environmental context, particularly under the Clean Air Act, Clean Water Act, and the Endangered Species Act,[35] as explained in the Chamber's May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*. The report provides detailed information on the extent of the sue and settle problem, as well as the public policy implications of having private parties exert direct influence on the regulatory priorities of federal agencies through agreements negotiated behind closed doors, without public participation.

B. What is Sue and Settle and Why Is It a Problem?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.[36]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best

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[35] Clean Air Act, 42 U.S.C. § 7401 *et seq.;* Clean Water Act, 33 U.S.C. § 1251 *et seq.*; Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

[36] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with court *on the same day* the advocacy group filed its Complaint against EPA. *See Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C.Cir. Apr. 23, 2013).

serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by the Office of Management and Budget and the public, and compliance with executive orders – at the critical moment when the agency's new obligations are created.

Because sue and settle agreements developed through the imposition of a court-approved consent decree bind an agency to meet a specified deadline for regulatory action – a deadline the agency often cannot meet – the agreement essentially reorders the agency's priorities and its allocation of resources. These agreements often go beyond simply enforcing statutory deadlines and themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

C. What Did Our Sue-and-Settle Research Reveal?

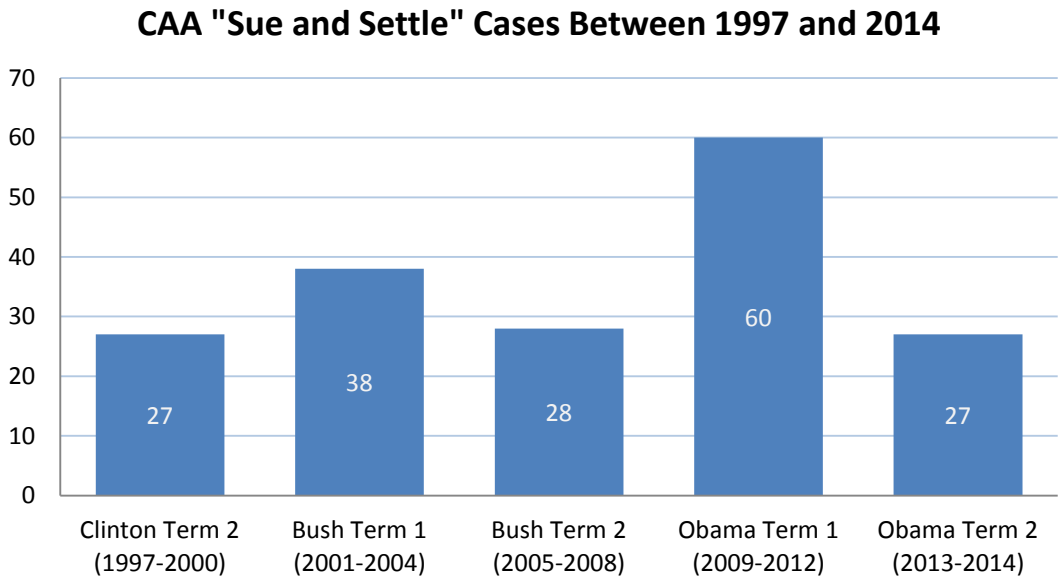
Our research shows that from 2009 to 2012, a total of 71 lawsuits were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules estimated to cost more than $100 million annually to comply with.

EPA is required by the Clean Air Act to publish public notices of draft consent decrees in the *Federal Register*.[37] Based on these *Federal Register* notices, the Chamber could identify Clean Air Act settlements/consent decrees going back to 1997. Comparing the number of Clean Air Act sue and settle agreements between 1997 and 2014, we determined that sue and settle is by no means a recent phenomenon;[38] the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its

[37] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, 42 U.S.C. § 9622(i) requires an equivalent public notice of a settlement agreement.

[38] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986).

procedural checks and balances, agencies have been willing for decades to allow sue and settle to skirt the rulemaking requirements of the Administrative Procedure Act.[39] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA actions. While advocacy groups have used sue and settle much more often in recent years, the tactic has clearly been used by both sides. The following chart compares the consent decrees finalized under the Clean Air Act during that period.



[39] 5 U.S.C. Subchapter II.

Sue and Settle Agreements Create Costly Federal Rules
1. Utility MACT rule - up to $**9.6 billion** annual costs[40] 2. Lead Repair, Renovation & Painting rule - up to **$500 million** in first-year costs[41] 3. Oil and Natural Gas MACT rule - up to **$738 million** annual costs[42] 4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to **$632 million** annual costs[43] 5. Regional Haze Implementation rules: **$2.16 billion** cost[44] 6. Chesapeake Bay Clean Water Act rules - up to **$18 billion** cost to comply[45] 7. Boiler MACT rule - up to **$3 billion** cost to comply[46] 8. Standards for Cooling Water Intake Structures - up to **$384 million** annual costs[47] 9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS - up to **$350 million** annual costs[48] 10. Reconsideration of 2008 Ozone NAAQS - up to **$90 billion** cost[49]

D. Sue and Settle Goes Far Beyond Simply Enforcing Statutory Deadlines

Groups that rely on the sue and settle process argue that these lawsuits are just about deadlines, and that the settlements are only about **when** the agency must do its nondiscretionary duty. They contend that because agencies only agree to do by a specific date what Congress instructed them to do earlier, involving other stakeholders in settlement negotiations is pointless. This argument ignores several critical facts, however.

First, EPA is subject to numerous statutory deadlines for regulatory action, particularly deadlines under the 1990 Clean Air Act Amendments. EPA nearly always fails to meet these deadlines. Since 1993, **98%** of EPA regulations (196 out of 200) under the major Clean Air Act programs (NAAQS, NESHAP, NSPS) were tardy, by an average

[40] Letter from President Obama to Speaker Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."
[41] 75 Fed. Reg, 24,802, 24,812 (May 6, 2010).
[42] Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector-NSPS and NESHAPS," RIN: 2060-AP76.
[43] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).
[44] William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).
[45] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).
[46] Letter from President Obama to Speaker Boehner, *supra* note 8.
[47] 2012 Regulatory Plan and Unified Agenda, "Standards for Cooling Water Intake Structures," RIN: 2040-AE95.
[48] EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).
[49] Letter from President Obama to Speaker Boehner, *supra* note 8.

of ***5½ years*** past their deadlines.[50] If EPA misses almost all of its Clean Air Act deadlines, and the agency acts in good faith, then the agency clearly has been given responsibilities by Congress that it cannot meet.

Second, by being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups. Through the appropriations process, Congress has the authority to control EPA's budget and resource priorities. Congress should not allow advocacy groups and the agency to use the sue and settle process to circumvent the appropriations process.

Third, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemaking often rushed and flawed. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that delays or defeats the objective the agency is seeking to achieve.[51] These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly-developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. These requirements include the Regulatory Flexibility Act (RFA)[52] and the Unfunded Mandates Reform Act.[53] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the Office of Management and Budget's regulatory review under executive orders,[54] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of its rule. An unreasonable deadline for one rule draws resources from other regulations that may also be under deadlines. Resulting

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[50] Competitive Enterprise Institute, *EPA's Shocking Record of Failure on Statutory Deadlines Raises Serious Questions: Since 1993, Only 2 Percent of Clean Air Act Regulations Promulgated On Time* (July 10, 2013).

[51] In the Boiler MACT rulemaking, for example, EPA asked the court for an additional 16 months to properly consider comments it had received and finalize a legally defensible rule. In the face of opposition from the advocacy group, the court only granted an additional month, however, and EPA was forced to immediately reconsider the rule to buy itself more time.

[52] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

[53] Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531-1538.

[54] *See, e.g.,* Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

delays will invite advocacy groups to reorder an agency's priorities further when they sue to enforce the other rules' deadlines.

This is illustrated clearly by sue and settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA.[55] Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation ($15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.[56] In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

Fourth, through sue and settle, advocacy groups can also significantly affect the regulatory environment by compelling an agency to issue substantive requirements that are not required by law.[57] Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations.[58] Third parties have a very difficult time challenging the agency's surrender of its discretionary power, because they typically cannot intervene and the courts often simply want the case to be settled quickly.

Finally, one of the primary reasons that advocacy groups favor sue and settle agreements approved by a court is that the court retains long-term jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. The court in the endangered species agreements discussed above will retain jurisdiction over the process until 2018, thereby binding FWS Directors in the next Administration to follow the requirements of the two 2011 settlements. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise in the consent decree, regardless of the consequences for the agency or regulated parties.

For all these reasons, "sue and settle" violates the principle that if an agency is going to write a rule, the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are

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[55] *Wildearth Guardians v. Salazar* (D.D.C. May 10, 2011); *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011).

[56] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

[57] For example, EPA's imposition of TMDL and stormwater requirements on the Chesapeake Bay was not mandated by federal law.

[58] Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules.

most often rushed, sloppy, and poorly thought-out. These flawed rules often take a great deal of time and effort to correct. It would have been better—and ultimately faster—to take the necessary time to develop the rule properly in the first place.

E. GAO's December 2014 report

The Government Accountability Office (GAO) evaluated settlement agreements the U.S. Environmental Protection Agency (EPA) entered into between May 31, 2008 and June 1, 2013 that resolved deadline suits filed against the agency by advocacy groups. The report finds that EPA issued 32 major rules (rules with anticipated annual compliance costs of $100 million or more) during that time period, and that 9 of these rules were the result of 7 settlement agreements in deadline suits. The report concludes that these settlement agreements had little or no impact on EPA or its rulemakings because they did not require EPA to modify its discretion, take an otherwise discretionary action, or prescribe a specific substantive rulemaking outcome. The report, which has been cited by opponents of greater transparency in the sue and settle process, suffers from fatal flaws, however.

1. The report is not objective.

The report acknowledges that GAO relied exclusively on statements and materials provided by EPA and Department of Justice (DOJ) personnel and that GAO made no attempt to conduct any research of its own. Accordingly, the report only parrots the positions on the "sue and settle" issue stated by EPA and DOJ. Moreover, while the report notes that "[w]e relied on EPA because neither EPA nor DOJ maintain a database that links settlements to rules, and there is no comprehensive public source of such information," GAO apparently does not consider this lack of transparency to be a problem. For years, Congress and the public have asked EPA to release more information about sue and settle negotiations and agreements, which the agency has refused to provide. The report simply accepts EPA's lack of transparency as a fact, rather than considering its adverse impact on the rulemaking process.

2. The report ignores or misrepresents key facts.

The report notes that all of the settlement agreements studied came out of just one EPA office, the Office of Air and Radiation (OAR). While this implies that settlement agreements are an isolated, perhaps unimportant phenomenon at EPA, the report ignores the fact that Clean Air Act rules issued by OAR represented **96.6% of total annual costs of <u>all</u> EPA regulations issued between 2008 and 2013**.[59]

Significantly, the report only considers 7 settlement agreements. Based on *Federal Register* notices of proposed Clean Air Act settlement agreements lodged with

[59] Source: EPA Regulatory Impact Analyses for the individual rules. With a 7% discount rate, these rules totaled $56.9 billion in estimated compliance costs.

the courts, at least **60** such agreements were reached between 2009 and 2012.[60] Why were the vast majority of these agreements ignored?

3. The report is misleading.

The title of the report gives the impression that GAO's research found that settlement agreements in deadline suits have no impact on rules issued by EPA or on the public's ability to participate in agency decision-making. The report itself contradicts this impression. The report states that with respect to the recurring review of hazardous air pollutant standards for specific industries under the NESHAP program, "most of the resources available to complete [the recurring reviews] are focused on a 2011 settlement . . . and they have been unable to meet all of the time frames contained in the 2011 settlement. . . . .Officials said they intend to complete all of the overdue [reviews] but are focused on fulfilling the terms of the 2011 settlement and several other settlements[.]" In other words, the 2011 settlement and other settlements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled reviews, which themselves are overdue.

EPA often agrees to bind itself to deadlines for regulatory action that it cannot meet. The agency subsequently uses the deadline it agreed to as justification for requiring shorter comment periods, relying on incomplete or questionable technical data, and cutting corners on regulatory reviews. The resulting rulemakings are rushed, sloppy, and often require years of litigation to fix.

F. Notice and Comment *After* Sue and Settle Agreements Doesn't Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, are not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments.[61]

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested parties usually have very limited ability to alter the design of the final rule or other action through their comments.[62] Rather than hearing from a range of interested

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[60] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013)at 14.

[61] In proposed settlement agreements the Chamber has commented on, such as for the revised $PM_{2.5}$ NAAQS standard, the timetable for final rulemaking action remained unchanged despite our comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself asserted that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

[62] EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately

parties and designing the rule with their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through "sue and settle," advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who will have to actually comply with a regulation.

III. 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. There is simply no reason for the United States to be tied with Papua New Guinea for last place in the world on the time it takes to permit a new mine.[63]

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 and MAP-21 have had on transportation projects, Congress will have done wonders to create jobs and boost our economic recovery.

Likewise, **t**he regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from the "sue and settle" negotiation and settlement process that results in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies to improperly hand over their discretion.

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promulgated largely as they had been proposed. *See, e.g.,* the Chamber's 2012 comments on the proposed PM NAAQS rule and the proposed GHG NSPS rule for new electric utilities.

[63] *2012 Ranking of Countries for Mining Investment*, Behre Dolbear Group at 8. *See* www.dolbear.com.

H.R. 712 would implement these and other important common-sense changes. It is a law based on good government principles recognizing the importance of open government and public participation. This legislation would address the "sue and settle" problem and make federal agencies' regulatory agendas more transparent, open, and accountable.

For all of these reasons, the Chamber strongly supports passage of the RAPID Act and the Sunshine for Regulatory Decrees and Settlements Act of 2015, 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.