

RAPID ACT

JULY 17, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4377]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4377) to provide for improved coordination of agency actions in the preparation and adoption of environmental documents for permitting determinations, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Responsibly And Professionally Invigorating Development Act of 2012” or as the “RAPID Act”.

SEC. 2. COORDINATION OF AGENCY ADMINISTRATIVE OPERATIONS FOR EFFICIENT DECISIONMAKING.

(a) IN GENERAL.—Part I of chapter 5 of title 5, United States Code, is amended by inserting after subchapter II the following:

“SUBCHAPTER IIA—INTERAGENCY COORDINATION REGARDING PERMITTING

“§ 560. Coordination of agency administrative operations for efficient decisionmaking

“(a) CONGRESSIONAL DECLARATION OF PURPOSE.—The purpose of this subchapter is to establish a framework and procedures to streamline, increase the efficiency of, and enhance coordination of agency administration of the regulatory review, environmental decisionmaking, and permitting process for projects undertaken, reviewed, or funded by Federal agencies. This subchapter will ensure that agencies administer the regulatory process in a manner that is efficient so that citizens are not burdened with regulatory excuses and time delays.

“(b) DEFINITIONS.—For purposes of this subchapter, the term—

“(1) ‘agency’ means any agency, department, or other unit of Federal, State, local, or Indian tribal government;

“(2) ‘category of projects’ means 2 or more projects related by project type, potential environmental impacts, geographic location, or another similar project feature or characteristic;

“(3) ‘environmental assessment’ means a concise public document for which a Federal agency is responsible that serves to—

“(A) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;

“(B) aid an agency’s compliance with NEPA when no environmental impact statement is necessary; and

“(C) facilitate preparation of an environmental impact statement when one is necessary;

“(4) ‘environmental impact statement’ means the detailed statement of significant environmental impacts required to be prepared under NEPA;

“(5) ‘environmental review’ means the Federal agency procedures for preparing an environmental impact statement, environmental assessment, categorical exclusion, or other document under NEPA;

“(6) ‘environmental decisionmaking process’ means the Federal agency procedures for undertaking and completion of any environmental permit, decision, approval, review, or study under any Federal law other than NEPA for a project subject to an environmental review;

“(7) ‘environmental document’ means an environmental assessment or environmental impact statement, and includes any supplemental document or document prepared pursuant to a court order;

“(8) ‘finding of no significant impact’ means a document by a Federal agency briefly presenting the reasons why a project, not otherwise subject to a categorical exclusion, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared;

“(9) ‘lead agency’ means the Federal agency preparing or responsible for preparing the environmental document;

“(10) ‘NEPA’ means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

“(11) ‘project’ means major Federal actions that are construction activities undertaken with Federal funds or that are construction activities that require approval by a permit or regulatory decision issued by a Federal agency;

“(12) ‘project sponsor’ means the agency or other entity, including any private or public-private entity, that seeks approval for a project or is otherwise responsible for undertaking a project; and

“(13) ‘record of decision’ means a document prepared by a lead agency under NEPA following an environmental impact statement that states the lead agency’s decision, identifies the alternatives considered by the agency in reaching its

decision and states whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not adopted.

“(c) PREPARATION OF ENVIRONMENTAL DOCUMENTS.—Upon the request of the lead agency, the project sponsor shall be authorized to prepare any document for purposes of an environmental review required in support of any project or approval by the lead agency if the lead agency furnishes oversight in such preparation and independently evaluates such document and the document is approved and adopted by the lead agency prior to taking any action or making any approval based on such document.

“(d) ADOPTION AND USE OF DOCUMENTS.—

“(1) DOCUMENTS PREPARED UNDER NEPA.—

“(A) Not more than 1 environmental impact statement and 1 environmental assessment shall be prepared under NEPA for a project (except for supplemental environmental documents prepared under NEPA or environmental documents prepared pursuant to a court order), and, except as otherwise provided by law, the lead agency shall prepare the environmental impact statement or environmental assessment. After the lead agency issues a record of decision, no Federal agency responsible for making any approval for that project may rely on a document other than the environmental document prepared by the lead agency.

“(B) Upon the request of a project sponsor, a lead agency may adopt, use, or rely upon secondary and cumulative impact analyses included in any environmental document prepared under NEPA for projects in the same geographic area where the secondary and cumulative impact analyses provide information and data that pertains to the NEPA decision for the project under review.

“(2) STATE ENVIRONMENTAL DOCUMENTS; SUPPLEMENTAL DOCUMENTS.—

“(A) Upon the request of a project sponsor, a lead agency may adopt a document that has been prepared for a project under State laws and procedures as the environmental impact statement or environmental assessment for the project, provided that the State laws and procedures under which the document was prepared provide environmental protection and opportunities for public involvement that are substantially equivalent to NEPA.

“(B) An environmental document adopted under subparagraph (A) is deemed to satisfy the lead agency’s obligation under NEPA to prepare an environmental impact statement or environmental assessment.

“(C) In the case of a document described in subparagraph (A), during the period after preparation of the document but before its adoption by the lead agency, the lead agency shall prepare and publish a supplement to that document if the lead agency determines that—

“(i) a significant change has been made to the project that is relevant for purposes of environmental review of the project; or

“(ii) there have been significant changes in circumstances or availability of information relevant to the environmental review for the project.

“(D) If the agency prepares and publishes a supplemental document under subparagraph (C), the lead agency may solicit comments from agencies and the public on the supplemental document for a period of not more than 45 days beginning on the date of the publication of the supplement.

“(E) A lead agency shall issue its record of decision or finding of no significant impact, as appropriate, based upon the document adopted under subparagraph (A), and any supplements thereto.

“(3) CONTEMPORANEOUS PROJECTS.—If the lead agency determines that there is a reasonable likelihood that the project will have similar environmental impacts as a similar project in geographical proximity to the project, and that similar project was subject to environmental review or similar State procedures within the 5 year period immediately preceding the date that the lead agency makes that determination, the lead agency may adopt the environmental document that resulted from that environmental review or similar State procedure. The lead agency may adopt such an environmental document, if it is prepared under State laws and procedures only upon making a favorable determination on such environmental document pursuant to paragraph (2)(A).

“(e) PARTICIPATING AGENCIES.—

“(1) IN GENERAL.—The lead agency shall be responsible for inviting and designating participating agencies in accordance with this subsection. The lead agency shall provide the invitation or notice of the designation in writing.

“(2) FEDERAL PARTICIPATING AGENCIES.—Any Federal agency that is required to adopt the environmental document of the lead agency for a project shall be

designated as a participating agency and shall collaborate on the preparation of the environmental document, unless the Federal agency informs the lead agency, in writing, by a time specified by the lead agency in the designation of the Federal agency that the Federal agency—

“(A) has no jurisdiction or authority with respect to the project;

“(B) has no expertise or information relevant to the project; and

“(C) does not intend to submit comments on the project.

“(3) INVITATION.—The lead agency shall identify, as early as practicable in the environmental review for a project, any agencies other than an agency described in paragraph (2) that may have an interest in the project, including, where appropriate, Governors of affected States, and heads of appropriate tribal and local (including county) governments, and shall invite such identified agencies and officials to become participating agencies in the environmental review for the project. The invitation shall set a deadline of 30 days for responses to be submitted, which may only be extended by the lead agency for good cause shown. Any agency that fails to respond prior to the deadline shall be deemed to have declined the invitation.

“(4) EFFECT OF DECLINING PARTICIPATING AGENCY INVITATION.—Any agency that declines a designation or invitation by the lead agency to be a participating agency shall be precluded from submitting comments on any document prepared under NEPA for that project or taking any measures to oppose, based on the environmental review, any permit, license, or approval related to that project.

“(5) EFFECT OF DESIGNATION.—Designation as a participating agency under this subsection does not imply that the participating agency—

“(A) supports a proposed project; or

“(B) has any jurisdiction over, or special expertise with respect to evaluation of, the project.

“(6) COOPERATING AGENCY.—A participating agency may also be designated by a lead agency as a ‘cooperating agency’ under the regulations contained in part 1500 of title 40, Code of Federal Regulations, as in effect on January 1, 2011. Designation as a cooperating agency shall have no effect on designation as participating agency. No agency that is not a participating agency may be designated as a cooperating agency.

“(7) CONCURRENT REVIEWS.—Each Federal agency shall—

“(A) carry out obligations of the Federal agency under other applicable law concurrently and in conjunction with the review required under NEPA; and

“(B) in accordance with the rules made by the Council on Environmental Quality pursuant to subsection (n)(1), make and carry out such rules, policies, and procedures as may be reasonably necessary to enable the agency to ensure completion of the environmental review and environmental decisionmaking process in a timely, coordinated, and environmentally responsible manner.

“(8) COMMENTS.—Each participating agency shall limit its comments on a project to areas that are within the authority and expertise of such participating agency. Each participating agency shall identify in such comments the statutory authority of the participating agency pertaining to the subject matter of its comments. The lead agency shall not act upon, respond to or include in any document prepared under NEPA, any comment submitted by a participating agency that concerns matters that are outside of the authority and expertise of the commenting participating agency.

“(f) PROJECT INITIATION REQUEST.—

“(1) NOTICE.—A project sponsor shall provide the Federal agency responsible for undertaking a project with notice of the initiation of the project by providing a description of the proposed project, the general location of the proposed project, and a statement of any Federal approvals anticipated to be necessary for the proposed project, for the purpose of informing the Federal agency that the environmental review should be initiated.

“(2) LEAD AGENCY INITIATION.—The agency receiving a project initiation notice under paragraph (1) shall promptly identify the lead agency for the project, and the lead agency shall initiate the environmental review within a period of 45 days after receiving the notice required by paragraph (1) by inviting or designating agencies to become participating agencies, or, where the lead agency determines that no participating agencies are required for the project, by taking such other actions that are reasonable and necessary to initiate the environmental review.

“(g) ALTERNATIVES ANALYSIS.—

“(1) PARTICIPATION.—As early as practicable during the environmental review, but no later than during scoping for a project requiring the preparation of an environmental impact statement, the lead agency shall provide an opportunity for involvement by cooperating agencies in determining the range of alternatives to be considered for a project.

“(2) RANGE OF ALTERNATIVES.—Following participation under paragraph (1), the lead agency shall determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project, subject to the following limitations:

“(A) NO EVALUATION OF CERTAIN ALTERNATIVES.—No Federal agency shall evaluate any alternative that was identified but not carried forward for detailed evaluation in an environmental document or evaluated and not selected in any environmental document prepared under NEPA for the same project.

“(B) ONLY FEASIBLE ALTERNATIVES EVALUATED.—Where a project is being constructed, managed, funded, or undertaken by a project sponsor that is not a Federal agency, Federal agencies shall only be required to evaluate alternatives that the project sponsor could feasibly undertake, consistent with the purpose of and the need for the project, including alternatives that can be undertaken by the project sponsor and that are technically and economically feasible.

“(3) METHODOLOGIES.—

“(A) IN GENERAL.—The lead agency shall determine, in collaboration with cooperating agencies at appropriate times during the environmental review, the methodologies to be used and the level of detail required in the analysis of each alternative for a project. The lead agency shall include in the environmental document a description of the methodologies used and how the methodologies were selected.

“(B) NO EVALUATION OF INAPPROPRIATE ALTERNATIVES.—When a lead agency determines that an alternative does not meet the purpose and need for a project, that alternative is not required to be evaluated in detail in an environmental document.

“(4) PREFERRED ALTERNATIVE.—At the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if the lead agency determines that the development of such higher level of detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review.

“(5) EMPLOYMENT ANALYSIS.—The evaluation of each alternative in an environmental impact statement or an environmental assessment shall identify the potential effects of the alternative on employment, including potential short-term and long-term employment increases and reductions and shifts in employment.

“(h) COORDINATION AND SCHEDULING.—

“(1) COORDINATION PLAN.—

“(A) IN GENERAL.—The lead agency shall establish and implement a plan for coordinating public and agency participation in and comment on the environmental review for a project or category of projects to facilitate the expeditious resolution of the environmental review.

“(B) SCHEDULE.—

“(i) IN GENERAL.—The lead agency shall establish as part of the coordination plan for a project, after consultation with each participating agency and, where applicable, the project sponsor, a schedule for completion of the environmental review. The schedule shall include deadlines, consistent with subsection (i), for decisions under any other Federal laws (including the issuance or denial of a permit or license) relating to the project that is covered by the schedule.

“(ii) FACTORS FOR CONSIDERATION.—In establishing the schedule, the lead agency shall consider factors such as—

“(I) the responsibilities of participating agencies under applicable laws;

“(II) resources available to the participating agencies;

“(III) overall size and complexity of the project;

“(IV) overall schedule for and cost of the project;

“(V) the sensitivity of the natural and historic resources that could be affected by the project; and

“(VI) the extent to which similar projects in geographic proximity were recently subject to environmental review or similar State procedures.

“(iii) COMPLIANCE WITH THE SCHEDULE.—

“(I) All participating agencies shall comply with the time periods established in the schedule or with any modified time periods, where the lead agency modifies the schedule pursuant to subparagraph (D).

“(II) The lead agency shall disregard and shall not respond to or include in any document prepared under NEPA, any comment or information submitted or any finding made by a participating agency that is outside of the time period established in the schedule or modification pursuant to subparagraph (D) for that agency’s comment, submission or finding.

“(III) If a participating agency fails to object in writing to a lead agency decision, finding or request for concurrence within the time period established under law or by the lead agency, the agency shall be deemed to have concurred in the decision, finding or request.

“(C) CONSISTENCY WITH OTHER TIME PERIODS.—A schedule under subparagraph (B) shall be consistent with any other relevant time periods established under Federal law.

“(D) MODIFICATION.—The lead agency may—

“(i) lengthen a schedule established under subparagraph (B) for good cause; and

“(ii) shorten a schedule only with the concurrence of the cooperating agencies.

“(E) DISSEMINATION.—A copy of a schedule under subparagraph (B), and of any modifications to the schedule, shall be—

“(i) provided within 15 days of completion or modification of such schedule to all participating agencies and to the project sponsor; and

“(ii) made available to the public.

“(F) ROLES AND RESPONSIBILITY OF LEAD AGENCY.—With respect to the environmental review for any project, the lead agency shall have authority and responsibility to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate the expeditious resolution of the environmental review for the project.

“(i) DEADLINES.—The following deadlines shall apply to any project subject to review under NEPA and any decision under any Federal law relating to such project (including the issuance or denial of a permit or license or any required finding):

“(1) ENVIRONMENTAL REVIEW DEADLINES.—The lead agency shall complete the environmental review within the following deadlines:

“(A) ENVIRONMENTAL IMPACT STATEMENT PROJECTS.—For projects requiring preparation of an environmental impact statement—

“(i) the lead agency shall issue an environmental impact statement within 2 years after the earlier of the date the lead agency receives the project initiation request or a Notice of Intent to Prepare an Environmental Impact Statement is published in the Federal Register; and

“(ii) in circumstances where the lead agency has prepared an environmental assessment and determined that an environmental impact statement will be required, the lead agency shall issue the environmental impact statement within 2 years after the date of publication of the Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register.

“(B) ENVIRONMENTAL ASSESSMENT PROJECTS.—For projects requiring preparation of an environmental assessment, the lead agency shall issue a finding of no significant impact or publish a Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register within 1 year after the earlier of the date the lead agency receives the project initiation request, makes a decision to prepare an environmental assessment, or sends out participating agency invitations.

“(2) EXTENSIONS.—

“(A) REQUIREMENTS.—The environmental review deadlines may be extended only if—

“(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

“(ii) the deadline is extended by the lead agency for good cause.

“(B) LIMITATION.—The environmental review shall not be extended by more than 1 year for a project requiring preparation of an environmental

impact statement or by more than 180 days for a project requiring preparation of an environmental assessment.

“(3) ENVIRONMENTAL REVIEW COMMENTS.—

“(A) COMMENTS ON DRAFT ENVIRONMENTAL IMPACT STATEMENT.—For comments by agencies and the public on a draft environmental impact statement, the lead agency shall establish a comment period of not more than 60 days after publication in the Federal Register of notice of the date of public availability of such document, unless—

“(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

“(ii) the deadline is extended by the lead agency for good cause.

“(B) OTHER COMMENTS.—For all other comment periods for agency or public comments in the environmental review process, the lead agency shall establish a comment period of no more than 30 days from availability of the materials on which comment is requested, unless—

“(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

“(ii) the deadline is extended by the lead agency for good cause.

“(4) DEADLINES FOR DECISIONS UNDER OTHER LAWS.—Notwithstanding any other provision of law, in any case in which a decision under any other Federal law relating to the undertaking of a project being reviewed under NEPA (including the issuance or denial of a permit or license) is required to be made, the following deadlines shall apply:

“(A) DECISIONS PRIOR TO RECORD OF DECISION OR FINDING OF NO SIGNIFICANT IMPACT.—If a Federal agency is required to approve, or otherwise to act upon, a permit, license, or other similar application for approval related to a project prior to the record of decision or finding of no significant impact, such Federal agency shall approve or otherwise act not later than the end of a 90 day period beginning—

“(i) after all other relevant agency review related to the project is complete; and

“(ii) after the lead agency publishes a notice of the availability of the final environmental impact statement or issuance of other final environmental documents, or no later than such other date that is otherwise required by law, whichever event occurs first.

“(B) OTHER DECISIONS.—With regard to any approval or other action related to a project by a Federal agency that is not subject to subparagraph (A), each Federal agency shall approve or otherwise act not later than the end of a period of 180 days beginning—

“(i) after all other relevant agency review related to the project is complete; and

“(ii) after the lead agency issues the record of decision or finding of no significant impact, unless a different deadline is established by agreement of the Federal agency, lead agency, and the project sponsor, where applicable, or the deadline is extended by the Federal agency for good cause, provided that such extension shall not extend beyond a period that is 1 year after the lead agency issues the record of decision or finding of no significant impact.

“(C) FAILURE TO ACT.—In the event that any Federal agency fails to approve, or otherwise to act upon, a permit, license, or other similar application for approval related to a project within the applicable deadline described in subparagraph (A) or (B), the permit, license, or other similar application shall be deemed approved by such agency and the agency shall take action in accordance with such approval within 30 days of the applicable deadline described in subparagraph (A) or (B).

“(D) FINAL AGENCY ACTION.—Any approval under subparagraph (C) is deemed to be final agency action, and may not be reversed by any agency. In any action under chapter 7 seeking review of such a final agency action, the court may not set aside such agency action by reason of that agency action having occurred under this paragraph.

“(j) ISSUE IDENTIFICATION AND RESOLUTION.—

“(1) COOPERATION.—The lead agency and the participating agencies shall work cooperatively in accordance with this section to identify and resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable laws.

“(2) LEAD AGENCY RESPONSIBILITIES.—The lead agency shall make information available to the participating agencies as early as practicable in the environmental review regarding the environmental, historic, and socioeconomic resources located within the project area and the general locations of the alter-

natives under consideration. Such information may be based on existing data sources, including geographic information systems mapping.

“(3) PARTICIPATING AGENCY RESPONSIBILITIES.—Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project’s potential environmental, historic, or socioeconomic impacts. In this paragraph, issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.

“(4) ISSUE RESOLUTION.—

“(A) MEETING OF PARTICIPATING AGENCIES.—At any time upon request of a project sponsor, the lead agency shall promptly convene a meeting with the relevant participating agencies and the project sponsor, to resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable laws.

“(B) NOTICE THAT RESOLUTION CANNOT BE ACHIEVED.—If a resolution cannot be achieved within 30 days following such a meeting and a determination by the lead agency that all information necessary to resolve the issue has been obtained, the lead agency shall notify the heads of all participating agencies, the project sponsor, and the Council on Environmental Quality for further proceedings in accordance with section 204 of NEPA, and shall publish such notification in the Federal Register.

“(k) REPORT TO CONGRESS.—The head of each Federal agency shall report annually to Congress—

“(1) the projects for which the agency initiated preparation of an environmental impact statement or environmental assessment;

“(2) the projects for which the agency issued a record of decision or finding of no significant impact and the length of time it took the agency to complete the environmental review for each such project;

“(3) the filing of any lawsuits against the agency seeking judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA, including the date the complaint was filed, the court in which the complaint was filed, and a summary of the claims for which judicial review was sought; and

“(4) the resolution of any lawsuits against the agency that sought judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA.

“(l) LIMITATIONS ON CLAIMS.—

“(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for an action subject to NEPA shall be barred unless—

“(A) in the case of a claim pertaining to a project for which an environmental review was conducted and an opportunity for comment was provided, the claim is filed by a party that submitted a comment during the environmental review on the issue on which the party seeks judicial review, and such comment was sufficiently detailed to put the lead agency on notice of the issue upon which the party seeks judicial review; and

“(B) filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed.

“(2) NEW INFORMATION.—The preparation of a supplemental environmental impact statement, when required, is deemed a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 180 days after the date of publication of a notice in the Federal Register announcing the record of decision for such action. Any claim challenging agency action on the basis of information in a supplemental environmental impact statement shall be limited to challenges on the basis of that information.

“(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

“(m) CATEGORIES OF PROJECTS.—The authorities granted under this subchapter may be exercised for an individual project or a category of projects.

“(n) EFFECTIVE DATE.—The requirements of this subchapter shall apply only to environmental reviews and environmental decisionmaking processes initiated after the date of enactment of this subchapter.

“(o) APPLICABILITY.—This subchapter applies, according to the provisions thereof, to all projects for which a Federal agency is required to undertake an environmental

review or make a decision under an environmental law for a project for which a Federal agency is undertaking an environmental review.”.

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to subchapter II the following:

“SUBCHAPTER IIA—INTERAGENCY COORDINATION REGARDING PERMITTING
“560. Coordination of agency administrative operations for efficient decisionmaking.”.

(c) REGULATIONS.—

(1) COUNCIL ON ENVIRONMENTAL QUALITY.—Not later than 180 days after the date of enactment of this Act, the Council on Environmental Quality shall amend the regulations contained in part 1500 of title 40, Code of Federal Regulations, to implement the provisions of this Act and the amendments made by this Act, and shall by rule designate States with laws and procedures that satisfy the criteria under section 560(d)(2)(A) of title 5, United States Code.

(2) FEDERAL AGENCIES.—Not later than 120 days after the date that the Council on Environmental Quality amends the regulations contained in part 1500 of title 40, Code of Federal Regulations, to implement the provisions of this Act and the amendments made by this Act, each Federal agency with regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall amend such regulations to implement the provisions of this subchapter.

Purpose and Summary

H.R. 4377, the “Responsibly And Professionally Invigorating Development Act of 2012” (hereinafter, “the RAPID Act” or “the Bill”) is bipartisan legislation that will encourage employers to create jobs by establishing a more transparent and efficient Federal permitting process through the Administrative Procedure Act (“APA”). The RAPID Act will streamline the Federal environmental review process established by the National Environmental Policy Act of 1969 (“NEPA”) by drawing upon: definitions and established best practices under current NEPA regulations and guidance; recommendations from the President’s Council on Jobs and Competitiveness; Section 6002 of the “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” (“SAFETEA-LU”), bipartisan legislation enacted in 2005 that easily passed the House; and, NEPA guidance and permit streamlining Presidential memoranda and Executive Orders recently issued by the Administration.

Background and Need for the Legislation

“The problem at hand is the increasingly undue length of time it takes to conduct a NEPA review of a proposed project, be it public or private, that relies on Federal funds or approval of some kind.”¹ “The Hoover Dam was built in 5 years. The Empire State Building took 1 year and 45 days. The New Jersey Turnpike needed only 4 years from inception to completion. Fast forward to 2012, and the results are much different. Cape Wind has needed over a decade to find out if it can build an offshore wind farm. Shell Corporation is at 6 years and counting on its permits for oil and gas exploration in Beaufort Bay. And the Port of Savannah, Georgia has spent thirteen years reviewing a potential dredging project, with no end to the review process in sight.”² “[T]he Congress and President of 1969 never intended that an environmental impact

¹*Responsibly And Professionally Invigorating Development (RAPID) Act of 2012: Hearing before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (Apr. 25, 2012), (hereinafter “RAPID Act Hearing”) at 61 (Testimony of Gus Bauman).

²*Id.* at 43 (Testimony of William Kovacs).

statement process—a statement, mind you—would devolve over time into a multiyear incredibly arcane thicket of rules, huge reports, and constant court fights in which any project of importance to the Nation or a State that has some kind of Federal hook attached would likely be delayed.”³ “[W]hen Congress was debating the issue, they were talking about time frames like 90 days. In 1981 [the Council on Environmental Quality] thought it could all be done in a year.”⁴ A recent study, however, found that the average length of time to prepare an EIS is 3.4 years and gets longer each year, making the problem worse and worse.⁵

I. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

NEPA “declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”⁶ In pursuit of this goal, NEPA requires agencies to prepare a “detailed” statement analyzing “major Federal actions significantly affecting the quality of the human environment.”⁷

The environmental review required by NEPA typically causes agencies to generate one of three documents: a categorical exclusion (“CE”); an environmental assessment (“EA”); or, an environmental impact statement (“EIS”). In brief, a CE is the shortest document and is used for types of actions that are known not to significantly affect the environment. An EA is used to determine if there are significant environmental effects. If not, then the agency issues a finding of no significant impact (FONSI); otherwise, the agency will prepare an EIS, which is a thorough analysis of the proposed agency action, its environmental impact, and a range of alternatives and their impacts.⁸ “The required documents can be voluminous and may take years to produce.”⁹

“CEQ estimates that the vast majority of Federal actions require an EA or are categorically excluded from the requirement to prepare an EA or EIS.”¹⁰ But projects that require an EA or an EIS, and therefore “result in the most significant delays during NEPA,” typically also are “[t]he types of projects that create jobs.”¹¹

An EIS ensures that agencies carefully consider a proposed action’s environmental impacts during, and provides transparency into, the decision-making process. “NEPA does not require the agency to choose the most environmentally preferable alter-

³*Id.* at 61 (Testimony of Gus Bauman).

⁴*Id.* at 39 (Testimony of William Kovacs).

⁵See Piet deWitt & Carole deWitt, “How Long Does It Take to Prepare and Environmental Impact Statement?,” ENVIRONMENTAL PRACTICE 10, pp. 164–174 (Dec. 2008).

⁶42 U.S.C. § 4331.

⁷*Id.* § 4332(2)(C).

⁸See generally Kristina Alexander, *Overview of National Environmental Policy Act (NEPA) Requirements* (CRS RS20621 Jan. 12, 2011).

⁹*Id.* at 3.

¹⁰Linda Luther, *The National Environmental Policy Act (NEPA): Background and Implementation*, at 15 (CRS RL33152 Jan. 10, 2011).

¹¹RAPID Act Hearing, note 1 *supra*, at 201 (Testimony of Thomas Margro).

native.”¹² Regulations require robust public participation in this process, from the “scoping” stage where issues are identified, through drafting and in the final EIS, which should respond to comments made throughout. Public hearings may be utilized.¹³ Because NEPA does not create a cause of action, lawsuits challenging an agency’s review are brought under the APA’s 6-year statute of limitations.¹⁴

Of course, NEPA is not the only statute that requires Federal agencies to analyze environmental effects. Myriad federal, state, tribal and local laws also require analysis of how a proposed government action could affect particular aspects of the environment (e.g., clean air, endangered species). In preparing an EIS, agencies should address all of the environmental issues they are required to consider:

To integrate the compliance process and avoid duplication of effort, NEPA regulations specify that, to the fullest extent possible, agencies must prepare the EIS concurrently with *any* environmental requirements. The EIS must list any Federal permits, licenses, and other entitlements required to implement the proposed project. In this capacity, NEPA functions as an ‘umbrella’ statute; any study, review, or consultation required by any other law that is related to the environment should be conducted within the framework of the NEPA process.¹⁵

II. REGULATIONS OUTLINING THE NEPA PROCESS

NEPA created the Council on Environmental Quality (“CEQ”) within the Executive Office of the President.¹⁶ The CEQ promulgates regulations implementing NEPA.

A. *Environmental Impact Statements*

The basic EIS preparation process under NEPA regulations begins when the lead agency (i.e., “the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement”¹⁷) publishes a notice of intent in the Federal Register, briefly describing the proposed action and the agency’s scoping process, and giving contact information and/or hearing dates. The lead agency then initiates the “scoping process,”¹⁸ which entails:

- Identifying and inviting “cooperating agencies,”¹⁹ as well as stakeholders and other interested parties, to participate in preparing the EIS;

¹²Alexander, note 8 *supra*, at 4; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA “does not mandate particular results, but simply prescribes the necessary process.”).

¹³Alexander, note 8 *supra*, at 4–5.

¹⁴*See* 28 U.S.C. § 2401.

¹⁵Luther, note 10 *supra*, at 25.

¹⁶*See* 28 U.S.C. § 4342.

¹⁷40 C.F.R. § 1508.16.

¹⁸*Id.* § 1501.7.

¹⁹*Id.* § 1508.5 (“any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment”).

- Identifying significant issues to be analyzed in depth in the EIS;
- Eliminating insignificant issues;
- Allocating responsibilities among the lead and cooperating agencies, although the lead agency ultimately remains responsible for the EIS;
- Identifying other relevant environmental review documents, or review and consultation requirements, to avoid duplication and to maximize efficiency.²⁰

The alternatives section “is the heart of the environmental impact statement.”²¹ The lead agency must “rigorously explore and objectively evaluate all reasonable alternatives” and explain why other alternatives have been excluded.²² The EIS must “devote substantial treatment to each alternative in detail” (including the alternative of no action) so the reader may evaluate them comparatively, and give the lead agency’s preferred alternative in the draft EIS and chosen alternative in the final EIS.²³ The lead agency may set time and page limits for preparing the EIS, although none are required.²⁴

The EIS is prepared in two stages: draft and final. The draft EIS should be within the parameters established during the scoping process.²⁵ The lead agency is responsible for inviting comments on the draft EIS, from interested governmental agencies or bodies, the applicant, and the public.²⁶ The regulations recommend a standard format for the final EIS, to “encourage good analysis and clear presentation of the alternatives including the proposed action.”²⁷

B. Environmental Assessments and Categorical Exclusions

NEPA regulations do not address in detail the process for formulating an EA. Instead, each agency has the authority to develop its own process,²⁸ although “[a]gencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking”²⁹ or to: “(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; (2) Aid an agency’s compliance with the Act when no environmental impact statement is necessary; (3) Facilitate preparation of a statement when one is necessary.”³⁰ Generally, an EA “[s]hall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and

²⁰ *Id.* § 1501.7(a).

²¹ *Id.* § 1502.14.

²² *Id.* § 1502.14(a).

²³ *Id.* § 1502.14(b)-(f).

²⁴ *Id.* § 1501.7(b).

²⁵ *Id.* § 1502.9.

²⁶ *Id.* § 1503.1(a)(4) (The lead agency shall “affirmatively solicit[] comments from those persons or organizations who may be interested or affected”).

²⁷ *Id.* § 1502.10. (The recommended format is: Cover sheet; Summary; Table of contents; Purpose of and need for action; Alternatives including proposed action; Affected environment; Environmental consequences; List of preparers; List of Agencies, Organizations, and persons to whom copies of the statement are sent; Index; Appendices (if any)).

²⁸ *Id.* §§ 1501.3, 1507.3.

²⁹ *Id.* § 1501.3(b).

³⁰ *Id.* § 1508.9(a).

persons consulted.”³¹ Regarding CEs, agencies are required to list in their regulations “specific criteria for and identification of” actions that typically result in a CE (as well as those that typically result in an EA or EIS).³²

III. PROJECT DELAYS DUE TO THE NEPA PROCESS

It has long been alleged that NEPA is overly cumbersome, causing a lengthy decision-making process for Federal agencies. The cause of delay falls into two categories: preparation of the documents required by NEPA (e.g., an EIS) and litigation challenging the documents’ adequacy. Generally, stakeholders express that EISs have become far too lengthy and technical, and that litigation—and the mere threat of litigation during the 6-year statute of limitations period—deters breaking ground on a project even after all permits have been approved.³³ The deWitt study, which “appears to be the only true quantitative analysis of the time required to complete an EIS,” 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). 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.”³⁴ In the 109th Congress, the U.S. House of Representatives Committee on Resources Task Force on Improving and Updating the National Environmental Policy Act received testimony regarding delays in environmental review and permitting, including delays that cost jobs by causing projects to fail, and made suggestions to improve the NEPA process in its Final Report.³⁵

Stakeholders believe this “paralysis by analysis” results in lost jobs when project sponsors and capital withdraw their support in the face of lengthy delays. In March 2011, as part of its *Project No Project* initiative the U.S. Chamber of Commerce published a study of 351 proposed energy projects—solar, wind, wave, bio-fuel, coal, gas and nuclear—that have been delayed or cancelled altogether due to extensive delays in the Federal permitting process.³⁶ “[I]f these projects had been built, there would have been direct investment in the 2010 timeframe of \$576 billion in direct investment; that trickle-down effect or the multiplier effect would have been a \$1.1 trillion boost to the economy and it would have created 1.9 million jobs through the 7 years of construction.”³⁷

One timely example of the need to reform Federal permitting and environmental review is the Keystone Pipeline XL project, which—after more than 1,200 days and 10,000 pages of analysis—was brought to resolution only by an Act of Congress forcing the Admin-

³¹*Id.* § 1508.9(b).

³²*Id.* § 1507.3(b).

³³See generally Luther, note 10 *supra*, at 26–29; Linda Luther, *The National Environmental Policy Act: Streamlining NEPA*, at 7–10 (RL33267 Dec. 6, 2007).

³⁴RAPID Act Hearing, note 1 *supra*, at 47–48 (Testimony of William Kovacs).

³⁵Available at http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPATaskForce_FinalRecommendations.pdf (last accessed June 25, 2012).

³⁶Steve Pociask & Joseph P. Fuhr, Jr., *Progress Denied: A Study on the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects* (Mar. 11, 2011), available at <http://www.uschamber.com/reports/progress-denied-study-potential-economic-impact-permitting-challenges-facing-proposed-energy> (last accessed June 25, 2012).

³⁷RAPID Act Hearing, note 1 *supra*, at 39 (Testimony of William Kovacs).

istration to decide the issue by February 21, 2012.³⁸ On January 18, the Administration announced the Keystone Pipeline XL permit would not be approved by February 21. On March 8, the Senate narrowly defeated an amendment to a transportation bill to override the President's decision and approve the pipeline.³⁹ On March 22, the President announced during a speech in Oklahoma that he was ordering agencies to fast-track review of the TransCanada pipeline from Cushing, Okla., to refineries on the Gulf Coast of Texas.⁴⁰ TransCanada recently reapplied to build the full pipeline, which would run from Alberta to the Gulf of Mexico,⁴¹ and the U.S. Department of State has announced that it will begin preparing a new supplemental environmental impact statement.⁴² TransCanada first applied for a permit to build the pipeline in September 2008.⁴³

Save the Peaks Coalition v. United States Forest Service illustrates how a party can delay a project through litigation after "resting on its rights." The Ninth Circuit called the plaintiff's obstructionist tactics "a serious abuse of the judicial process" but still declined to bar their lawsuit.⁴⁴ Save the Peaks Coalition (SPC) sued the U.S. Forest Service (USFS) and Arizona Snowbowl Resort Limited Partnership (ASRLP) after they "had successfully defended an agency decision to allow snowmaking at a ski resort on Federal land all the way to the United States Supreme Court."⁴⁵ SPC "had closely monitored and, in some cases, actively encouraged and helped finance the first litigation," but waited until the last moment to sue.⁴⁶ The court decried SPC's deliberately delaying tactics while bemoaning that current law allows them:

Although it is apparent to us that the 'new' plaintiffs and their counsel have grossly abused the judicial process by strategically holding back claims that could have, and should have, been asserted in the first lawsuit (and would have been decided earlier but for counsel's procedural errors in raising those claims), we are compelled to hold that laches does not apply here because the USFS and ASRLP cannot demonstrate that they suffered prejudice, as defined by our case law.⁴⁷

³⁸ See H.R. 3765, Title V, Subtitle A.

³⁹ See S. Amdt. 1537 to S. 1813 (Mar. 8, 2012).

⁴⁰ See "Remarks by the President on American-Made Energy," Mar. 22, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/03/22/remarks-president-american-made-energy> (last accessed June 25, 2012) ("Now, right now, a company called TransCanada has applied to build a new pipeline to speed more oil from Cushing to state-of-the-art refineries down on the Gulf Coast. And today, I'm directing my administration to cut through the red tape, break through the bureaucratic hurdles, and make this project a priority, to go ahead and get it done.")

⁴¹ Dan Frosch, "New Application Is Submitted for Keystone Pipeline," NEW YORK TIMES (May 4, 2012), available at <http://www.nytimes.com/2012/05/05/us/transcanada-submits-new-application-for-keystone-project.html> (last accessed June 25, 2012).

⁴² See <http://www.keystonepipeline-xl.state.gov/> (last accessed June 25, 2012).

⁴³ See <http://energycommerce.house.gov/keystonexl.shtml> (last accessed June 25, 2012).

⁴⁴ *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1034 (9th Cir. 2012).

⁴⁵ *Id.* at 1028.

⁴⁶ *Id.*

⁴⁷ *Id.*

A. *Examples of and Recommendations for NEPA Streamlining*

i. *SAFETEA-LU*

“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,”⁴⁸ which authorized spending on Federal highway programs for FYs 2005–2009. Section 6002 of SAFETEA-LU, regarding “Efficient environmental reviews for project decisionmaking,” expedited construction by codifying existing regulatory requirements, definitions, concepts and procedures. Specifically, Section 6002 utilized the lead agency/participating agency NEPA process for conducting environmental reviews: project initiation; defining the project’s purpose and need; coordination and scheduling for conducting the review; and, identifying and resolving issues that could delay the approval process. SAFETEA-LU also established a 180-day statute of limitations to challenge a final agency action (e.g., permitting decision) related to the environmental review.⁴⁹ A bipartisan bill co-sponsored by numerous Democrats, SAFETEA-LU passed the House 412 to 8. The Federal Highway Administration found Section 6002 has reduced the average NEPA review time almost by half, from 73 months to 36.85 months.⁵⁰ “The RAPID Act is very wisely modeled after” Section 6002.⁵¹

ii. *Energy Policy Act of 2005*

The Energy Policy Act of 2005 also contained several NEPA streamlining provisions, requiring the Secretaries of Agriculture, Commerce, Defense, Energy and the Interior to complete within 2 years any environmental review related to designating energy corridors in the West.⁵² The Act required the Secretary of the Interior to complete within 18 months a programmatic EIS “for a commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming.”⁵³ The Act also codified principles of inter-agency coordination by directing the Secretary of Energy, in consultation with the Secretaries of Interior, Agriculture and Defense, to prepare a memorandum of understanding “to coordinate all applicable Federal authorizations and environmental reviews relating to a proposed or existing utility facility.”⁵⁴ The MOU was necessary, inter alia, to “provide for an agreement among the affected Federal agencies to prepare a single environmental review document to be used as the basis for all Federal authorization decisions.”⁵⁵

⁴⁸ *RAPID Act Hearing*, note 1 *supra*, at 56 (Testimony of William Kovacs).

⁴⁹ See 23 U.S.C. § 139(l).

⁵⁰ Office of Project Development & Environmental Review, Federal Highway Administration, U.S. Department of Transportation, “Biannual Assessment of SAFETEA-LU Section 6002 Implementation Effectiveness,” at 9 (Sept. 2010).

⁵¹ *RAPID Act Hearing*, note 1 *supra*, at 55 (Testimony of William Kovacs).

⁵² 109 P.L. 58, § 368.

⁵³ *Id.* § 369.

⁵⁴ *Id.* § 372.

⁵⁵ *Ibid.*

iii. NEPA Task Force

In July 2006 the House Resources Committee's NEPA Task Force released its Final Report,⁵⁶ with 20 recommendations based on input received at five field hearings and two more hearings in Washington, D.C., and on comments to the December 2005 draft report. Finding that "there are no time limits for any component of the NEPA process" because agencies have not "establish[ed] appropriate time limits for the [EIS] process" as the regulations require, the Final Report recommended that agencies have 18 months to complete an EIS and 9 months to complete an EA.⁵⁷ The Final Report recommended that the CEQ should "prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements."⁵⁸ Regarding the need to streamline litigation, the Final Report recommended that only parties that had "been actively involved throughout the [NEPA] process" could bring a lawsuit, with a 180-day statute of limitations.⁵⁹ The Final Report recommended that agencies should have to consider only "reasonable" alternatives, defined as "those that are economically and technically feasible."⁶⁰ The Final Report also stressed the need to clarify the responsibilities of lead agencies, and that the lead agency should be in charge of "develop[ing] a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions," as well as "recognizing the mission and operations of cooperating agencies."⁶¹

iv. Jobs Council

Recently, the President's Jobs Council recommended permit streamlining as a strategy to create jobs. A June 2011 op-ed by Jeffrey Immelt, Chair of the Jobs Council and Chairman and CEO of General Electric, and Kenneth I. Chenault, Chairman and CEO of American Express, urged the President: "Streamline permitting. Cut red tape so job-creating construction and infrastructure projects can move forward. The administration can take a few simple steps to streamline the process of obtaining permits, without undercutting the protections that our regulatory system provides."⁶² The Jobs Council also observed that "[t]he current system for permitting and approving job-creating projects, which involves federal, state and local agencies, can lead to significant delays." In June 2011 the Jobs Council made several relevant recommendations to the President:

- Data collection and transparency;
- Early stakeholder engagement;
- Centralized monitoring and accountability for Federal agency performance;
- Limiting duplication among local, state, and Federal agency reviews;

⁵⁶ See note 35 *supra*.

⁵⁷ *Id.*, Recommendation 1.3.

⁵⁸ *Id.*, Recommendation 3.1.

⁵⁹ *Id.*, Recommendation 4.1.

⁶⁰ *Id.*, Recommendation 5.1.

⁶¹ *Id.*, Recommendation 6.2.

⁶² "How We're Meeting the Job Creation Challenge," WALL STREET JOURNAL, June 13, 2011.

- Improve litigation management.⁶³

The Jobs Council reiterated these suggestions in its October 2011 Interim Report, explaining that “[t]he thrust is to give stakeholders visibility into the process, deliver timely reviews and avoid duplicative analysis and requirements.”⁶⁴ The Jobs Council’s year-end report also mentioned the importance of permit streamlining.⁶⁵

v. The Administration

Following these recommendations, on August 31, 2011, the President asked the Secretaries of Agriculture, Commerce, Housing and Urban Development, the Interior, and Transportation each to identify three “high-impact, job-creating infrastructure projects that can be expedited through outstanding review and permitting processes.”⁶⁶ The President described this initiative as “a common-sense step to speed job creation in the near term while increasing our competitiveness and strengthening the economy in the long term.”⁶⁷ On October 11, the President announced 14 projects for expedited environmental review and permitting.⁶⁸ These projects are tracked online by the Federal Infrastructure Projects Dashboard (“Dashboard”), which was created pursuant to the August 31 Presidential Memorandum.⁶⁹ On March 22, 2012, the President established a “Steering Committee on Federal Infrastructure Permitting and Review Process Improvement” to select projects to be tracked on the Dashboard and to “develop and publish on the Dashboard a Federal Plan to significantly reduce the aggregate time required to make Federal permitting and review decisions on infrastructure projects while improving outcomes for communities and the environment.”⁷⁰ President Obama emphasized that the Federal Plan should address the following goals:

- Institutionalizing best practices for: enhancing Federal, State, local, and tribal government coordination on permitting and review processes (such as conducting reviews concurrently rather than sequentially to the extent practicable); avoiding duplicative reviews; and engaging with stakeholders early in the permitting process;
- Developing mechanisms to better communicate priorities and resolve disputes among agencies at the national and regional levels;

⁶³“Simply Regulatory Review and Streamline Project Approvals,” JOBS COUNCIL RECOMMENDATIONS, available at http://files.jobs-council.com/files/2011/10/JobsCouncil_Regulatory.pdf (last accessed June 25, 2012).

⁶⁴Available at http://files.jobs-council.com/jobscouncil/files/2011/10/JobsCouncil_InterimReport_Oct11.pdf, p. 27 (last accessed June 25, 2012).

⁶⁵Available at http://files.jobs-council.com/files/2012/01/JobsCouncil_2011YearEndReportWeb.pdf, pp. 42–44 (last accessed June 25, 2012).

⁶⁶Press Release, “White House Announces Steps to Expedite High Impact Infrastructure Projects to Create Jobs,” Aug. 31, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/08/31/white-house-announces-steps-expedite-high-impact-infrastructure-projects> (last accessed June 25, 2012).

⁶⁷*Id.*

⁶⁸Press Release, “Obama Administration Announces Selection of 14 Infrastructure Projects to be Expedited Through Permitting and Environmental Review Process,” Oct. 11, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/10/11/obama-administration-announces-selection-14-infrastructure-projects-be-e> (last accessed June 25, 2012).

⁶⁹See <http://permits.performance.gov/> (last accessed June 25, 2012).

⁷⁰Exec. Order No. 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, 77 Fed. Reg. 18887 (Mar. 28, 2012).

- Institutionalizing use of the Dashboard, working with the CIO to enhance the Dashboard, and utilizing other cost-effective information technology systems to share environmental and project-related information with the public, project sponsors, and permit reviewers; and
- Identifying timeframes and Member Agency responsibilities for the implementation of each proposed action.

The Federal Plan since has been released⁷¹ and contains numerous suggestions that are consistent with both the goals identified in the President's Executive Order and suggestions made at the Subcommittee's April 25 hearing.

Relatedly, on March 6, 2012, the CEQ issued a memorandum to Federal agencies and departments regarding "Improving the Process for Preparing Efficient and Timely Environmental Reviews under [NEPA]." This guidance was issued to "emphasize and clarify" the opportunities for agencies to "meet the goal" of conducting "high quality, efficient and timely environmental reviews" under NEPA that are "fully consistent with a thorough and meaningful environmental review." The memorandum encouraged agencies to follow numerous practices that would be required by the Bill, such as the need for EISs and EAs to be concise and clear; the importance of early and effective scoping and of inter-agency and inter-governmental coordination, including conducting concurrent reviews; adopting, when appropriate, existing environmental study documents; and, the importance of establishing clear timelines and deadlines. "In many ways, the RAPID Act is a codification of principles set forth in CEQ's March 2012 guidance on NEPA efficiency."⁷² Environmental review already has been completed, permits have been issued, and construction has begun on several of these projects.⁷³

IV. LEGISLATIVE HISTORY OF H.R. 4377

On April 25, 2012, Messrs. Kovacs, Bauman and Margro testified before the Subcommittee on Courts, Commercial and Administrative Law in support of the RAPID Act; Ms. Bear testified against it.

In summary, Mr. Kovacs, who is Senior Vice President for Environment, Technology & Regulatory Affairs at the U.S. Chamber of Commerce, discussed the findings of the March 2011 study *Progress Denied: A Study on the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*; described how the NEPA process has become an impediment to job creation and economic growth and how the Bill would correct this; and, discussed how permit streamlining has enjoyed broad support, at least in principle, from members of both parties and from the Administration.⁷⁴ Drawing on his experience as an environmental attorney, Mr. Bauman described how today's NEPA process does not resemble what was originally envisioned, and testified that the RAPID Act "would restore to NEPA a more rational and manageable proc-

⁷¹ See http://permits.performance.gov/sites/default/files/Federal_Infrastructure_Plan.pdf (last accessed June 25, 2012).

⁷² *RAPID Act Hearing*, note 1 *supra*, at 57 (Testimony of William Kovacs).

⁷³ See <http://permits.performance.gov/news-and-updates> (last accessed June 25, 2012).

⁷⁴ *Id.* at 42-60.

ess without undercutting the law’s environmental review elements.”⁷⁵

Mr. Margro, an engineer, discussed how the RAPID Act would improve the Federal environmental review and permitting process in light of his personal experience with attempting to build a 16-mile toll road in Orange County, Calif. This project would create over 17,000 jobs, would generate \$3 billion in economic output and create almost \$160 million in State and local tax revenues, and requires no Federal funding—but after 15 years under review the road still is not built.⁷⁶ Ten years into the environmental review, “[w]hen the [Transportation Corridor Agencies] applied for the consistency certification under the Coastal Zone Management Act, project opponents objected to the project and produced a study disputing the previous 10 years of analysis by the collaborative. At this point, both the EPA and Army Corps questioned the preferred alternative that they had previously selected and asserted the need for additional environmental studies and reopened the debate concerning other alternatives.”⁷⁷ “If H.R. 4377 was the law when we were planning the 241 Toll Road, the road likely would be built and the public would have the benefit of a critical alternative to the traffic-choked Interstate-5 in South Orange County.”⁷⁸

Ms. Bear, who served for 25 years as General Counsel to the CEQ, testified that the environmental review process itself is much less of an impediment to permitting and construction than lack of adequate staffing and resources at Federal agencies.⁷⁹ Ms. Bear also voiced specific concerns with the drafting of the RAPID Act, many of which were addressed in the Manager’s Amendment adopted by voice vote of the Full Committee on June 6, 2012.⁸⁰

Hearings

The Subcommittee on Courts, Commercial and Administrative Law held a hearing on H.R. 4377, on Wednesday, April 25, 2012. The Subcommittee received two letters in opposition to the RAPID Act, from: Nancy Sutley, Chair of CEQ; and, representatives of 26 organizations (e.g., Earthjustice, Center for Biological Diversity, Natural Resources Defense Council, etc.).

⁷⁵*Id.* at 61.

⁷⁶*Id.* at 67.

⁷⁷*Id.* at 68.

⁷⁸*Id.* at 197.

⁷⁹*Id.* at 80–81. *But see id.* at 199 (Testimony of Thomas Margro) (“My experience with TCA and working for transit agencies in the past is that because there are no limitations on the NEPA process, resource agencies feel unconstrained in raising issues or requesting studies on a piecemeal basis often without considering whether the issues were already addressed or whether the agency requesting the information has any rational basis for doing so.”).

⁸⁰*See, e.g., id.* at 82–83 (objecting to requiring lead agencies to accept environmental documents from project sponsors and to allowing lead agencies to accept contributions of funds from project sponsors, per Subsection (c) to the new Section 560, 5 U.S.C.); *id.* at 83–84 (stating that Subsection (d)(1)(A) could be interpreted not to allow supplemental and court-ordered environmental documents); *id.* at 84–85 (objecting to requiring agencies to accept certain state environmental documents, per Subsection (d)(2)); *id.* at 85 (criticizing the as too short a 30-day comment period on supplements to state environmental documents under Subsection (d)(2)(D)); *ibid.* (regarding Subsection (e)(3): “Unlike the CEQ regulations, there are no references to county and tribal governments that ‘may have an interest in the project.’”); *id.* at 86 (criticizing as unclear the language of Subsection (e)(4), prohibiting an agency that declines an invitation to become a participating agency from “taking any measures to oppose the project”); *id.* at 86–87 (regarding Subsection (g)(4): “Alternatives must reflect the agency’s purpose and need. . . .”); *id.* at 89 (criticizing the wording of Subsection (i)(4)). These concerns are addressed in the corresponding sections of the Bill, as ordered reported.

Committee Consideration

On June 6, 2012, the Committee met in open session and ordered the bill H.R. 4377 favorably reported with amendment, by a rollcall vote of 14 to 8, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 4377.

1. Amendment #3 to the Ross Amendment in the Nature of a Substitute (“Ross Amendment”), offered by Mr. Johnson, to exempt from the Bill any regulation that the CEQ determines has a detrimental impact on human health. Not agreed to by a vote of 10 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson, Jr.	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	10	13	

2. Amendment #2 to the Ross Amendment, offered by Mr. Conyers, to add a rule of construction clarifying that nothing in the Bill shall have the effect of changing or limiting any law or regulation that requires or provides for public comment or public participation in an agency decision making process. Not agreed to by a vote of 12 to 13.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	12	13	

3. Amendment #4 to the Ross Amendment, offered by Mr. Nadler, to exempt from the Bill any project that pertains to the safety of a nuclear reactor or that pertains to nuclear safety. Not agreed to by a vote of 12 to 13.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	12	13	

4. Amendment #5 to the Ross Amendment, offered by Ms. Jackson Lee, to order a GAO study on the amount of time required for projects that required approval by a permit or regulatory decision by a Federal agency to complete environmental review under NEPA during the four calendar years prior to the date of enactment. Not agreed to by a vote of 11 to 12.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	11	12	

5. Amendment #6 to the Ross Amendment, offered by Mr. Cohen, to strike the creation of a new subchapter under the Administrative Procedure Act and redraft the Bill as freestanding legislative language. Not agreed to by a vote of 9 to 10.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin			
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch			
Ms. Sánchez			
Mr. Polis	X		
Total	9	10	

6. Motion to report H.R. 4377, as amended, favorably to the House. Agreed to by a vote of 14 to 8.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler			

	Ayes	Nays	Present
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Cohen		X	
Mr. Johnson, Jr.		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu			
Mr. Deutch			
Ms. Sánchez			
Mr. Polis			
Total	14	8	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4377, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 25, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4377, the “Responsibility and Professionally Invigorating Development Act of 2012.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

**H.R. 4377—Responsibility and Professionally Invigorating
Development Act of 2012.**

As ordered reported by the House Committee on the Judiciary
on June 6, 2012.

SUMMARY

H.R. 4377 would amend the Administrative Procedures Act, the law that governs how Federal agencies propose and establish regulations. Specifically, the bill would aim to expedite the review process required by the National Environmental Policy Act (NEPA) for construction projects that are partly or fully financed with Federal funds or require permits or approvals from Federal regulatory agencies.

CBO estimates that implementing this legislation would cost \$5 million over the next five years, assuming the availability of appropriated funds, as Federal agencies would incur additional administrative costs to meet the new requirements imposed by H.R. 4377. Additional Federal expenditures also would occur if agencies face legal challenges as a result of the bill's implementation. In the long term, we expect that the bill could reduce the time needed to commence and complete some construction projects financed with Federal funds. Expediting the time required to start such projects would generally reduce the total costs to complete them, but CBO has no basis for estimating the timing or magnitude of such savings.

Enacting H.R. 4377 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4377 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

MAJOR PROVISIONS

Under NEPA, Federal agencies are required to assess the environmental consequences of an action and its alternatives before proceeding. The affected Federal agencies are required to consult with other interested agencies, document analysis, and make this information available for public comment prior to implementing a proposal. Most construction projects that are partially or fully financed by the Federal Government require a NEPA review; in those cases, a permit or regulatory decision by a Federal agency may also be necessary. In addition, if Federal agencies must issue permits or regulatory decisions before certain privately funded con-

struction projects can proceed, then a NEPA review may also be required.

The bill's major provisions would:

- Authorize sponsors of private construction projects to prepare environmental reviews for NEPA purposes if they are later reviewed and approved by the Federal agency leading those reviews;
- Require agencies to join a multiagency NEPA review process as a participant or be precluded from commenting on or opposing a construction project at a later time;
- Allow the lead Federal agency to use environmental reviews that were conducted for other projects in close proximity to a proposed construction project if the projects are expected to have similar effects on the environment;
- Specify which type of alternatives should be considered during the NEPA review process;
- Impose strict deadlines on various stages of the NEPA review process, including a two-year deadline for completing Environmental Impact Statements and issuing a Record of Decision; and
- Establish a 180-day deadline to file a lawsuit challenging a NEPA review process.

COSTS FOR FEDERAL AGENCIES TO IMPLEMENT EXPEDITED REVIEWS

All Federal agencies have a responsibility to implement NEPA; however, most Federal construction projects are sponsored by:

- The Department of Transportation (which spends about \$50 billion annually on highway and transit related construction projects);
- The Department of Defense (which spends roughly \$15 billion a year in construction); and
- The Army Corps of Engineers (the Corps) (which spends about \$2 billion annually on civilian construction projects).

The NEPA review process may also be required when private entities need to obtain a Federal permit to construct a project. Federal agencies that have a major role in regulating and overseeing the permit process for such projects include: the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Corps, the Bureau of Land Management, and the Forest Service.

This legislation would codify many existing practices in use by DOT and other agencies when conducting the NEPA review, but it also would impose some new requirements. CBO expects that some Federal agencies would issue new regulations and guidelines to meet the new requirements and deadlines imposed by this bill and, consequently, would be required to devote more personnel and technical resources to implement the bill. For example, when DOT implemented similar NEPA requirements under the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFE TEA-LU), the agency spent about \$1 million to establish new regulations, issue guidance, and establish new review processes. Based on information from several Federal agencies and regulatory experts, CBO estimates that additional discretionary funding would be required over the next several years by Federal agencies. Assuming that the

level of effort required under the bill would be similar to that experienced by DOT under SAFE TEA-LU, CBO estimates that implementing the bill's requirements would cost \$5 million over the next five years, subject to the availability of appropriated funds.

LITIGATION COSTS

According to the Congressional Research Service, specific actions and procedures taken by Federal agencies to comply with NEPA have evolved over many years following considerable litigation, and Federal courts have played a prominent role in interpreting and enforcing NEPA's requirements. Although this legislation would impose some restrictions that would seek to limit the number of claims concerning NEPA that are filed against Federal agencies, several agencies indicated to CBO that some new litigation would likely occur under this bill. Given the history of litigation associated with the NEPA process and the fact that H.R. 4377 would affect the NEPA process by amending the Administrative Procedures Act and not the underlying law, CBO expects that agencies would face increased litigation costs following enactment of the bill as stakeholders seek clarification of the new law's requirements or challenge an agency's compliance with those requirements. CBO cannot estimate the level of spending that would occur, however.

COST OF FEDERAL CONSTRUCTION PROJECTS

H.R. 4377 also could affect Federal spending for construction projects, but CBO has no basis for estimating the timing or magnitude of the net impact on Federal construction costs. On the one hand, to the extent that implementing H.R. 4377 would successfully streamline the NEPA review process, the time line for completing Federal construction projects would be accelerated, and over the long term, Federal agencies would realize efficiencies and ultimately savings in construction and administrative costs. On the other hand, if enacting this legislation leads to short-term delays in completing Federal construction projects over the next five years due to increased litigation, those efficiencies would not be gained immediately.

STAFF CONTACTS

The CBO staff contact for this estimate is Susanne S. Mehlman. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4377 will encourage job creation by establishing a more transparent and efficient Federal permitting process.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4377 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1: Short Title. Section 1 sets forth the short title of the bill as the “Responsibly And Professionally Invigorating Development Act of 2012” or as the “RAPID Act.”

Sec. 2(a): Coordination of Agency Administrative Operations for Efficient Decisionmaking. Subsection (a) to the new Section 560, 5 U.S.C., declares that the purpose of the Bill is to establish a framework to increase efficiency in the Federal permitting process. Because the Administrative Procedure Act coordinates agency action in other respects, it is fitting that it also should coordinate agency permitting decisions, a major component of which is the environmental review process. Subsection (b) contains definitions of terms used in the Bill, drawing upon NEPA regulations. Subsection (c) allows a project sponsor to prepare any environmental document required by NEPA, at the request and with the oversight and approval of the lead agency.⁸¹

Subsection (d) states that only one EIS and one EA (not including supplemental and court-ordered environmental documents) may be prepared under NEPA for a project, to be used by all Federal agencies. To maximize efficiency, lead agencies may choose to use existing, relevant data from similar environmental reviews. The lead agency may adopt an existing environmental study document that already has been prepared under state law that meets the requirements of NEPA.⁸² A lead agency also may prepare and publish a supplement to an existing state environmental study document, and its record of decision or finding of no significant impact should be based upon this environmental study document and any supplements. A lead agency may adopt environmental documents for a similar nearby project within the last 5 years.

Subsection (e) provides that a lead agency is responsible for inviting and designating participating agencies. The lead agency designates as a participating agency any Federal agency that will adopt the resulting environmental study document; the designated agency can only decline the designation in writing. The lead agency must invite to be a participating agency any other agencies “that may have an interest in the project, including, where appropriate, Governors of affected states.” Consistent with current NEPA practice, tribal and local governments, including counties, also may become participating agencies in the environmental review process. If the agency does not respond in writing within 30 days to the lead agency’s invitation, then the invitation is declined. If an agency declines the lead agency’s designation or invitation, then it is precluded from participating in the environmental review or taking any measures to oppose a permit, license or approval related to the project. A participating agency also may be designated as a cooperating agency, using the definition given to this term in the NEPA

⁸¹ *RAPID Act Hearing*, note 1 *supra*, at 198 (Testimony of Thomas Margro) (“Protections are currently in place under NEPA and its implementing regulations, and would remain in place under H.R. 4377, to protect against conflicts of interest.”).

⁸² *See, e.g., ibid.* (The California Environmental Quality Act “provides for a thorough consideration of the environmental impacts of a project and the identification of mitigation measures that are equivalent to NEPA. Moreover, as a law that requires project sponsors to mitigate environmental impacts, CEQA is even more stringent than NEPA, which is simply a procedural statute.”).

regulations as an agency with a particularly strong jurisdictional interest or expertise in the review. Subsection (e) requires the participating agencies to contribute to the environmental document concurrently, pursuant to regulations issued by CEQ, and to limit comments to their own areas of jurisdiction and authority.

Subsection (f) directs the project sponsor to notify the responsible Federal agency of the project's initiation, so it can identify and promptly notify the lead agency. The lead agency should initiate the environmental review within 45 days, by inviting and designating the participating agencies.

Subsection (g) requires the lead agency and the cooperating agencies to begin the scoping process "as early as practicable." The lead agency ultimately is responsible for determining the range of alternatives to be evaluated. When making a decision under the project, no agency should evaluate an alternative that was not evaluated in the environmental study document. Cooperating agencies should only evaluate those alternatives that are "technically and economically feasible" for the project sponsor to undertake, and the methodologies should be developed collaboratively between the lead and cooperating agencies and published in the environmental document. An alternative that does not meet the project's purpose and need should not be evaluated. The lead agency may give a greater degree of analysis to a preferred alternative, and the analysis of each alternative shall include its potential effects on employment.

Under Subsection (h), the lead agency is responsible for coordinating public and agency involvement in the review process and for making a schedule to complete the entire review process within the applicable timeframe, considering the particular factors given in the Bill. The lead agency should disregard untimely contributions made by participating agencies. If a participating agency does not object in writing to a lead agency decision, finding or request for concurrence in the document, then the participating agency shall be deemed to have concurred. As the review proceeds, the lead agency may lengthen the schedule for good cause, or shorten it with the concurrence of the cooperating agencies. The schedule must be given to the participating agencies and project sponsor within 15 days and made publicly available.

Subsection (i)(1) sets reasonable deadlines to complete the environmental review.⁸³ The lead agency must complete a review that requires an EA within 1 year, with a 6-month extension allowed for good cause or by agreement among the lead agency, project sponsor and all participating agencies. An EIS must be completed within 2 years, with a 1-year extension allowed for good cause or by agreement among the lead agency, project sponsor and all participating agencies. Thus, for a project requiring both an EA and an EIS, the entire environmental review process should not take more than four-and-a-half years, with maximum extensions granted. All comments on a draft EIS must be made within 60 days, and on other documents within 30 days;⁸⁴ extensions on these deadlines are al-

⁸³ Cf. *RAPID Act Hearing*, note 1 *supra*, at 88 (Testimony of Dinah Bear) ("These time periods are within the realm of the reasonable in many cases 747if, importantly, an agency has adequate reasons to implement NEPA and all other environmental laws that may be implicated in a proposed action.")

⁸⁴ NEPA regulations allow agencies to set comment periods of 45 days for a draft EIS and 30 days for a final EIS. See 40 C.F.R. § 1506.10.

lowed by agreement among the lead agency, all participating agencies, and the project sponsor, or for good cause in the lead agency's judgment.

Subsection (i)(4) sets reasonable deadlines for agencies to make permitting decisions. These timelines do not begin to run until all relevant agency review on the project—including the environmental review, per the applicable deadlines established by Subsection (i)(1)—is complete. Thus, no permit would ever be issued, by default or otherwise, until the relevant agency review and analysis has been performed. If the decision must be made before the record of decision is published, then the agency has 90 days beginning after all other relevant agency review related to the project is complete and after the lead agency publishes the final environmental impact statement, to make the decision, finding or approval. Otherwise, the agency has 180 days beginning after all other relevant agency review related to the project is complete and after the record of decision is published to make the decision, finding or approval, with extensions not to exceed 1 year from when the record of decision was published. If the agency does not decide within these timeframes, then the project or permit is deemed approved. The default approval is not appealable within the agency, and the mere fact that an approval was obtained by default cannot be used to support an APA lawsuit challenging the permitting decision as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence. A default approval still could be challenged under the APA on other grounds, however.

Subsection (j) generally requires the lead agency and participating agencies to work cooperatively to identify relevant issues; new issues should not be raised when it is too late to analyze them properly. The CEQ retains its traditional power to mediate disputes among agencies regarding issues that could delay completion of the environmental review. Subsection (k) increases transparency by requiring each agency to report annually to Congress regarding its compliance with NEPA.

Subsection (l) applies to claims against an agency decision that are predicated on an alleged defect in the NEPA process. Only persons or entities that commented on the environmental review document (if an opportunity for comment was provided) may challenge that document in court, and all claims must be brought within 180 days after the final decision is published. Filing a supplemental EIS begins the 180-day statute of limitations anew, but a lawsuit brought within that new statute of limitations can only challenge the supplemental EIS. Subsection (l) neither creates a right to judicial review nor limits the right to claim a violation of the terms of a permit, license or approval.

Subsection (m) allows the Bill's process to apply to individual projects or to categories of projects. Per Subsections (n) and (o), the Bill does not apply retroactively, only prospectively, to all projects for which an agency is required to undertake an environmental review or to make a decision that is based upon an environmental review.

Sec. 2(b). Makes technical amendments to the U.S. Code.

Sec. 2(c). Requires the CEQ to issue implementing regulations within 180 days of enactment, and agencies to amend their regulations within 120 days thereafter.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.

500. Administrative practice; general provisions.

* * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.

* * * * *

SUBCHAPTER IIA—INTERAGENCY COORDINATION REGARDING PERMITTING

560. *Coordination of agency administrative operations for efficient decisionmaking.*

* * * * *

*SUBCHAPTER IIA—INTERAGENCY COORDINATION
REGARDING PERMITTING*

§ 560. Coordination of agency administrative operations for efficient decisionmaking

(a) *CONGRESSIONAL DECLARATION OF PURPOSE.*—*The purpose of this subchapter is to establish a framework and procedures to streamline, increase the efficiency of, and enhance coordination of agency administration of the regulatory review, environmental decisionmaking, and permitting process for projects undertaken, reviewed, or funded by Federal agencies. This subchapter will ensure that agencies administer the regulatory process in a manner that is efficient so that citizens are not burdened with regulatory excuses and time delays.*

(b) *DEFINITIONS.*—*For purposes of this subchapter, the term—*

(1) *“agency” means any agency, department, or other unit of Federal, State, local, or Indian tribal government;*

(2) *“category of projects” means 2 or more projects related by project type, potential environmental impacts, geographic location, or another similar project feature or characteristic;*

(3) *“environmental assessment” means a concise public document for which a Federal agency is responsible that serves to—*

(A) *briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;*

(B) *aid an agency's compliance with NEPA when no environmental impact statement is necessary; and*

(C) *facilitate preparation of an environmental impact statement when one is necessary;*

(4) *"environmental impact statement" means the detailed statement of significant environmental impacts required to be prepared under NEPA;*

(5) *"environmental review" means the Federal agency procedures for preparing an environmental impact statement, environmental assessment, categorical exclusion, or other document under NEPA;*

(6) *"environmental decisionmaking process" means the Federal agency procedures for undertaking and completion of any environmental permit, decision, approval, review, or study under any Federal law other than NEPA for a project subject to an environmental review;*

(7) *"environmental document" means an environmental assessment or environmental impact statement, and includes any supplemental document or document prepared pursuant to a court order;*

(8) *"finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why a project, not otherwise subject to a categorical exclusion, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared;*

(9) *"lead agency" means the Federal agency preparing or responsible for preparing the environmental document;*

(10) *"NEPA" means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);*

(11) *"project" means major Federal actions that are construction activities undertaken with Federal funds or that are construction activities that require approval by a permit or regulatory decision issued by a Federal agency;*

(12) *"project sponsor" means the agency or other entity, including any private or public-private entity, that seeks approval for a project or is otherwise responsible for undertaking a project; and*

(13) *"record of decision" means a document prepared by a lead agency under NEPA following an environmental impact statement that states the lead agency's decision, identifies the alternatives considered by the agency in reaching its decision and states whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not adopted.*

(c) *PREPARATION OF ENVIRONMENTAL DOCUMENTS.—Upon the request of the lead agency, the project sponsor shall be authorized to prepare any document for purposes of an environmental review required in support of any project or approval by the lead agency if the lead agency furnishes oversight in such preparation and independently evaluates such document and the document is approved and adopted by the lead agency prior to taking any action or making any approval based on such document.*

(d) *ADOPTION AND USE OF DOCUMENTS.—*(1) *DOCUMENTS PREPARED UNDER NEPA.—*

(A) *Not more than 1 environmental impact statement and 1 environmental assessment shall be prepared under NEPA for a project (except for supplemental environmental documents prepared under NEPA or environmental documents prepared pursuant to a court order), and, except as otherwise provided by law, the lead agency shall prepare the environmental impact statement or environmental assessment. After the lead agency issues a record of decision, no Federal agency responsible for making any approval for that project may rely on a document other than the environmental document prepared by the lead agency.*

(B) *Upon the request of a project sponsor, a lead agency may adopt, use, or rely upon secondary and cumulative impact analyses included in any environmental document prepared under NEPA for projects in the same geographic area where the secondary and cumulative impact analyses provide information and data that pertains to the NEPA decision for the project under review.*

(2) *STATE ENVIRONMENTAL DOCUMENTS; SUPPLEMENTAL DOCUMENTS.—*

(A) *Upon the request of a project sponsor, a lead agency may adopt a document that has been prepared for a project under State laws and procedures as the environmental impact statement or environmental assessment for the project, provided that the State laws and procedures under which the document was prepared provide environmental protection and opportunities for public involvement that are substantially equivalent to NEPA.*

(B) *An environmental document adopted under subparagraph (A) is deemed to satisfy the lead agency's obligation under NEPA to prepare an environmental impact statement or environmental assessment.*

(C) *In the case of a document described in subparagraph (A), during the period after preparation of the document but before its adoption by the lead agency, the lead agency shall prepare and publish a supplement to that document if the lead agency determines that—*

(i) a significant change has been made to the project that is relevant for purposes of environmental review of the project; or

(ii) there have been significant changes in circumstances or availability of information relevant to the environmental review for the project.

(D) *If the agency prepares and publishes a supplemental document under subparagraph (C), the lead agency may solicit comments from agencies and the public on the supplemental document for a period of not more than 45 days beginning on the date of the publication of the supplement.*

(E) *A lead agency shall issue its record of decision or finding of no significant impact, as appropriate, based upon the document adopted under subparagraph (A), and any supplements thereto.*

(3) *CONTEMPORANEOUS PROJECTS.*—If the lead agency determines that there is a reasonable likelihood that the project will have similar environmental impacts as a similar project in geographical proximity to the project, and that similar project was subject to environmental review or similar State procedures within the 5 year period immediately preceding the date that the lead agency makes that determination, the lead agency may adopt the environmental document that resulted from that environmental review or similar State procedure. The lead agency may adopt such an environmental document, if it is prepared under State laws and procedures only upon making a favorable determination on such environmental document pursuant to paragraph (2)(A).

(e) *PARTICIPATING AGENCIES.*—

(1) *IN GENERAL.*—The lead agency shall be responsible for inviting and designating participating agencies in accordance with this subsection. The lead agency shall provide the invitation or notice of the designation in writing.

(2) *FEDERAL PARTICIPATING AGENCIES.*—Any Federal agency that is required to adopt the environmental document of the lead agency for a project shall be designated as a participating agency and shall collaborate on the preparation of the environmental document, unless the Federal agency informs the lead agency, in writing, by a time specified by the lead agency in the designation of the Federal agency that the Federal agency—

(A) has no jurisdiction or authority with respect to the project;

(B) has no expertise or information relevant to the project; and

(C) does not intend to submit comments on the project.

(3) *INVITATION.*—The lead agency shall identify, as early as practicable in the environmental review for a project, any agencies other than an agency described in paragraph (2) that may have an interest in the project, including, where appropriate, Governors of affected States, and heads of appropriate tribal and local (including county) governments, and shall invite such identified agencies and officials to become participating agencies in the environmental review for the project. The invitation shall set a deadline of 30 days for responses to be submitted, which may only be extended by the lead agency for good cause shown. Any agency that fails to respond prior to the deadline shall be deemed to have declined the invitation.

(4) *EFFECT OF DECLINING PARTICIPATING AGENCY INVITATION.*—Any agency that declines a designation or invitation by the lead agency to be a participating agency shall be precluded from submitting comments on any document prepared under NEPA for that project or taking any measures to oppose, based on the environmental review, any permit, license, or approval related to that project.

(5) *EFFECT OF DESIGNATION.*—Designation as a participating agency under this subsection does not imply that the participating agency—

(A) supports a proposed project; or

(B) has any jurisdiction over, or special expertise with respect to evaluation of, the project.

(6) *COOPERATING AGENCY.*—A participating agency may also be designated by a lead agency as a “cooperating agency” under the regulations contained in part 1500 of title 40, Code of Federal Regulations, as in effect on January 1, 2011. Designation as a cooperating agency shall have no effect on designation as participating agency. No agency that is not a participating agency may be designated as a cooperating agency.

(7) *CONCURRENT REVIEWS.*—Each Federal agency shall—

(A) carry out obligations of the Federal agency under other applicable law concurrently and in conjunction with the review required under NEPA; and

(B) in accordance with the rules made by the Council on Environmental Quality pursuant to subsection (n)(1), make and carry out such rules, policies, and procedures as may be reasonably necessary to enable the agency to ensure completion of the environmental review and environmental decisionmaking process in a timely, coordinated, and environmentally responsible manner.

(8) *COMMENTS.*—Each participating agency shall limit its comments on a project to areas that are within the authority and expertise of such participating agency. Each participating agency shall identify in such comments the statutory authority of the participating agency pertaining to the subject matter of its comments. The lead agency shall not act upon, respond to or include in any document prepared under NEPA, any comment submitted by a participating agency that concerns matters that are outside of the authority and expertise of the commenting participating agency.

(f) *PROJECT INITIATION REQUEST.*—

(1) *NOTICE.*—A project sponsor shall provide the Federal agency responsible for undertaking a project with notice of the initiation of the project by providing a description of the proposed project, the general location of the proposed project, and a statement of any Federal approvals anticipated to be necessary for the proposed project, for the purpose of informing the Federal agency that the environmental review should be initiated.

(2) *LEAD AGENCY INITIATION.*—The agency receiving a project initiation notice under paragraph (1) shall promptly identify the lead agency for the project, and the lead agency shall initiate the environmental review within a period of 45 days after receiving the notice required by paragraph (1) by inviting or designating agencies to become participating agencies, or, where the lead agency determines that no participating agencies are required for the project, by taking such other actions that are reasonable and necessary to initiate the environmental review.

(g) *ALTERNATIVES ANALYSIS.*—

(1) *PARTICIPATION.*—As early as practicable during the environmental review, but no later than during scoping for a project requiring the preparation of an environmental impact statement, the lead agency shall provide an opportunity for involvement by cooperating agencies in determining the range of alternatives to be considered for a project.

(2) *RANGE OF ALTERNATIVES.*—Following participation under paragraph (1), the lead agency shall determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project, subject to the following limitations:

(A) *NO EVALUATION OF CERTAIN ALTERNATIVES.*—No Federal agency shall evaluate any alternative that was identified but not carried forward for detailed evaluation in an environmental document or evaluated and not selected in any environmental document prepared under NEPA for the same project.

(B) *ONLY FEASIBLE ALTERNATIVES EVALUATED.*—Where a project is being constructed, managed, funded, or undertaken by a project sponsor that is not a Federal agency, Federal agencies shall only be required to evaluate alternatives that the project sponsor could feasibly undertake, consistent with the purpose of and the need for the project, including alternatives that can be undertaken by the project sponsor and that are technically and economically feasible.

(3) *METHODOLOGIES.*—

(A) *IN GENERAL.*—The lead agency shall determine, in collaboration with cooperating agencies at appropriate times during the environmental review, the methodologies to be used and the level of detail required in the analysis of each alternative for a project. The lead agency shall include in the environmental document a description of the methodologies used and how the methodologies were selected.

(B) *NO EVALUATION OF INAPPROPRIATE ALTERNATIVES.*—When a lead agency determines that an alternative does not meet the purpose and need for a project, that alternative is not required to be evaluated in detail in an environmental document.

(4) *PREFERRED ALTERNATIVE.*—At the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if the lead agency determines that the development of such higher level of detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review.

(5) *EMPLOYMENT ANALYSIS.*—The evaluation of each alternative in an environmental impact statement or an environmental assessment shall identify the potential effects of the alternative on employment, including potential short-term and long-term employment increases and reductions and shifts in employment.

(h) *COORDINATION AND SCHEDULING.*—

(1) *COORDINATION PLAN.*—

(A) *IN GENERAL.*—The lead agency shall establish and implement a plan for coordinating public and agency participation in and comment on the environmental review for a project or category of projects to facilitate the expeditious resolution of the environmental review.

(B) SCHEDULE.—

(i) IN GENERAL.—The lead agency shall establish as part of the coordination plan for a project, after consultation with each participating agency and, where applicable, the project sponsor, a schedule for completion of the environmental review. The schedule shall include deadlines, consistent with subsection (i), for decisions under any other Federal laws (including the issuance or denial of a permit or license) relating to the project that is covered by the schedule.

(ii) FACTORS FOR CONSIDERATION.—In establishing the schedule, the lead agency shall consider factors such as—

(I) the responsibilities of participating agencies under applicable laws;

(II) resources available to the participating agencies;

(III) overall size and complexity of the project;

(IV) overall schedule for and cost of the project;

(V) the sensitivity of the natural and historic resources that could be affected by the project; and

(VI) the extent to which similar projects in geographic proximity were recently subject to environmental review or similar State procedures.

(iii) COMPLIANCE WITH THE SCHEDULE.—

(I) All participating agencies shall comply with the time periods established in the schedule or with any modified time periods, where the lead agency modifies the schedule pursuant to subparagraph (D).

(II) The lead agency shall disregard and shall not respond to or include in any document prepared under NEPA, any comment or information submitted or any finding made by a participating agency that is outside of the time period established in the schedule or modification pursuant to subparagraph (D) for that agency's comment, submission or finding.

(III) If a participating agency fails to object in writing to a lead agency decision, finding or request for concurrence within the time period established under law or by the lead agency, the agency shall be deemed to have concurred in the decision, finding or request.

(C) CONSISTENCY WITH OTHER TIME PERIODS.—A schedule under subparagraph (B) shall be consistent with any other relevant time periods established under Federal law.

(D) MODIFICATION.—The lead agency may—

(i) lengthen a schedule established under subparagraph (B) for good cause; and

(ii) shorten a schedule only with the concurrence of the cooperating agencies.

(E) *DISSEMINATION.*—A copy of a schedule under subparagraph (B), and of any modifications to the schedule, shall be—

(i) provided within 15 days of completion or modification of such schedule to all participating agencies and to the project sponsor; and

(ii) made available to the public.

(F) *ROLES AND RESPONSIBILITY OF LEAD AGENCY.*—

With respect to the environmental review for any project, the lead agency shall have authority and responsibility to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate the expeditious resolution of the environmental review for the project.

(i) *DEADLINES.*—The following deadlines shall apply to any project subject to review under NEPA and any decision under any Federal law relating to such project (including the issuance or denial of a permit or license or any required finding):

(1) *ENVIRONMENTAL REVIEW DEADLINES.*—The lead agency shall complete the environmental review within the following deadlines:

(A) *ENVIRONMENTAL IMPACT STATEMENT PROJECTS.*—For projects requiring preparation of an environmental impact statement—

(i) the lead agency shall issue an environmental impact statement within 2 years after the earlier of the date the lead agency receives the project initiation request or a Notice of Intent to Prepare an Environmental Impact Statement is published in the Federal Register; and

(ii) in circumstances where the lead agency has prepared an environmental assessment and determined that an environmental impact statement will be required, the lead agency shall issue the environmental impact statement within 2 years after the date of publication of the Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register.

(B) *ENVIRONMENTAL ASSESSMENT PROJECTS.*—For projects requiring preparation of an environmental assessment, the lead agency shall issue a finding of no significant impact or publish a Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register within 1 year after the earlier of the date the lead agency receives the project initiation request, makes a decision to prepare an environmental assessment, or sends out participating agency invitations.

(2) *EXTENSIONS.*—

(A) *REQUIREMENTS.*—The environmental review deadlines may be extended only if—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(B) *LIMITATION.*—The environmental review shall not be extended by more than 1 year for a project requiring

preparation of an environmental impact statement or by more than 180 days for a project requiring preparation of an environmental assessment.

(3) ENVIRONMENTAL REVIEW COMMENTS.—

(A) COMMENTS ON DRAFT ENVIRONMENTAL IMPACT STATEMENT.—For comments by agencies and the public on a draft environmental impact statement, the lead agency shall establish a comment period of not more than 60 days after publication in the Federal Register of notice of the date of public availability of such document, unless—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(B) OTHER COMMENTS.—For all other comment periods for agency or public comments in the environmental review process, the lead agency shall establish a comment period of no more than 30 days from availability of the materials on which comment is requested, unless—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(4) DEADLINES FOR DECISIONS UNDER OTHER LAWS.—Notwithstanding any other provision of law, in any case in which a decision under any other Federal law relating to the undertaking of a project being reviewed under NEPA (including the issuance or denial of a permit or license) is required to be made, the following deadlines shall apply:

(A) DECISIONS PRIOR TO RECORD OF DECISION OR FINDING OF NO SIGNIFICANT IMPACT.—If a Federal agency is required to approve, or otherwise to act upon, a permit, license, or other similar application for approval related to a project prior to the record of decision or finding of no significant impact, such Federal agency shall approve or otherwise act not later than the end of a 90 day period beginning—

(i) after all other relevant agency review related to the project is complete; and

(ii) after the lead agency publishes a notice of the availability of the final environmental impact statement or issuance of other final environmental documents, or no later than such other date that is otherwise required by law, whichever event occurs first.

(B) OTHER DECISIONS.—With regard to any approval or other action related to a project by a Federal agency that is not subject to subparagraph (A), each Federal agency shall approve or otherwise act not later than the end of a period of 180 days beginning—

(i) after all other relevant agency review related to the project is complete; and

(ii) after the lead agency issues the record of decision or finding of no significant impact, unless a dif-

ferent deadline is established by agreement of the Federal agency, lead agency, and the project sponsor, where applicable, or the deadline is extended by the Federal agency for good cause, provided that such extension shall not extend beyond a period that is 1 year after the lead agency issues the record of decision or finding of no significant impact.

(C) *FAILURE TO ACT.*—In the event that any Federal agency fails to approve, or otherwise to act upon, a permit, license, or other similar application for approval related to a project within the applicable deadline described in subparagraph (A) or (B), the permit, license, or other similar application shall be deemed approved by such agency and the agency shall take action in accordance with such approval within 30 days of the applicable deadline described in subparagraph (A) or (B).

(D) *FINAL AGENCY ACTION.*—Any approval under subparagraph (C) is deemed to be final agency action, and may not be reversed by any agency. In any action under chapter 7 seeking review of such a final agency action, the court may not set aside such agency action by reason of that agency action having occurred under this paragraph.

(j) *ISSUE IDENTIFICATION AND RESOLUTION.*—

(1) *COOPERATION.*—The lead agency and the participating agencies shall work cooperatively in accordance with this section to identify and resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable laws.

(2) *LEAD AGENCY RESPONSIBILITIES.*—The lead agency shall make information available to the participating agencies as early as practicable in the environmental review regarding the environmental, historic, and socioeconomic resources located within the project area and the general locations of the alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping.

(3) *PARTICIPATING AGENCY RESPONSIBILITIES.*—Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project's potential environmental, historic, or socioeconomic impacts. In this paragraph, issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.

(4) *ISSUE RESOLUTION.*—

(A) *MEETING OF PARTICIPATING AGENCIES.*—At any time upon request of a project sponsor, the lead agency shall promptly convene a meeting with the relevant participating agencies and the project sponsor, to resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable laws.

(B) *NOTICE THAT RESOLUTION CANNOT BE ACHIEVED.*—If a resolution cannot be achieved within 30 days following such a meeting and a determination by the lead agency

that all information necessary to resolve the issue has been obtained, the lead agency shall notify the heads of all participating agencies, the project sponsor, and the Council on Environmental Quality for further proceedings in accordance with section 204 of NEPA, and shall publish such notification in the Federal Register.

(k) REPORT TO CONGRESS.—The head of each Federal agency shall report annually to Congress—

(1) the projects for which the agency initiated preparation of an environmental impact statement or environmental assessment;

(2) the projects for which the agency issued a record of decision or finding of no significant impact and the length of time it took the agency to complete the environmental review for each such project;

(3) the filing of any lawsuits against the agency seeking judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA, including the date the complaint was filed, the court in which the complaint was filed, and a summary of the claims for which judicial review was sought; and

(4) the resolution of any lawsuits against the agency that sought judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA.

(l) LIMITATIONS ON CLAIMS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for an action subject to NEPA shall be barred unless—

(A) in the case of a claim pertaining to a project for which an environmental review was conducted and an opportunity for comment was provided, the claim is filed by a party that submitted a comment during the environmental review on the issue on which the party seeks judicial review, and such comment was sufficiently detailed to put the lead agency on notice of the issue upon which the party seeks judicial review; and

(B) filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed.

(2) NEW INFORMATION.—The preparation of a supplemental environmental impact statement, when required, is deemed a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 180 days after the date of publication of a notice in the Federal Register announcing the record of decision for such action. Any claim challenging agency action on the basis of information in a supplemental environmental impact statement shall be limited to challenges on the basis of that information.

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to create a right to judicial review or place

any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

(m) CATEGORIES OF PROJECTS.—The authorities granted under this subchapter may be exercised for an individual project or a category of projects.

(n) EFFECTIVE DATE.—The requirements of this subchapter shall apply only to environmental reviews and environmental decisionmaking processes initiated after the date of enactment of this subchapter.

(o) APPLICABILITY.—This subchapter applies, according to the provisions thereof, to all projects for which a Federal agency is required to undertake an environmental review or make a decision under an environmental law for a project for which a Federal agency is undertaking an environmental review.

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Dissenting Views

INTRODUCTION

H.R. 4377, the “Responsibly And Professionally Invigorating Development Act of 2012” or “RAPID Act,” is the latest in a series of anti-regulatory measures that are intended to prevent Federal agencies from implementing the responsibilities that Congress gave them to protect public health and safety. H.R. 4377 specifically does this by requiring these agencies to adhere to a complex process with respect to any construction project that is federally funded or that needs approval by a Federal agency through the issuance of a permit or regulatory decision.

In sum, this bill prioritizes speed, one-size-fits-all deadlines, and project approval over protecting the public interest and the environment by truncating the deliberative process pursuant to which the environmental consequences of proposed projects are considered. Specifically, H.R. 4377: (1) is a solution in search of a problem as it attempts to address purported delays in the environmental review and permit approval process that have nothing to do with the National Environmental Policy Act (NEPA),¹ the law that this bill primarily seeks to re-write; (2) creates a parallel environmental review process for an ill-defined subset of Federal projects that will lead to confusion and spawn litigation that may very well result in further delay; (3) forecloses potentially valuable agency and public input and imposes unduly rigid deadlines for agency action; (4) institutionalizes a bias in favor of approving an agency’s preferred alternative, and (5) is a thinly veiled effort to amend NEPA, which is not in the committee’s jurisdiction, by amending the Administrative Procedure Act (APA).²

Not surprisingly, 25 environmental groups, including the Audubon Society, League of Conservation Voters, Natural Resources Defense Council, Sierra Club, and The Wilderness Society, have expressed strong opposition to H.R. 4377.³ In addition, the White

¹ 42 U.S.C. §§ 4321–4347 (2012).

² 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2012).

³ Letter from Jim Bradley, Senior Director of Government Relations, American Rivers *et al.* to Members of the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary (Apr. 25, 2012) (on file with Democratic staff of the H. Comm. on the Judiciary).

House's Council on Environmental Quality (CEQ), which coordinates the implementation of NEPA throughout the Executive Branch, adamantly opposes this bill.⁴ The CEQ observes that H.R. 4377 is "deeply flawed" and that it "will undermine the environmental review process."⁵

For these reasons and those described below, we respectfully dissent and urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

H.R. 4377 amends the APA to establish a complex series of requirements that Federal agencies must adhere to with respect to reviewing the environmental impact of construction projects that are federally funded or that require approval by a Federal agency. The bill was introduced on April 18, 2012 by Representative Dennis Ross (R-FL) together with Committee Chairman Lamar Smith (R-TX), Subcommittee on the Courts, Commercial and Administrative Law (CCAL) Chairman Howard Coble (R-NC), and Representative Collin Peterson (D-MN). The CCAL Subcommittee held a hearing on this bill on April 25, 2012. Majority witnesses were Gus Bauman, Esq. with Beveridge & Diamond; William Kovacs, Vice President for the Environment, Technology & Regulatory Affairs Division, U.S. Chamber of Commerce; and Tom Margro, CEO, Transportation Corridor Agencies. The Minority witness was Dinah Bear, former General Counsel, Council on Environmental Quality, who explained in detail the many problematic aspects of the bill.

A section-by-section explanation of the reported version of the bill's principal provisions follows. Section 2 adds a new subchapter to the APA. All further section references are to the proposed new provisions added by the bill. New section 560(a) sets forth a Congressional declaration of purpose. It states that this new subchapter is intended to establish a framework and procedures to streamline, increase the efficiency of, and enhance coordination of agency administration of the regulatory review, environmental decisionmaking, and permitting process for projects undertaken, reviewed, or funded by Federal agencies. The apparent scope of this provision is extremely extensive, as it is not limited to environmental actions by agencies.

Subsection (a) also states that the subchapter is intended to ensure that agencies administer the regulatory process in a manner that is efficient "so that citizens are not burdened with regulatory excuses and time delays." It is unclear what would constitute a "regulatory" excuse. Also, it is somewhat hypocritical for supporters of this legislation to criticize "time delays," when virtually all of the regulatory legislation that this Committee has considered this Congress has been intended to slow down or stop the regulatory processes of agencies.

Subsection (b) sets forth various definitions, including those for environmental assessments, environmental impact statements (EISs), and findings of no significant impact (FONSI)s. An environmental document (ED), for example, means an environmental as-

⁴Letter from Nancy H. Sutley, Chair, Council on Environmental Quality, Executive Office of the President, to Rep. Howard Coble (R-NC), Chair, and Rep. Steve Cohen (D-TN), Ranking Member, Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary (Apr. 24, 2012) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁵*Id.* at 1.

assessment or an EIS, including any supplemental document or document prepared pursuant to a court order. It should be noted that the bill frequently utilizes the term “project,” which is defined here as “major Federal actions that are construction activities undertaken with Federal funds or construction activities that require approval by a permit or regulatory decision issued by a Federal agency.” As a result, it appears that the bill is largely limited to construction projects that are either federally-funded or that require Federal approval. NEPA, however, applies to a broad range of activities that go beyond construction projects. These activities include such diverse undertakings as management plans; fishing, hunting, and grazing permits; Defense Department base realignment and closures activities; and treaties.

Subsection (c) authorizes the lead agency (which is the Federal agency responsible for preparing an environmental assessment or EIS) to request a project sponsor (which is defined as including an agency, private entity, or public-private entity that seeks approval for a project or otherwise is responsible for undertaking a project), to prepare any document for purposes of an environmental review by a Federal agency, providing the lead agency: (1) furnishes oversight in the preparation of such document; (2) independently evaluates it; and (3) approves and adopts such document prior to taking or making any approval based on such document.

Subsection (d)(1)(A) provides that only one EIS and one environmental assessment may be prepared for a project, except for supplemental environmental documents prepared under NEPA or environmental documents prepared pursuant to court order. The lead agency must prepare the EIS or environmental assessment “except as otherwise provided by law,” or, in other words, as provided by subsection (c). After the lead agency issues a record of decision, no Federal agency responsible for making any approval for that project may rely on a document other than the ED prepared by the lead agency.

Subsection (d)(1)(B) provides that upon request of a project sponsor, a lead agency may adopt, use or rely on secondary and cumulative impact analyses included in any ED prepared under NEPA for projects in the same geographic area where the secondary and cumulative impact analyses provide information and data that pertains to the NEPA decision for the project under review. It is unclear why this provision is in the alternative and why it is needed. Under current law, a lead agency may utilize such analyses whether the project sponsor requests it or not.

Subsection (d)(2)(A) requires that a lead agency, upon request of a project sponsor, to adopt a document prepared for a project under state law and procedures as the EIS or environmental assessment for the project, providing the state law and procedures provide environmental protection and opportunities for public involvement that are substantially equivalent to NEPA. This provision could generate litigation as to whether a state law or procedure is “substantially equivalent” to NEPA, although section (c)(1) of the bill may address this concern.

Subsection (d)(2)(B) provides that an ED adopted pursuant to the above is deemed to satisfy the lead agency’s obligation under NEPA to prepare an EIS or environmental assessment.

Subsection (d)(2)(C) provides that the lead agency—after preparation of such ED, but before its adoption by the agency—must prepare and publish a supplement to such ED if the agency determines that there has been a significant change to the project that is relevant to the environmental review of such project or there has been significant changes in the information relevant to the environmental review of the project.

Subsection (d)(2)(D) provides that if the agency prepares and publishes a supplemental document (as described above), the agency may solicit comments from agencies and the public on such document for a period not to exceed 45 days from publication of the supplement. It is unclear whether this time frame would be sufficient for all projects.

Subsection (d)(2)(E) requires a lead agency to issue its record of decision or FONSI based on the document adopted pursuant to subsection(d)(2)(A) and any supplements thereto.

If the lead agency determines that there is a reasonable likelihood that the project will have similar environmental impacts as a similar project in geographical proximity to the project, subsection (d)(3) authorizes the lead agency to adopt the ED that resulted from the environmental review of such similar project if it was subject to environmental review or similar state procedures within the 5-year period immediately preceding the date on which the agency made such determination. The lead agency may adopt such ED, if it is prepared under state law and procedures only after making a favorable determination on such ED pursuant to subsection (d)(2)(A). This provision does not require the state law or procedure to be substantially similar to NEPA.

Subsection (e)(1) requires the lead agency to be responsible for inviting and designating participating agencies in accordance with subsection (e) and such invitation and notice of designation must be in writing.

Subsection (e)(2) provides that a Federal agency required to adopt the lead agency's ED for a project must be designated as a participating agency and collaborate on the preparation of the ED, unless the agency informs the lead agency in writing by a time specified by the lead agency that such agency: (1) has no jurisdiction or authority with respect to the project; (2) has no expertise or information relevant to the project; and (3) does not intend to submit comments on the project. It would appear that these requirements should be in the alternative.

Subsection (e)(3) requires the lead agency to identify and invite as early as possible in the environmental review for a project any other agencies (other than those described in paragraph (2)) that may have an interest in the project, including governors of affected states and heads of "appropriate" tribal and local governments. Such invitation must set a 30-day deadline for responses to be submitted. This period may be extended by the lead agency for good cause shown. Any agency that fails to respond prior to the deadline is deemed to have declined the invitation. This 30-day time frame may be unreasonable under certain circumstances.

Subsection (e)(4) pertains to an agency that declines a designation or invitation by a lead agency to be a participating agency. It precludes such agency from submitting comments on any document prepared under NEPA for such project or taking any measures to

oppose, based on the environmental review, any permit, license, or approval related to such project. This prohibition may preclude an agency from bringing to the attention of the lead agency critical information and thereby allow the lead agency to disregard such information. This appears to be a very shortsighted provision. On the one hand, it could encourage various agencies, even those with only a peripheral interest in the project, to become a participating agency so their opportunity to comment is not foreclosed. On the other hand, agencies may decline to participate on an unrelated basis (e.g., lack of resources), but then be foreclosed from offering helpful comments.

Subsection (e)(5) provides that the designation as a participating agency does not imply that such agency supports a proposed project or has any jurisdiction over or special expertise with respect to the evaluation of such project.

Subsection (e)(6) permits a lead agency to designate a participating agency as a cooperating agency under 40 C.F.R. part 1500. Such designation has no effect on the agency's designation as a participating agency. On the other hand, only a participating agency may be designated as a cooperating agency. It is not clear, however, what the substantive differences are between a participating agency and a cooperating agency.

Subsection (e)(7) requires each Federal agency to implement its responsibilities under other applicable law concurrently and in conjunction with its NEPA review, and in accordance with CEQ's rules in a way to ensure completion of the environmental review and decisionmaking process in a timely, coordinated, and environmentally responsible manner.

Subsection (e)(8) requires a participating agency to limit its comments on a project to areas that are within such agency's authority and expertise and it must identify in such comments its statutory authority to make such comments. The lead agency cannot act upon, respond to, or include in any document prepared under NEPA any comment submitted by a participating agency that concerns matters outside of the participating agency's authority and expertise.

Subsection (f)(1) requires the project sponsor to give the Federal agency responsible for undertaking a project notice of the initiation of the project by giving a description of the proposed project, its general location, and a statement of any Federal approvals anticipated to be necessary for the project for the purpose of informing the Federal agency that the environmental review should be initiated.

Subsection (f)(2) requires the agency that receives the project initiation notice to promptly identify the lead agency for the project. In turn, the lead agency must initiate the environmental review within 45 days of receipt of such notice by inviting or designating agencies to become a PA. If the lead agency determines that no participating agency is required for the project, then it must take such other action that is reasonable and necessary to initiate the environmental review.

Subsection (g)(1) requires the lead agency, as early as practicable during the environmental review, but no later than during scoping for a project requiring the preparation of an EIS, to give an opportunity for involvement by cooperating agencies in determining the

range of alternatives to be considered for a project. Note that this is the first and only time that the term “scoping” is used in this legislation. It is undefined. This illustrates the problem of creating a parallel universe on an incomplete basis with key terms that are vague and undefined.

Subsection (g)(2) provides that following participation pursuant to the above, the lead agency must determine the range of alternatives for consideration in any document that the lead agency is responsible for preparing for the project, subject to certain limitations. First, no Federal agency may evaluate any alternative that was identified, but not carried forward for detailed evaluation in an environmental document or evaluated and not selected in any environmental document prepared under NEPA for the same project. This prohibition may be overly restrictive depending on the circumstances presented. Second, where a project is being constructed, managed, funded, or undertaken by a project sponsor that is not a Federal agency, Federal agencies may only be required to evaluate alternatives that the project sponsor could feasibly undertake, including alternatives that can actually be undertaken by the project sponsor, and that are technically and economically feasible. This requirement may also be overly restrictive under certain circumstances.

Subsection (g)(3)(A) requires the lead agency to determine, in collaboration with cooperating agencies at appropriate times during the environmental review, the methodologies to be used and the level of detail required in the analysis of each alternative for a project. The lead agency must include in the environmental document a description of the methodologies used and how they were selected. Subsection (g)(3)(B) provides that if the lead agency determines that an alternative does not meet the purpose and need for a project, then that alternative does not have to be evaluated in detail in an environmental document.

Subsection (g)(4) authorizes the lead agency, in its discretion, to develop the preferred alternative for a project to a higher level of detail than other alternatives to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if such additional detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review.

Subsection (g)(5) requires the evaluation of each alternative in an EIS or environmental assessment to identify the potential effects of such alternative on employment, including potential short-term and long-term impacts.

Subsection (h)(1)(A) requires the lead agency to establish and implement a plan for coordinating public and agency participation and comment for the environmental review for a project or category of projects to facilitate the expeditious resolution of such review. Subsection (h)(1)(B) requires the lead agency, after consultation with each participating agency and project sponsor (if applicable), to establish a schedule for completion of the environmental review, which must include deadlines for decisions under any other Federal laws, including the issuance or denial of a permit or license relating to the project that is the subject of such schedule. The provision itemizes a series of factors that must be considered in establishing the schedule. A participating agency must comply with such time

periods. The lead agency must disregard, not respond to, or not include in any document prepared under NEPA any comment or information submitted or any finding made by a participating agency that is outside of the time periods established in the schedule. If a participating agency fails to object in writing to a lead agency's decision, finding, or request for concurrence within the time period established by law or by the lead agency, the agency shall be deemed to have concurred in the decision, finding, or request. The provision is problematic where there is a conflict between current law and the lead agency's determination. Subsection (h)(1)(C) requires the schedule as described above to be consistent with any other relevant time periods established under Federal law. Subsection (h)(1)(D) permits the lead agency to lengthen an established schedule for good cause. The lead agency may shorten it only with the concurrence of the cooperating agencies. Subsection (h)(1)(E) requires a copy of the schedule and any modification to be provided to all participating agencies and the project sponsor within 15 days of completion or modification and made available to the public. This provision, however, fails to specify who is to make the schedule available and how it is to be made available to the public. Finally, subsection (h)(1)(F) provides that the lead agency has the authority and responsibility to take such actions as are necessary and proper to facilitate the expeditious resolution of the environmental review for the project. Note that there is no paragraph (2).

Subsection (i) sets forth various deadlines applicable to any project subject to review under NEPA and any decision under Federal law relating to such project, including the issuance or denial of a permit or license or any required finding. For a project requiring an EIS, the lead agency must issue such statement within 2 years after the earlier of the date on which the lead agency receives the project initiation request or a Notice of Intent to Prepare an EIS is published in the Federal Register. Where the lead agency has prepared an environmental assessment and determined that an EIS is required, the lead agency must issue the EIS within 2 years from the date of publication of the Notice of Intent to Prepare an EIS in the Federal Register. For a project requiring an environmental assessment, the lead agency must issue a FONSI or publish a Notice of Intent to Prepare an EIS in the Federal Register within 1 year after the earlier of the date the lead agency receives the project initiation request, makes a decision to prepare an environmental assessment, or sends out participating agency invitations. These deadlines may be extended only if a lead agency, project sponsor and participating agency jointly agree or the lead agency determines that such extension is needed for good cause. The extension for a project requiring an EIS cannot be more than 1 year. The limit for an environmental assessment is 180 days.

Subsection (i)(3) pertains to environmental review comments. With respect to comments by agencies and the public on a draft EIS, the lead agency must establish a comment period not longer than 60 days after publication in the Federal Register of notice of the date of public availability of such EIS, unless a different deadline is established by agreement of the lead agency, project sponsor, and participating agency, or the deadline is extended by the lead agency for good cause. For all other comment periods for agency or public comments in the environmental review process, the lead

agency must establish a comment period that does not exceed 30 days from the availability of the materials on which comment is requested, unless a different deadline is established by agreement of the lead agency, project sponsor, and participating agency, or if the deadline is extended by the lead agency for good cause.

Subsection (i)(4) overrides all other laws to impose certain deadlines in any case in which a decision under any other Federal law relates to the undertaking of a project reviewed under NEPA. With respect to instances where a Federal agency must approve or otherwise act upon a permit, license or similar application for approval relating to a project prior to the record of decision or FONSI, subsection (i)(4)(A) requires such agency to approve or otherwise act no later than 90 days after: (1) all other relevant agency review relating to the project is complete; and (2) the lead agency publishes a notice of the availability of the final EIS or issuance of other final environmental documents, or not later than such other date that is otherwise required by law, whichever occurs first. This provision may impose an unreasonable time frame for certain determinations. Disputes could arise as to what constitutes "good cause." Also, it is unclear what "otherwise act" would mean.

With respect to any approval or other action related to a project by a Federal agency not covered above, subsection (i)(4)(B) requires such agency to approve or otherwise act not later than 180 days after: (1) all other relevant agency review related to the project is complete; and (2) the lead agency issues the record of decision or FONSI, unless a different deadline is established by agreement of the Federal agency, lead agency, and project sponsor, or the Federal agency extends the deadline for good cause. Such extension may not be longer than 1 year after the lead agency issues the record of decision or FONSI. This provision gives the project sponsor a lot of control. Disputes could arise as to what constitutes "good cause." The time frame may be unreasonable under certain circumstances. Also, it is not clear what "otherwise act" would mean.

If the Federal agency fails to approve or otherwise act upon a permit, license, or other similar application for approval related to a project within the time frames set forth above, subsection (i)(4)(C) provides that such permit, license, or application must be deemed approved by such agency and the agency must take action in accordance with such approval within 30 days of the applicable time frame. This provision would be very problematic for highly complex projects that require more time for review. Subsection (i)(4)(D) prohibits another agency from reversing a permit, license or application deemed approved under subsection (C). Also, it prohibits a court from setting aside such deemed approval by reason that it occurred under subsection (C).

Subsection (j)(1) requires the lead agency and participating agency to work cooperatively to identify and resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable law. This subsection does not address the situation where, for example, a participating agency chooses not to work cooperatively.

Subsection (j)(2) requires the lead agency to make information available to a participating agency as early as practicable in the environmental review regarding the environmental, historic, and

socioeconomic resources located within the project area and the general locations of alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping. The ramifications that would result if the lead agency fails to comply with this provision are unclear.

Subsection (j)(3) requires the participating agency, based on information received from the lead agency, to identify as early as practicable any issue of concern regarding the project's potential environmental, historic, or socioeconomic impacts. It is unclear what happens if the participating agency's concerns are not based on information provided by the lead agency. The provision specifies that issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval needed for the project. Thus, the bill would essentially codify a presumption that all projects should be approved in some form.

Subsection (j)(4) requires the lead agency, upon request of a project sponsor to promptly convene a meeting with the relevant participating agencies and the project sponsor to resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for such project. If a resolution cannot be achieved within 30 days following such meeting and a determination by the lead agency that all information necessary to resolve the issue has been obtained, the lead agency must notify all participating agencies, the project sponsor, and the CEQ for further proceedings in accordance with section 204 of NEPA and publish such notification in the Federal Register.

Subsection (k) requires each Federal agency to report annually to Congress on the following: (1) the projects for which the agency initiated the preparation of an EIS or environmental assessment; (2) projects for which the agency issued a record of decision or FONSI and the length of time it took for the agency to complete the environmental review for each such project; (3) filing of any lawsuits against the agency seeking judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA, including the date the complaint was filed, the court in which the complaint was filed, and a summary of the claims for which judicial review was sought; and (4) the resolution of such lawsuits.

Subsection (l)(1) overrides all other laws to bar a claim for judicial review of a permit, license, or approval issued by a Federal agency for an action subject to NEPA, unless certain criteria apply. Judicial review is available for a claim pertaining to a project for which an environmental review was conducted and for which an opportunity for comment was provided, if such claim is filed by a party that submitted a comment during the environmental review on the issue on which the party seeks judicial review and such comment was sufficiently detailed to put the lead agency on notice of the issue. In addition, the claim must be filed within 180 days after publication of a Federal Register notice announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Subsection (l)(2) provides that the preparation of a supplemental EIS (when required) is deemed a separate final agency action and the deadline for filing a claim for judicial review of such action is 180 days after publication of a Federal Register notice announcing

the record of decision for such action. Any claim challenging agency action on the basis of information in a supplemental EIS is limited to challenges on the basis of such information. Subsection (l)(3) specifies that nothing in subsection (l) may be construed to create a right to judicial review or limit the filing of a claim that a person has violated the terms of a permit, license, or approval.

Subsection (m) provides that the authorities under subchapter IIA may be exercised for an individual project or category of projects.

Subsection (n) specifies that the amendments made by this legislation apply prospectively to environmental reviews and environmental decisionmaking processes initiated after the date of enactment.

Subsection (o) specifies that the amendments apply to all projects for which a Federal agency is required to undertake an environmental review or make a decision under an environmental law for a project for which a Federal agency is undertaking an environmental review or making a decision under an environmental law for a project for which a Federal agency is undertaking an environmental review.

Section (c)(1) of the bill requires the CEQ to amend its regulations to implement this Act within 180 days from date of enactment, which is an unrealistic time frame. Also, the CEQ must designate states with laws and procedures that satisfy 5 U.S.C. section 560(d)(2)(A), as added by the bill. Section (c)(2) of the bill requires Federal agencies with regulations implementing NEPA to amend such regulations within 120 days from when the CEQ amends its regulations. Again, these time frames may not be feasible.

CONCERNS WITH H.R. 4377

H.R. 4377 imposes a series of problematic review and approval requirements for agencies responsible for approving construction projects that are federally funded or that require Federal approval. The bill ignores the fact that for more than 40 years, NEPA has provided an effective framework for all types of proposed actions (not just construction projects) that require Federal approval pursuant to a Federal law, such as the Clean Water Act.⁶ To ensure compliance with NEPA, the CEQ has issued regulations and guidance that makes measures such as H.R. 4377 unnecessary. Moreover, courts have developed a large body of case law interpreting the key terms of NEPA that have guided its implementation.

Contrary to the bill's title, H.R. 4377 will lead to more litigation and delay rather than streamlining the permit approval process. It will also create a parallel universe of regulatory requirements that would pertain only to certain types of projects. Most importantly, it potentially will shift control of the approval process from Federal agencies that are charged with protecting the health and safety of our Nation's citizens to the private sector, which is committed to with maximizing shareholder interests.

I. H.R. 4377 Addresses a Largely Nonexistent Problem under NEPA

While not perfect, the NEPA framework for environmental reviews works very well. The vast majority of projects requiring Fed-

⁶ 33 U.S.C. §§ 1344 *et seq.* (2012).

eral approval go through the NEPA process in a timely manner. Of the remaining projects that actually require a formal environmental review leading to an environmental impact statement (EIS) or environmental assessment because of the complexity of the issues they present, NEPA provides flexibility to permit careful review without imposing artificial deadlines.

To the extent that H.R. 4377 is intended to reduce delays in the conduct of environmental reviews of Federal projects, it is aimed at the wrong target. Broadly speaking, H.R. 4377 attempts to short-circuit the existing environmental review processes under NEPA and its implementing regulations. As Dinah Bear, who served as the CEQ's General Counsel for 25 years during the Reagan, George H.W. Bush, Clinton, and George W. Bush administrations and who was intimately involved in the implementation of NEPA throughout the Executive Branch, observed, most delays in the environmental review processes are caused by factors other than NEPA or are justified by the nature of the project in question. Specifically, she noted:

[T]he principal causes of *unjustified* delay in implementing the NEPA review process are inadequate agency resources, inadequate training, inadequate leadership in implementing conflict dispute resolution mechanisms (both internal and interagency), and lack of coordination between Federal agencies and agencies at the county, tribal and state level, including and in particular coordinated, single environmental review processes in cases where government agencies at other levels have environmental review procedures. Causes of *justified* delay include the complexity of proposed projects and the associated impacts of them, changes in the proposed project, the extent and nature of public controversy, changes in budget and policy direction, including Congressional oversight, and new information.⁷

In a similar vein, the Congressional Research Service, in an April 2012 report on the environmental review process for federally funded highway projects, noted:

The time it takes to complete the NEPA process is often the focus of debate over project delays attributable to the overall environmental review stage. However, the majority of [Federal Highway Administration]-approved projects required limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local

⁷ *Responsibly And Professionally Invigorating Development (RAPID) Act of 2012: Hearing on H.R. 4377 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. 193 (2012) (response of Dinah Bear to questions for the record from Subcommittee Ranking Member Steve Cohen) (emphases in the original).

opposition to a project, project complexity, or late changes in project scope. Further, approaches that have been found to expedite environmental reviews involve procedures that local and state transportation agencies may implement currently, such as efficient coordination of interagency involvement; early and continued involvement with stakeholders interested in the project; and identifying environmental issues and requirements early in project development.⁸

In light of the foregoing, H.R. 4377's focus on upending the NEPA review process for construction projects is, at best, misplaced.

To assess the true scope of purported delays in the environmental review process, Representative Sheila Jackson Lee (D-TX) offered an amendment at markup that would have required the Government Accountability Office to study and report to Congress on the amount of time required to complete environmental reviews under NEPA for projects going back 4 years prior to the bill's enactment date. The amendment was defeated by an 11 to 12 vote along party lines.

II. H.R. 4377 Establishes a Parallel Regulatory Approval Scheme That Will Lead to Confusion, Delay, and Litigation

Rather than streamlining the NEPA process, H.R. 4377 only adds complication, confusion, and potential litigation to the process. NEPA establishes a flexible framework for environmental impact reviews that applies to all Federal agencies and all actions affecting the environment that require Federal approval. This panoply of Federal actions includes fishing, hunting, and grazing permits, land management plans, military base realignment and closure activities, and treaties. The changes to the NEPA review process contemplated by H.R. 4377, however, apply only to a subset of Federal activities, namely, proposed Federal construction projects, which the bill itself does not define. At the outset, H.R. 4377 could lead to litigation over whether a given project is a "construction project" subject to this new, non-NEPA review process.

Additionally, the establishment of a different NEPA review process for an undefined subset of Federal activities could lead to two different environmental review processes for the same project. Consider the construction of a new nuclear reactor facility. H.R. 4377 would apply to the building phase of the project, but not to the relicensing or decommissioning aspect of the projects or to the transportation and storage aspects of spent fuel. Thus, agencies charged with regulating the reactor would be forced to apply two distinct laws to one undertaking.

H.R. 4377 will further cause confusion by incorporating some facets of current NEPA practice, but ignoring others. It also incorporates modified versions of still other NEPA provisions. For example, new section 560(b) defines various terms, some of which are identical to how they are defined in NEPA, but other definitions in the bill differ from NEPA. Likewise, new section 560(g)(2)(B) requires consideration, under certain circumstances, of whether alter-

⁸Linda Luther, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, Congressional Research Service Report for Congress, R42479, Apr. 11, 2012, at unnumbered summary page.

natives to the project are “economically feasible,” which is a new term. As a result, courts will be required to interpret new terminology and requirements without the benefit of any precedent.

Further still, the bill would import state law into the Federal approval process. New section 560(d)(2) would direct the lead agency to adopt a document prepared for a project under state law if such law and the state’s procedure are “substantially equivalent to NEPA.” First, it is important to keep in mind that few states have meaningful environmental laws. Second, the bill requires the lead agency to adopt a state environmental review even if it was poorly executed, providing the state’s law and review process is “substantially” equivalent to NEPA.

The bill presents the potential for numerous unintended consequences. For example, section 560(e) would force more participants to be formally involved in the commenting process at the risk of being precluded from offering comments as a nonparticipating agency. This requirement could unnecessarily inflate the number of participants and thereby slow down the review process.

Rather than streamlining the environmental review process as set forth in the bill’s findings, H.R. 4377 will result in delay stemming from litigation over the numerous discrepancies between H.R. 4377 and current CEQ regulations implementing NEPA. These include new or inconsistent definitions, the expansion of a project sponsor’s authority to prepare any NEPA document rather than just environmental assessments, and more limited opportunity to evaluate alternatives.

H.R. 4377’s ultimate effect will be to both undermine longstanding and effective environmental reviews under NEPA while also potentially hampering agencies from engaging in proper environmental reviews by creating unnecessary confusion, litigation, and delay. Such delay will ultimately harm public health and safety by slowing down the approval process for any health or safety related construction projects.

In an effort to ensure that H.R. 4377 would not delay certain critical projects, two Members offered amendments that would have carved out exceptions from the bill for these undertakings. Representative Hank Johnson (D-GA) offered an amendment at markup that would have limited H.R. 4377 to those projects that CEQ determines would not have a detrimental effect on human health. This amendment was defeated by a 10 to 13 vote along party lines. Representative Jerrold Nadler (D-NY) offered an amendment at markup that would have excepted from H.R. 4377 any project pertaining to nuclear safety. This amendment was defeated by a 12 to 13 vote also along party lines.

III. H.R. 4377 Forecloses Potentially Meaningful Public and Government Input and Imposes Rigid One-Size-Fits-All Deadlines

Several provisions in H.R. 4377 will limit meaningful input from other government agencies and restrict public comment and judicial review. For example, the lead agency is prohibited from considering comments supplied by an agency if the agency did not become a participating agency pursuant to new section 560(d)(4). There are many reasons why an agency may decline to be a participating agency, but the bill cuts off the ability of such agency to provide helpful input. Similarly, the bill prevents a lead agency from con-

sidering any untimely comments, even if they provide meaningful insight.

H.R. 4377 minimizes the important role that the public plays in the NEPA process, such as participation in scoping, proposing alternatives, review of analyses and public comment, whether written or in public hearings. NEPA requires agencies to use a wide range of outreach mechanisms to solicit views by people who would be affected by the proposed project.

With respect to the bill's deadlines for projects subject to review under NEPA, the impact of these time frames in many instances may be nominal as a lot of environmental reviews do not take much time. On the other hand, there are occasionally very complicated and complex projects that require extended review periods that would exceed the deadlines set forth in new section 560(i). The bill allows these deadlines to be extended by consent of the interested parties or for good cause, which may not provide sufficient flexibility.

H.R. 4377 also restricts public participation by limiting judicial review of certain agency actions. Specifically, section 560(i)(4)(D) prohibits a court from reversing an agency's approval of a permit, license, or other similar application when such application had been "deemed" approved because of the agency's failure to meet an applicable deadline under H.R. 4377.

The NEPA process is designed to facilitate public participation and interagency cooperation in the review of potential environmental impacts of Federal actions. To highlight this fundamental purpose of NEPA, Ranking Member John Conyers, Jr. (D-MI) offered an amendment at markup that simply would have added a rule of construction to H.R. 4377 clarifying that nothing in H.R. 4377 shall be construed to change or limit any law or regulation that requires or provides for public comment or public participation in the agency decisionmaking process. The amendment was defeated by a 12 to 13 vote along party lines, an implicit admission against interest to the extent that H.R. 4377's proponents claim that it does not adversely affect the public's ability to participate in environmental reviews.

IV. H.R. 4377 Institutionalizes Bias Towards Approving an Agency's Preferred Alternative

The requirement that agencies analyze and consider reasonable alternatives that fulfill the purpose of and need for the proposed action has long been considered the heart of the NEPA process. Without a genuine consideration of alternatives, the NEPA process loses its primary value in influencing decisionmaking and becomes a process that simply analyzes the effects of a decision already made. It is important to remember that under current law, alternatives can be proposed by anyone, inside or outside the lead agency, and that agencies are obligated to analyze the alternative of not approving a proposed project just as robustly as the alternative of approving the proposed project and reasonable alternatives to it.⁹

H.R. 4377 fundamentally alters this essential requirement in at least two ways. First, subsection (g)(4) permits a lead agency to develop the preferred alternative to a higher level of detail than other

⁹ 40 C.F.R. § 1502.14 (2012).

alternatives if the agency determines that such analysis will not prevent it from making an impartial decision as to whether to accept another alternative. While this may seem fine in theory, in reality, developing one alternative to a higher level of detail than other alternatives inevitably raises the risk that the preferred alternative will be more likely to be approved than the other alternatives, including the alternative of non-approval.

Second, the various provisions that mandate “approval by default” if deadlines are not met, as well as the provision in subsection (j)(1) requiring resolution of issues that “could result in denial of any approvals,” all demonstrate a bias towards project approval. While project approval may well be the optimum result in many situations, Congress should not be weighing in across the spectrum of almost a hundred Federal agencies to dictate in advance that all proposed projects are worthy of approval, no matter what their impacts might be to the environment, to affected citizens, and to the public fisc.¹⁰

V. H.R. 4377 Is a Thinly Disguised Effort to Amend NEPA by Amending the APA

H.R. 4377 makes substantive changes to NEPA and its implementing regulations through the ruse of amending the APA. NEPA is not within the jurisdiction of the Judiciary Committee. The proponents of this bill, however, purport to amend the APA as this law is within our Committee’s jurisdiction. This is a very problematic and deceptive practice that our Committee must oppose. We must not allow the APA to operate as a back door to amending substantive law that is not within the Committee’s jurisdiction.

H.R. 4377’s proponents have never offered a reason why any of the changes to or codifications of NEPA practice and other laws contemplated in H.R. 4377 should belong in the APA, either during the CCAL hearing or the full Committee markup of this bill. Simply put, there is no substantive reason why amendments or additions to NEPA’s environmental review requirements or to requirements under other laws cannot be accomplished by amending NEPA or these other laws directly.

The APA is the “administrative Constitution” and, like the U.S. Constitution, is a broad framework that should not be tinkered with lightly. If enacted, H.R. 4377 opens the door to amending other statutes or substantive law by simply adding subchapters to the APA. This is not the purpose or function of the APA, and this Committee should guard against that temptation.

To address this concern, Representative Steve Cohen (D-TN) offered an amendment during markup that would have struck the creation of a new APA subchapter and re-stated the substantive portions of H.R. 4377 as freestanding legislative language. Representative Dennis Ross (R-FL), the bill’s sponsor, failed to even

¹⁰H.R. 4377 tilts the balance of the environmental review and permit approval processes in favor of project sponsors in other ways too. For example, new section 560(i)(4)(C) would deem permits or licenses approved if an agency does not meet certain deadlines under the bill, rather than allowing agencies the time necessary to make an informed decision on a permit or license application. Moreover, the bill prohibits a court from setting aside such action pursuant to new section 560(i)(4)(D)), denying affected parties the right to challenge a “deemed” approval and placing the interests of private sector actors above those of other stakeholders in the environmental review and permit approval processes.

address our concern that H.R. 4377 misuses the APA.¹¹ Nevertheless, this amendment was defeated by a 9 to 10 vote along party lines.

CONCLUSION

H.R. 4377 is based on the unproven assumptions that there are unwarranted delays in the environmental review process required by NEPA and in permit approvals and, to the extent that there are such delays, that NEPA is to blame for such delays. The bill also will result in confusion, litigation, and delay by creating a parallel environmental review process for an ill-defined subset of Federal activities; foreclose potentially meaningful input into the environmental review process from agencies and the public; institutionalize a bias in favor of approving an agency's preferred alternative; and inappropriately change substantive law by amending the APA.

For the foregoing reasons, we strongly urge our colleagues to oppose H.R. 4377.

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¹¹ Unofficial Tr. of Markup of H.R. 4377, the Responsibly And Professionally Invigorating Development Act of 2012: Markup of H.R. 4377 Before the H. Comm. on the Judiciary, 112th Cong. 157 (2012).