



Statement of the U.S. Chamber of Commerce

ON: HEARING ON THE “RESPONSIBLY AND
PROFESSIONALLY INVIGORATING DEVELOPMENT ACT
OF 2013”

TO: HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE
ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

BY: WILLIAM L. KOVACS,
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY
& REGULATORY AFFAIRS

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The Chamber’s mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

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.

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,
COMMERCIAL AND ANTITRUST LAW**

The “Responsibly and Professionally Invigorating Development Act of 2013”

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

July 11, 2013

Good morning, Chairman Bachus, Ranking Member Cohen, 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. You have asked me to come before the Subcommittee today to discuss the “Responsibly and Professionally Invigorating Development Act of 2013,” or the RAPID Act. 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 speeding 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.

I. BIPARTISAN SUPPORT FOR PERMIT STREAMLINING

The RAPID Act would be the strong action needed to speed up the permitting process and let 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

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:

- President Obama pledged to cut “red tape” and speed up “new oil and gas permits” in his 2013 State of the Union address.

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

- 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 that they are “based upon more consistent standards that provide greater certainty and cut needless delays.”
- Minnesota Governor Mark Dayton (Democratic-Farmer-Labor Party) has increased his efforts to expedite the permitting process by announcing in January of this year that he had directed the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency to issue or deny permits within 90 or 150 days (depending on the nature and complexity of the permit), rather than allowing applications to languish indefinitely.
- In February of this year, the Department of Interior announced that it had identified 23 renewable energy projects as priority projects for pushing through the federal permitting process this year and next year.²
- On March 5, 2013, the White House Council on Environmental Quality released new guidelines aimed at making environmental reviews under the National Environmental Policy Act (NEPA) more efficient. According to CEQ, the guidelines will “promote informed federal decisions on projects that impact American communities and help agencies improve efficiency, maximize staff resources and reduce costs.”³ For example, the National History Preservation Act and NEPA have duplicative requirements that agencies must examine how a proposal may affect historic properties. The CEQ guidelines call for combining those requirements in an environmental review.
- The President’s Fiscal Year 2014 Budget, which the White House released on April 10, 2013, seeks to expedite “infrastructure projects by modernizing the Federal permitting process to cut through red tape while creating incentives and better outcomes for communities and the environment” and establish “a new goal of cutting timelines in half for major infrastructure projects in areas such as highways, bridges, railways, ports, waterways, pipelines, and renewable energy.”⁴
- 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.”⁵ She also added that she did not think that environmentalists’ concerns about potentially rushed permit approvals were

² Available at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/active_renewable_projects.html.

³ Available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/handbooks>

⁴ Available at <http://www.whitehouse.gov/photos-and-video/video/2013/04/10/president-obama-announces-fiscal-year-2014-budget#transcript>

⁵ 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>)

“legitimate.”⁶ The Senator made these comments in support of legislation that would impose deadlines for environmental reviews of water projects.

- In May 2013, President Obama signed a Presidential Memorandum aimed at modernizing the Federal infrastructure permitting process by directing all relevant agencies to institute best practices for efficient review and permitting of projects and developing a fast track procedure for infrastructure projects through the expanded use of IT tools like geospatial systems. According to the White House, streamlining the permitting process will mean that the U.S. can “start construction sooner, create jobs earlier, and fix our Nation’s infrastructure faster.”⁷
 - In support of this initiative, the White House announced that, since the President issued a March 2012 Executive Order calling for improved efficiency in the Federal permitting process, agencies have expedited the review and permitting of 50 major projects, 22 of which have completed the Federal permitting and review process.
 - Similarly, the time it takes to permit these projects has been significantly shortened. For example, concurrent reviews on projects like the Southwest Light Rail Transit project in Minneapolis and the Central Valley segment of the California High Speed Rail are expected to cut project timelines by as much as 30%. Also, close collaboration between Federal, State and local governments has reduced the timeline for the Tappan Zee Bridge in New York by 2-3 years.
- On June 7, 2013, President Obama issued a Memorandum calling for improvements in the performance of Federal siting, permitting, and review processes for modernizing and expanding the nation’s electric grid.⁸
- According to a Department of Energy study released in April 2013, residential solar systems are cheaper in cities with streamlined permitting processes. The study states that “all else being equal, streamlining the permitting process could potentially reduce the price of a 4-kW residential PV [photovoltaic] system by \$1,000 or more, on average, and cut development time by about a month.”⁹
- In March 2012, President Obama issued Executive Order 13604, aimed at “Improving Performance of Federal Permitting and Review of Infrastructure Projects.”¹⁰ The Executive Order directs federal agencies to ramp up efforts to improve the federal permitting process by institutionalizing best practices, reducing the amount of time

⁶ *Id.*

⁷ Available at <http://www.whitehouse.gov/the-press-office/2013/05/17/creating-jobs-faster-cutting-timelines-half-major-infrastructure-project>

⁸ Available at <http://www.whitehouse.gov/the-press-office/2013/06/07/presidential-memorandum-transforming-our-nations-electric-grid-through-i>

⁹ Available at <http://emp.lbl.gov/news/impact-city-level-permitting-processes-residential-photovoltaic-installation-prices-and-develop>

¹⁰ Available at <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>.

required to make permitting and review decisions, and improving environmental and community outcomes.¹¹

- 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.”¹² Recommendations included early stakeholder engagement, reduced duplication among local, state and federal agency reviews, and improved litigation management.¹³

II. 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 2013, and the results are much different. Cape Wind 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, with the end of the review process not coming until late last year.

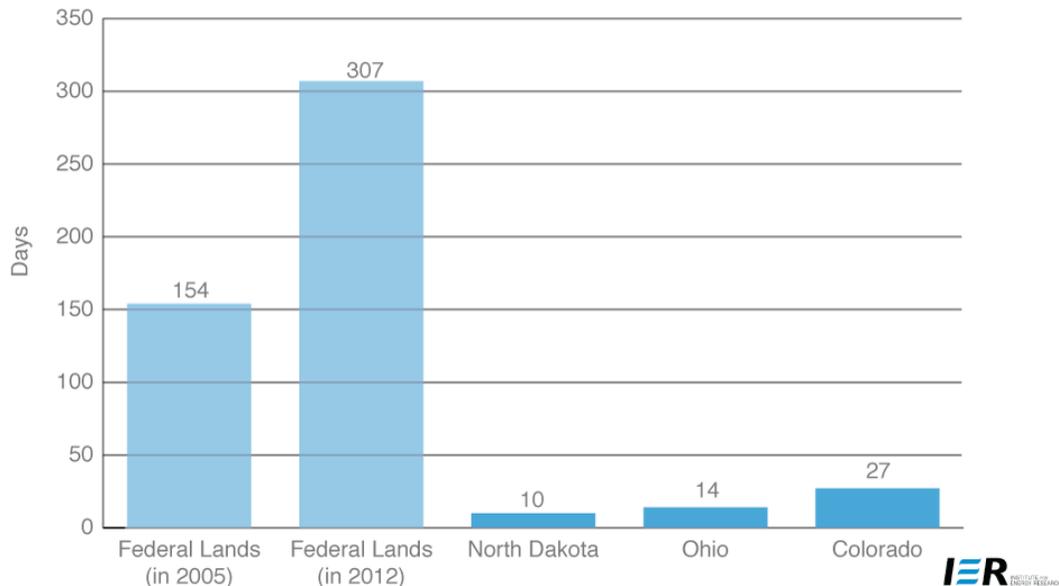
At a February 5, 2013 hearing before the House Subcommittee on Energy and Power, a representative from the Institute for Energy Research testified that it currently takes more than 300 days to process a permit to drill for oil and gas on federal lands onshore. This is in contrast to the time it takes to process a permit for the same drilling activities on private and state lands – less than one month.

¹¹ 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.

¹² “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/>.

¹³ *Id.*

Time Required for Processing a Permit to Drill-Federal vs. States



This is a systemic problem that is pervading our country across geographic and industry lines. Indeed, the United States ranks 17th in the world in the time it takes to obtain a government green light for development – one of the ten criteria that the International Monetary Fund considers when looking for the “ease of doing business.”

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 endless permit delays related to our complex regulatory process that allow 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 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 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 startling. 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.¹⁴ 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.

B. How Did the Environmental Review Process For Projects Get So Out of Hand?

The mandate to conduct environmental reviews of major projects 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.¹⁵ When NEPA was enacted some forty-four 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 emphatically 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.¹⁶ 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.

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.)¹⁷

¹⁴ 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/>.

¹⁵ 42 U.S.C. § 4332.

¹⁶ House Report No. 91-765, December 17, 1969.

¹⁷ *Id.* at 8-9 (emphasis added).

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.¹⁸ 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).¹⁹ 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.²⁰ 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.²¹

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.²² 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*,²³ 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. By 1977, in *Shiffler v. Schlesinger*,²⁴ 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.”

¹⁸ Piet deWitt, Carole A. deWitt, “How Long Does It Take to Prepare an Environmental Impact Statement?” *Environmental Practice* 10 (4), December 2008.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Council on Environmental Quality, “NEPA’s Forty Most Asked Questions,” 46 Fed. Reg. 55 at 18026-18038 (1981).

²³ 449 F.2d 1109 (D.C. Cir. 1971).

²⁴ 548 F.2d 96 (3d Cir. 1977).

(emphasis added). The Court cited *Aberdeen & Rockfish R.R. v. SCRAP (SCRAP II)*,²⁵ 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*,²⁶ 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 action of ‘each authority of the Government of the United States’ ... 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.’”²⁷ 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.
- **Third-party environmental groups have standing to sue on NEPA claims (1972).** In *Sierra Club v. Morton*,²⁸ 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. 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 promptly amended its complaint following the Court’s decision, and was able to 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 1978.²⁹ (*see* 40 C.F.R. §§ 1500.1 – 1508.28). Among other things, this rule required agencies to incorporate the review requirements of

²⁵ 422 U.S. 289, 319 (1975).

²⁶ 401 U.S. 402 (1971).

²⁷ *Id.* at 410.

²⁸ 405 U.S. 727 (1972).

²⁹ 43 Fed. Reg. 55,990 (November 28, 1978)

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 increasingly 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.

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 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.³⁰

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.³¹ 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

³⁰ Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), at 172, December 2008.

³¹ 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/>.

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."³² 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 economic stimulus bill.

C. The Recovery Act and SAFETEA-LU: 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.³³ 7,133 reviews went through an EA and received a finding of no significant impact (FONSI).³⁴ Only 841 required an EIS, the longest available process under NEPA.³⁵

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).³⁶ The structure of the RAPID 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. This 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 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 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.

³² *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).

³³ 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.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Public Law 109-59 (2005).

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.³⁷ The 180-day statute of limitations is cutting back on a typical NIMBY (“Not In My Backyard”) 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.

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. MAP-21 was signed into law by President Obama on July 6, 2012 with votes of 373-52 in the House of Representatives and 74-19 in the Senate. Building upon SAFETEA-LU, MAP-21 includes an additional requirement that designated complex projects must be completed within 4 years, including the completion of any permit, approval, review, or study required for the projects. Significantly, Congress willingly went a step further on the statute of limitations provision in MAP-21, reducing the time allotted for filing a lawsuit from 180 days to 150 days. Of the five members of this Subcommittee serving at the time – Reps. Bachus (R-AL), Farenthold (R-TX), Issa (R-CA), Marino (R-PA), and Cohen (D-TN) – all voted for the bill.

D. 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. Like SAFETEA-LU and MAP-21, 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;

³⁷ Federal Highway Administration, *Integrating Freight into NEPA Analysis* (Sept. 2010), available at <http://ops.fhwa.dot.gov/publications/fhwahop10033/index.htm>.

- 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 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 23 projects the Department of Interior announced it would streamline in February, 2013. 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 likely will 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 shorter statute of limitations—which, again, has worked as part of SAFETEA-LU and MAP-21—fixes what essentially is 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, 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 the 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 the creation of millions of jobs is worth forcing our government to work a little faster. The RAPID Act accomplishes this goal.

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.³⁸

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. 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.

³⁸ *2012 Ranking of Countries for Mining Investment*, Behre Dolbear Group at 8. See www.dolbear.com.