

TESTIMONY BY SCOTT SLESINGER,
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FOR THE HEARING ON H.R. XXXX, THE “RESPONSIBLY AND
PROFESSIONALLY INVIGORATING DEVELOPMENT ACT OF 2013”

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL
AND ANTITRUST LAW OF THE COMMITTEE ON THE JUDICIARY

JULY 11, 2013

July 11, 2013
Room 2141 Rayburn House Office Building

Thank you for the opportunity to testify today. My name is Scott Slesinger, and I am the Legislative Director for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by this bill.

Many of the problems the environmental community sees with this bill were detailed by Dinah Bear in her testimony on a similar bill in the last Congress before the Subcommittee on Courts, Commercial and Administrative Law. I have attached her testimony as her comments are just as relevant this year. I will limit my testimony to some major points, address some of the myths surrounding NEPA and explain why some of this bill's proposed changes to the NEPA process will likely encourage litigation and delay projects.

First and foremost, I would like the Committee to appreciate why this law is so important. With an emphasis on "smart from the start" federal decision making, the National Environmental Policy Act (NEPA) protects our health, our homes, and our environment. Passed by an overwhelming bipartisan majority and signed into law by President Nixon, NEPA has empowered the public, including citizens, local officials, landowners, industry, and taxpayers, and demanded government accountability for more than 40 years. The law was prompted in part by concerns from communities whose members felt their views had been ignored in setting routes for the Interstate Highway System, on which work began in the 1950s.

NEPA is democratic at its core. In many cases, NEPA gives citizens their only opportunity to voice concerns about a federal project's impact on their community. When the federal government undertakes a major project such as constructing a dam, a major highway, a power plant, or if a private entity needs a permit so it can pollute the air or water, it must ensure that the project's impacts – environmental and otherwise – are considered and disclosed to the public. And because informed public engagement often produces ideas, information, and solutions that the government might otherwise overlook, NEPA leads to better decisions – and better outcomes – for everyone. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and cultivating better projects with more public support. Our website <http://www.nrdc.org/legislation/nepa-success-stories.asp> highlights NEPA success stories that prove this point. Thanks to this law, tens of thousands of Americans have participated in important federal decisions.

Implementation of the NEPA process is nowhere near perfect. Many agencies have decimated their NEPA staff, leading to an over reliance on consultants instead of conducting analyses in-house. Since contract oversight requires ongoing agency approval, such statements are often delayed. Significant improvements to the process could be gleaned by providing adequately trained staff to handle this critical law. Inadequate environmental impact statements (“EISs”) are challenged for not adhering to the law, further delaying the process. However, unrealistic and arbitrary deadlines, particularly for the largest projects, could end up dragging it out even more. Only the largest projects are subject to the requirements for full environmental impact statements. For example, of the hundreds of transportation projects, the Department of Transportation estimates that only 3% are subject to full NEPA review.

Projects like the Cape Wind offshore wind project –the first to be approved in the United States – have experienced delays, but these largely are due to the efforts of well-funded NIMBY opposition groups. NRDC is a strong supporter of the Cape Wind project. The NEPA process for the Project ensured that there was a full and transparent disclosure of the Project’s impacts and benefits, allowing NRDC and many other environmental groups to back the Project. While we understand Cape Wind’s frustration, gutting NEPA is not the answer.

During consideration of the 2013 Water Resources Development Act, there has been much discussion about delayed projects handled by the Corps of Engineers. But the reason for most delays in Corps of Engineers projects is not NEPA – it is a lack of funding. For instance, the Corps was funded in the House appropriations bill this year at \$4.65 billion, but the backlog of congressionally approved projects is about \$60 billion and this year’s Senate bill authorizes approximately \$12 billion more. Under Section 560(f) of the RAPID Act, a local project sponsor could force the Corps to immediately begin the NEPA process and finish in the timeframe demanded by the bill even if the project is unlikely to be funded for another generation. With sequester cutting agency budgets, should private entities be able to demand that the federal government waste its scarce resources on studies for projects unlikely to be funded instead of carrying out shovel-ready projects? Secondly, the EISs undertaken under this bill could easily be outdated by the time the projects find appropriation dollars. Imagine a flood control project EIS done in 2010 for Staten Island. Wouldn’t the experience of Superstorm Sandy make the original analysis useless? When speaking to project sponsors, it has been very easy to blame delays on rules and regulations, environmentalists, and NEPA but the real delay is more likely inadequate funding for projects that have been authorized.

Recent investigations by the Congressional Research Service underscore both the genesis of delays in factors other than federal NEPA processes and how better resource allocation at a federal agency can expedite decision making. In relevant part summary, the report found that:

“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 FHWA-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 opposition to a project, project complexity, or late changes in project scope¹.”**

The Chamber of Commerce website of Projectnoproject.com bears this out. It purports to offer evidence in support for amending NEPA, but actually includes very few stories that implicate NEPA as the cause of project cancellation or even delay. Far more often than not, the cases attribute delays and cancellations directly to state regulatory hiccups and funding shortfalls. County ordinances, state government veto threats, and local zoning issues are not part of the NEPA process. When investigating sources of delay in the transportation context, the most recent Congressional Research Service report noted that the available data “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.” The report went on:

“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; an identifying environmental issues and requirements early in project development.”ⁱⁱ

One of the most overreaching subsections (Section 560(h)(4)(C)) in this bill allows the automatic approvals of permits and licenses under the Clean Water Act, the Clean Air Act and even the licensing requirements under the Atomic Energy Act if the deadlines in the bill are not met. This subsection would automatically approve any permit or license related to a major federal if the deadlines, which are as short as one year, are not met. For all practical purposes it could remove Nuclear Regulatory Commission (NRC) authority over the approval of most of its licensing activities, including licenses of nuclear power reactors, waste management sites, nuclear fuel facilities, and waste disposal facilities. It would automatically lead to the approval of any selected geological disposal site for the disposal of spent nuclear fuel and high level radioactive waste, before the safety review is completed. At best it would short circuit the safety and nonproliferation reviews of a wide variety of very hazardous nuclear activities in the civil and national security/nuclear weapons areas.

The reason for delays could be staffing, the size of the project or administrations wanting to sit on their hands to get automatic approvals. Budget limitations could also delay actions, particularly in this era of the budget sequester.

In addition, the right to challenge these automatic approvals is suspect. This provision states that a “court may not set aside such agency action by reason of that agency action having occurred

under this paragraph [deem approval after the deadline is missed].” For instance, if the Corps just doesn’t do anything with a dredge and fill permit application by the deadline, regardless of the reason, it is automatically approved. A downstream entity – whether a local government, business, or citizen group – could sue because the Corps did not undertake a public interest review or because there were less damaging alternatives that avoided impacts to aquatic systems. The Corps could argue the reason the record does not contain any information on those things is that this permit was automatically approved. There is no record to contest that the Corps was arbitrary and capricious. We urge the Committee to drop these provisions.

Section 560(g) of the bill deals with the important issue of alternatives analysis. The analysis of reasonable alternatives to achieve an agency’s purpose and need in moving forward with a proposed action is, by definition, the heart of the environmental impact statement process. This bill limits consideration of alternatives to those that could be carried out by the project sponsor. Linking alternatives analysis to one particular proponent could undercut the private sector competitive process. In a number of situations, an opportunity for development of a particular type of project is apparent to a number of private sector entities. An agency may receive multiple applications for a transmission line, an energy project, or some other sort of project within roughly the same timeframe. Under H.R XXXX, if a project sponsor is a bridge builder, a tunnel is not a possible alternative and vice versa. In those circumstances, a lead federal agency should be able consider the needs and requirements of both the public in the context of national policy and all of the applicants.

Several sections intended to speed up the NEPA process are of questionable benefit. Section 560(e)(8) does not allow agencies to comment on areas outside their area of expertise. For instance, in comments on expansion of the Palmdale Airport near the Edwards Air Force base, the Air Force expressed concerns about the airport's impact on, groundwater recharging, and landfill capacity. This subsection would have prevented the Air Force from submitting these comments.

The deadlines in the bill affect the most complicated and unique projects. Having these strict deadlines will undercut the public's ability to have a say on major federal spending. EISs can be detailed and technical. Under this bill, all the documents must be limited to one document. Requiring the public to digest such documents and comment in as few as 30 days essentially cuts the public out of the process. Consider a flood control project that benefits a particular community. Shouldn't the community that will be impacted by these diverted waters have a fair chance to comment?

Subsections 560(e)(3) and (4) are also questionable in that they undercut our federalist system. These provisions seem to preclude any entity, including agencies, governors, or local governments that do not become participating agencies from "submitting comments on any NEPA document prepared for that project or taking any measures to oppose, based on the environmental review, any permit, license, or approval related to that project." The language is unclear but should be clarified that such agencies foreclosed from participating because they did not become participating agencies should not include non-federal levels governmental entities. To do so would undercut the ability of our local and state governmental leaders from protecting their citizens and their states. This radical reduction of state and local rights can be fixed by clarifying that the word "agencies" does not include non-federal entities.

NEPA is an important statute that is made incredibly complicated by this bill. This bill would overturn or conflict with many provisions adopted through the 2012 NEPA transportation legislation. Additionally, this bill would apply in addition to the existing and contradictory requirements of NEPA requirements that are now not part of the APA, complicating the process and likely leading to delays, litigation, and uncertainty.

Members of this subcommittee heard from my colleague, David Goldston on Tuesday regarding the Regulatory Accountability Act (RAA). In that bill, the intent is to slow down the regulatory process. The RAPID Act is essentially the opposite of the RAA. In the RAA, the number of alternatives to consider are multiplied, and the grounds for appeal are increased; additional analysis of impacts are required, making the implementation of the country's laws passed by Congress much more difficult—if not impossible. This bill does the opposite. Alternatives are limited; deadlines force action or default to moving forward. Because permit approvals and EISs are thought to delay construction projects, the RAPID Act makes it more likely that ill-conceived projects and unnecessarily expensive projects will move forward without a balance between the bias of the lead agency and the views of those affected by the project. We believe that such a cost is too high.

ⁱ The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress”, CRS 7-5700, R42479, April 11, 2012.

ⁱⁱ Ibid.

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

HEARING ON H.R. 4377 - THE RESPONSIBLY AND PROFESSIONALLY
INVIGORATING DEVELOPMENT ACT OF 2012 (The "Rapid Act")

April 25, 2012
Room 2141 Rayburn House Office Building

Introductory Remarks

Thank you for the invitation to appear before the Subcommittee on Courts, Commercial and Administrative Law in regards to H.R. 4377, The Responsibly and Professionally Invigorating Development Act of 2012. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by H.R. 4377.

By way of background, the Council on Environmental Quality (CEQ) is the agency established by Congress with responsibility for overseeing the National Environmental Policy Act, the subject of much, although by no means all, of H.R. 4377's focus. I was asked to serve as the Deputy General Counsel for the Council on Environmental Quality (CEQ) with President Reagan's team in 1981. In 1983, I was appointed as General Counsel, a non-career position. In that role, I had responsibility for oversight of agency implementation of NEPA. I remained in that position throughout the remainder of President Reagan's tenure and that of President George H.W. Bush. I resigned from CEQ in October, 1993 and resumed responsibilities as General Counsel in January, 1995. I remained at CEQ during the Clinton and George W. Bush administrations until the end of calendar year 2007, when I retired from federal service. My husband and I moved to Tucson, Arizona last year and I continue to be active in the field of environmental law generally and NEPA specifically.

As this bill is considered, it is important to recall the purpose of the NEPA process. NEPA does not regulate the private sector. Rather, it informs government agency decisionmaking, with the help of public involvement. The NEPA process helps to ensure that agency employees "look before they leap" so that federal dollars are spent wisely through the identification of less controversial, feasible and less costly alternatives. It is also the framework for identifying appropriate mitigation measures that could resolve problems for both the project proponent and the public resources during and after project implementation. It provides an important opportunity – often the only opportunity – for the public to influence federal agency decisionmaking.

While someone who reads H.R. 4377 quickly may assume that the bill is directed only at environmental laws, principally NEPA, the bill's explicit deadlines for decisionmaking as well as for environmental review and compliance processes implicitly amend dozens of unidentified authorizing statutes for every federal agency in the executive branch. It approaches changes to environmental law requirements by relying on what is generally referred to as the NEPA process and through required amendments to CEQ's regulations implementing the procedural provisions

of NEPA (40 C.F.R. Parts 1500-1508). All other agencies and departments would be required to undertake rulemaking to conform to the requirements of the bill, for changes to NEPA procedures, other federal environmental laws, their authorizing legislation, and for some agencies, their administrative appeals processes.

I understand that this legislation represents the frustrations of those who perceive environmental laws and regulations to be the major cause of unwarranted delays in approval of construction projects that require federal approvals or for which federal funding is sought. Environmental review processes are not always conducted perfectly, from anyone's perspective. However, the role of environmental regulation in project delays is often taken out of context and overplayed in comparison to other causes of delay. As a result, proposed solutions often fail to address the real causes of those delays that really are unnecessary and related to environmental issues. A major premise of this bill appears to be the belief that foot-dragging or recalcitrance by government agencies is the principal cause of delay in achieving compliance with environmental laws and reaching decisions. The bill addresses this premise through provisions that in some instances eviscerate the line between the role of government and private sector project proponents, require federal agencies and federal courts to ignore information, and mandate a "one size fits all" solution to the perceived cause of delay. It is not clear from the bill that the relationship between provisions in this statute and the other laws it affects has been thought through. A consistent theme in the bill is that the foreordained outcome of environmental review and compliance processes should be the rapid approval of all proposed projects, a premise that is inconsistent with law in some cases and good public policy as an across-the-board proposition.

Causes of Delay

While the causes of project delay have not been systematically documented throughout the government for all actions, the body of information available has improved greatly since GAO noted in 1994 that there was no repository of information on highway projects and their environmental reviews.¹ In particular, some valuable analysis has been done on this issue in the context of highway construction. Since at least the mid-1990's, two Congressional agencies, the General Accounting Office/General Accountability Office (GAO), and the Congressional Research Service (CRS), have prepared a series of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally and NEPA specifically to decisionmaking timelines. Some of this research is relevant to construction in other federal contexts, but certainly, this type of research is needed more broadly if agencies and/or legislators are going to be able to formulate successful approaches to reducing delays.

By 2002, improvement in baseline data and more specific identification of factors affecting completion time was available, concurrent with the implementation by both federal and state highway agencies of initiatives to improve the efficiency of environmental review processes. Significantly, these initiatives included the use of interagency funding agreements to

¹ "Highway Planning: Agencies are Attempting to Expedite Environmental Reviews, but Barriers Remain", GAO/RCED-94-211, p. 7.

hire additional staff at state and federal environmental agencies.² This was a very important move, confirmed by a 2003 GAO report that found that 69% of transportation stakeholders reported that state departments of transportation and federal environmental agencies lacked sufficient staff to handle their workloads.³ While a similar analysis has not been done for other departments and agencies, based on my observations of trends in agency planning and compliance budgets, I believe that similar or much more severe staff shortages exist for many programs.

Recent investigations by CRS underscore both the genesis of delays in factors other than federal NEPA processes and how better resource allocation at a federal agency can expedite decisionmaking. Three weeks ago, CRS issued a report on the environmental review process for federally funded highway projects. In relevant part summary, the report found that:

“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 FHWA-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 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; an identifying environmental issues and requirements early in project development.”⁴

Importantly, this report points out that while much work has been done to document delays and improvements in timelines related to highway construction, very little work has been done to understand why certain types of delays occur. One government study suggested that a major affect was actually external social and economic factors associated with different geographic regions of the country.⁵ As noted above, in my view, staff shortages clearly have been a major factor and the highway department funding of staff has, I understand, improved the situation in that area. But little analytical work has been done regarding federally assisted or funded construction that takes place in other contexts.

Project Sponsor Responsibilities

² “Highway Infrastructure: Preliminary Information on the Timely Completion of Highway Construction Projects”, GAO-02-1067T.

³ “Highway Infrastructure: Stakeholders’ Views on Time to Conduct Environmental Reviews of Highway Projects”, GAO-03-534, p. 5.

⁴ “The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress”, CRS 7-5700, R42479, April 11, 2012.

⁵ *Id.* at p. 35.

Now let me turn to the Responsibly and Professionally Invigorating Development Act of 2012. By definition, “project sponsors” for purposes of this bill includes both public and private entities as well as public-private entities.⁶ “Projects” are defined as construction activities “undertaken with Federal funds or that require approval by a permit or regulatory decision issued by a Federal agency.”⁷ The first provision of the bill following the definitions articulates the role of project sponsors in the NEPA process. “Upon the request of any project sponsor”, the project sponsor may prepare any NEPA document (including an environmental impact statement) in support of its proposal. § 2(c)(1) The provision goes to state that in such cases, the lead agency must furnish oversight and independently evaluate, approve and adopt the document prior to taking action based upon it.

This blurring of the distinction between government and private sector roles in the context of a process designed to inform government action is extremely troubling. This is particularly true because projects that require an environmental impact statement (EIS) are those that by definition may have genuinely significant impacts. Government agencies, whether at the federal, state, tribal or local level, are structured to represent the public and are accountable to the public through a variety of mechanisms. Corporations have legitimately different responsibilities to their shareholders. Both the public at large and corporate shareholders have the right to expect these respective sectors to behave in ways that are responsible about those distinctions.

Project sponsors, whether governmental or private, already have a central role in the NEPA process. Many, if not most, proposed actions analyzed under NEPA are, of course, initiatives of the lead agency itself. State agencies proposing a project may prepare EISs and other NEPA documents under conditions set out in Section 102(2) (D) of NEPA. State, local and tribal government project proponents may become joint lead agencies with federal agencies when they have similar environmental review requirements, or cooperating agencies when they have jurisdiction by law over some component of the project or special expertise regarding any environmental impact associated with one or more of the alternatives to be analyzed. 40 C.F.R. §§ 1501.5(b), 1506.2, 1500.5(b), 1502.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a) (1), 1503.1, 1503.3, 1506.3(c), 1506.5(a), 1508.5. Private sector project sponsors may submit whatever information they choose to the lead agency and to prepare environmental assessments (EAs). 40 C.F.R. § 1506.5. Due to inadequate agency budgets, project sponsors also often choose to pay for preparation of an EIS by a consultant or contractor that is chosen by and works under the direction of the lead agency to expedite EIS preparation.

However, the law has always wisely drawn a line between private sector and public project proponent involvement when the proposed action is one that triggers the statutory requirement for a “detailed statement” for proposed actions significantly affecting the quality of the human environment, that is, an EIS. In that situation – a very small percentage of the thousands of actions falling under NEPA annually – the distinction between private sector project proponents and government agencies is drawn more sharply. Private sector project proponents are not permitted to prepare EISs. Any contractor selected by the agency to prepare the EIS must execute a disclosure statement prepared by the lead agency specifying that it has no

⁶ Section 2(b) (12).

⁷ Section 2(b) (11).

financial or other interest in the outcome of the project. 40 C.F.R. §1506.5(c). Obviously, a private sector project sponsor inherently has a financial interest in the project.

The public is already concerned about the integrity of the process, especially when it knows that the proponent is funding preparation of the EIS. The provisions in this section intended to be safeguards regarding government agency oversight and approval of NEPA documents prepared by proponents are not sufficient to ensure that integrity and, in fact, are weaker than those already required under NEPA for state project proponents.

This extremely serious concern is exacerbated in the next provision of the bill, Section 2(c)(2), that authorizes lead agencies to accept “voluntary contributions of funds from a project sponsor” for purposes of either undertaking the NEPA process or making a decision under another environmental law for the sponsor’s proposed project. Under this provision, corporate money could be used to pay for the preparation, oversight and approval of a NEPA document, a Section 7 consultation under the Endangered Species Act, a Clean Water Act permit, etc. These are inherently government functions that benefit the public at large (as well as the proponent) and should be financed with government funds rather than from private sources that raise the specter of a conflict of interest.

Limitation on Number of NEPA Documents

Another major concern with this legislation arises from the restrictions found in Section 2(d) regarding the number of EISs and EAs. The bill would limit an agency to “not more than 1” EIS and EA per proposed project and “no Federal agency responsible for making any approval for that project may rely on a document other than the environment document prepared by the lead agency.” This section is a solution in search of a problem, since agencies generally do not seek out opportunities to prepare additional EISs. Indeed, decisions to prepare a revised or supplemental EIS or additional EA are usually painful ones reached after much internal discussion within an agency. However, the fact is that sometimes NEPA documents prove to be seriously inadequate and must be revised or supplemented to remedy those inadequacies. And the fact remains that sometimes there are major new developments, whether of a legal, policy or factual nature, that require additional analysis. An artificial cap to the number of NEPA documents that can be prepared will not change these facts; it will simply put the analyses out of sync with the needs of decisionmakers and the public. And because, under the bill, all federal agencies would have to rely on an EA or EIS for compliance with more than 30 other federal environmental laws, every document needed for compliance would now have to be included in the NEPA document, thus lengthening considerably every one.

It is unclear how this provision would be interpreted in the context of programmatic EISs and tiering. For example, every military installation prepares an installation plan under the Sikes Act. That installation plan, which is the subject of NEPA compliance, may approve future construction of a major building complex or weapons testing area. Several years later, the installation may need to do another EIS focused specifically on that construction. It is not clear whether the installation would be prohibited from doing the second EIS under this provision.

Similarly, this limitation would create confusion and litigation issues in the context of judicial remedies. A typical remedy when a federal court has determined that a finding of no significant impact was inadequately justified is the preparation and issuance of additional NEPA analysis addressing the deficiencies identified by the court. It is not clear whether this provision eliminates the judicial branch's ability to provide agencies with another opportunity to comply with the law by issuing a new EA or EIS. Taken literally, this provision could require that a defective EA be replaced only with a full EIS, or if both an EA and an EIS already addressed a project, could leave a court with no remedy other than to enjoin a federal agency from proceeding with the proposed action at all, because there was no ability to undertake further compliance.

Adoption of State Documents

The bill also provides that "upon the request of a project sponsor" (public or private), a lead agency must adopt a document prepared under a state environmental impact assessment law if the state law and procedures at issue are "substantially equivalent to NEPA".⁸ CEQ would be given 180 days to designate which state environmental impact assessment laws meet that criterion, along with undertaking additional rulemaking to conform to the requirements of this bill in the same period.

Coordination between federal agencies and states with environmental impact assessment laws is extremely important. Clearly, the preferred situation for both the proponent and the public is for both federal and state laws to be complied with through a single process. As a result, the CEQ regulations already provide for joint planning processes, joint environmental research and studies, joint public hearings (except where otherwise required by another law), joint environmental assessments and joint environmental impact statements. In these cases, the appropriate state agency may be a joint lead agency. Where state laws or local ordinances have EIS requirements in addition to but not in conflict with those in NEPA, federal agencies are instructed to cooperate in fulfilling those requirements as well so that one document will comply with all applicable laws. 40 C.F.R. 1506.2. This approach under existing law can work very well, and I have seen many examples of joint federal/state environmental review documents. Further, as mentioned earlier, state agencies are permitted under NEPA to take responsibility for the preparation of an EIS under NEPA. Additionally, I believe some states have provisions in their state laws to allow the adoption of NEPA documents to support their own requirements under certain circumstances. These approaches, including a state legislature's decision to allow the adoption of documents prepared under the auspices of NEPA, are, in my view, much more workable and likely to expedite project decisionmaking successfully and without intruding on state prerogatives rather than requiring CEQ, an agency in the Executive Office of the President, to interpret the law, regulations, guidance and case law of states and to make regulatory judgments about them.

I would further note that this section of H.R. 4377 provides for the possibility of a federal agency supplementing a state environmental review document, but only if there are significant new changes or new circumstances. The quality and adequacy of documents vary, whether under federal, state or municipal environmental review procedures, and this construct omits the

⁸ Section 2(d) (2).

very provision in the CEQ regulations giving agencies discretion to supplement a NEPA document for other reasons, such as inadequacy of an analyses for a particular issue. Further, the provision reduces the current review and comment period from 45 to 30 days, a recipe, in complex projects, for inadequate public understanding of and participation in public agency decisions.

The provision for adoption of state documents in this section also appears to circumvent the requirements for adoption of federal documents set forth in the CEQ regulations. As I read the legislation, the only requirements associated with adoption of a state document are that the project sponsor request it and that CEQ would have designated the particular state procedures to be “substantially equivalent” to NEPA. Thus, apparently, the federal agency would have no responsibility for independent review and evaluation, other than determining whether there are new circumstances or new information that would trigger the need to supplement the document, and no requirement for recirculation. 40 C.F.R. §1506.3.

Role of Participating Agencies

“Participating agencies” would be, in many instances, the same as cooperating agencies under existing law; indeed, any participating agency that would be required to adopt a document under this bill would inevitably also be a cooperating agency with jurisdiction by law under the NEPA regulations. However, the intent of the “participating agency” category is to include any agency, at least at the federal or state level. Unlike the CEQ regulations, there are no references to county and tribal governments that “may have an interest in the project”.

Under Section 2(e) (8) of the bill, each participating agency is limited in its comment to those areas where it can point to statutory authority pertaining to the subject of its comments. The lead agency is directed not to act upon, respond to or include in any documents any comment submitted by an agency that it deems to be outside of the authority and expertise of the commenting agency. This is a remarkable direction to the lead agency to put blinders on instead of using common sense and judgment. In my experience, agencies typically do focus on those subject areas within their authority and expertise and they certainly are accorded more deference by the lead agency and by the judiciary for comments reflecting that expertise. However, currently, lead agencies may read and consider other comments, if there are any such comments, just as they read, review and respond to comments from the project proponent, members of the public, communities, county commissioners and other affected parties who do not have statutory authority or academic credentials in a particular discipline. Ironically, this provision puts federal (and possibly state agencies) in a class distinctly behind an individual who has no expertise, let alone authority, on a particular matter but whose comments in their totality require a response from the lead agency.

Any agency that fails to respond to an invitation to be a participating agency within 30 days would be deemed to have declined the invitation and is thus precluded from submitting comments on or “taking any measures to oppose the project; any document prepared under NEPA for that project; and any permit, license, approval related to that project.” The lead

agency is instructed to disregard and not respond to or include in any NEPA document any comment by an agency that has declined an invitation or designation by the lead agency to be a participating agency. It is not clear how the prohibition against an agency “taking any measures to oppose the project” would be interpreted. Federal agencies are already barred from lobbying for or against government action. CEQ’s regulations have a more narrowly circumscribed provision, to deal with the circumstance of an agency declining an invitation to become a cooperating agency. They preclude an agency with jurisdiction by law from declining to be a cooperating agency and permit other agencies to decline degrees of involvement in an action when they are unable to assume particular responsibilities of a cooperating agency. 40 C.F.R. § 1501.

The bill also mandates concurrent reviews by all federal agencies, so that each federal agency must carry out their obligations under applicable law in conjunction with NEPA. On its face, this is similar to the existing provision in the CEQ regulation that, “To the fullest extent possible, agencies shall prepare draft EISs concurrently with and integrated with environmental impact analyses and related surveys [omitting examples and citations] and other environmental review laws and executive orders.” 40 C.F.R. § 1502.25(a). CEQ has worked very hard over many administrations to try to achieve this goal as have several other federal agencies. However, declining agency budgets make this very difficult to achieve and many agencies defer initiation of processes under other laws until the NEPA process is partially and completely concluded, in order to capitalize on the lead agency’s NEPA documentation.

Alternatives Analysis

Section 2(g) of the bill deals with the important issue of alternatives analysis. The analysis of reasonable alternatives to achieve an agency’s purpose and need in moving forward with a proposed action is, by definition, the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14. Without a robust alternatives analysis, this process would simply document the environmental effects of a decision rather than informing the decision. In my experience, by far the most important achievements of the NEPA process have come through alternatives analysis. The requirement in this section to afford an opportunity for involvement by cooperating agencies in determining the range of alternatives to be considered is positive and consistent with current law and guidance.

However, Section (g) (2) on the range of alternatives is confusing and imprudently restricts alternatives. In part, this section states that there is no requirement to evaluate any alternative identified but not carried forward to detailed evaluation in a NEPA document “or other EIS or EA”. That is as factually correct statement so far as it goes under current law, but only to the extent that the lead agency’s decision not to carry an alternative forward for detailed evaluation has a rational basis and is not deemed to be arbitrary and capricious. As a result, the bill’s provision creates confusion about whether it is intended to change current law in some manner. Secondly, this section states that “cooperating agencies shall 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 are technically and economically feasible.” To start with, it is typically the lead agency, not cooperating agencies that evaluate alternatives (as opposed to identifying them). Alternatives must reflect the agency’s purpose and

need and it is already the law that it is the lead agency that determines that purpose and need⁹. However, whatever agency evaluates alternatives for a proposed project, those alternatives should not be restricted to the needs of one particular project proponent only, although the applicant's requirements should certainly be part of the analysis. In the words of CEQ's guidance on this point:

“In determining the scope of alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Alternatives must be reasonable alternatives, including those that are *practical* or feasible from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant.” *Forty Most Asked Questions, Id.*, Q. 2a.

The proponent's needs must be considered in shaping the alternatives analysis and the proponent's proposal, of course, usually the proposed action. But agencies are not free under current law to exclude all other considerations. The project proponent is involved with a federal agency in the first place because Congress found a sufficient national interest in funding, regulating or permitting a particular category of activities to mandate a federal role in the proposed action. That national interest – the public's interest – needs to be at the table as agencies and the public identify potential alternatives.

Further, linking alternatives analysis to one particular proponent could undercut the private sector competitive process. In a number of situations, an opportunity for development of a particular type of project is apparent to a number of private sector entities. An agency may receive multiple applications for a transmission line, an energy project, or some other sort of project within roughly the same timeframe. In those circumstances, a lead federal agency must consider the needs and requirements of both the public in the context of national policy and all of the applicants.

Coordination and Schedules for Compliance with Environmental Laws

Section 2(h) of the “Responsibly and Professionally Invigorating Development Act” deals with coordination and scheduling. The first part of this section is similar to but somewhat inconsistent with CEQ's regulations on establishing time limits. CEQ's regulations provide that the agency must set time limits if an applicant requests them and may set time limits if a state or local agency or member of the public requests them, provided that the limits are consistent with the purposes of NEPA and other essential considerations of national policy. 40 C.F.R. 1501.8. H.R. 4377 mandates the development of a schedule for all construction projects. Both the CEQ regulations and the bill set forth factors to be considered in determining time limits, but H.R. 4377 omits several factors identified in the CEQ regulation, among them the degree of public need for the proposed action (including the consequences of delay and the degree to which relevant information is known, and if not known, the time required for obtaining it). H.R. 4377 then caps whatever schedule the lead and participating agencies might develop at no longer than

⁹ See Correspondence between Secretary of Transportation Norman Mineta and CEQ Chairman James Connaughton at <http://www.dot.gov/execorder/13274/impsched/letters/minetamay6.htm> for a discussion of the roles of lead and cooperating agencies with regard to developing a highway's purpose and need.

two years for a project requiring an EIS or one year for preparation of an EA. Agencies are allowed some flexibility in extending the deadlines but may not extend the deadline for an EIS by more than one year or for an EA by more than 180 days.

These time periods are within the realm of the reasonable in many cases if, importantly, an agency has adequate reasons to implement NEPA and all other environmental laws that may be implicated in a proposed action. However, there are some proposals subject to NEPA of extraordinary complexity or proposals that are affected by events quite outside of the agency's control. For example, some proposals subject to NEPA are affected by complex negotiations between the United States and foreign nations or by changes in Congressional direction. Some proposals may deal with cutting edge science or new information of great import. Some proposals may be significantly changed in the course of environmental review, because of the analysis or outside events. Agencies should not be forced to cut off analysis and public involvement where events outside of their control or the nature of a complex project warrant it. Otherwise decisionmaking will suffer, and in some cases could result in forced denials when full documentation would have facilitated approval.

Congress must consider the implications of this broadly, not just for one particular type of project. For example, this bill would govern the granting of a license for a nuclear power plant. Imagine, for instance, that the NRC has completed the NEPA process for the construction of a new nuclear power plant, or the relicensing of an existing one, and is about at the end of the allowed statutory time, including the one permitted extension. Then a major accident happens somewhere in the world. The Commission is asked to send a team of experts to the site to help with the immediate situation and another team a bit later to help evaluate the causes of the accident. The Commission may rationally wish to wait for a period of time before going forward with decisions on a plant, especially if early indications are that there are technical similarities in the plant that experienced an accident and the plant that is the subject of the imminent NRC decisionmaking. If it felt obliged to comply with the two year timeline, it would be required to make a decision without the information that most Americans would expect and want the NRC to have at its disposal in order to safeguard human health and the human environment from potentially disastrous consequences.

Schedule for Agency Decisionmaking

Section 2(i)(4) restricts all other federal agency decisionmaking related to construction projects. For agencies that are required to “approve, or make a determination or finding regarding a project prior to a record of decision for an EIS or a finding of no significant impact, an agency must make that decision no later than 90 days after the lead agency publishes a notice of availability of a final EIS or issuance of other final environmental documents “or no later than such other date that is otherwise required by law, whichever comes first.” The bill goes on to provide that “notwithstanding any other provision of law”, an agency must make a final decision on whether to approve a proposed project within 180 days after the execution of a record of decision or finding of no significant impact, unless mutual agreement is reached with “the federal agency, lead agency and the project sponsor” or when extended for good cause by a federal agency for no longer than one year.

The wording in this section is puzzling because if an agency has broad approval authority over a project (as opposed to making a determination or finding) it should already be the lead or joint lead agency and would be issuing a Record of Decision or other decision document¹⁰. If an agency is a cooperating agency because it has jurisdiction by law to issue a required permit associated with a project that requires an EIS, that cooperating agency will also sign a Record of Decision or, in the case of a project covered by an EA, another decision document.

To the extent that the provision's intent is to cover lead agencies, it impinges on the authority of agencies under countless non-environmental laws and arguably is incompatible with the constitutional authority of the President to manage the executive branch. There are a number of factors affecting decisionmaking that are outside of an agency's control. For example, the past few Presidents, both Republican and Democrat, coming into office have put a hold on entire categories of actions, including some requiring compliance with NEPA, so that they can evaluate the work of their predecessor and give their own direction. Foreign policy and/or national security concerns may affect some proposed decisions. Further, NEPA does not capture the entire universe of considerations regarding a federal agency's decision; indeed, that is precisely why the record of decision is not defined in the CEQ regulations as an environmental document. Considerations having nothing to do with environmental impacts and not analyzed in an EIS or EA or under other environmental laws often lawfully guide the final agency decision. Under this provision, an agency decisionmaker is faced with either disapproving a project or approving it under circumstances that may be arbitrary and capricious.

If a federal agency does not act upon a project within these timeframes, the project "shall be deemed approved by such agency and such agency shall issue any required permit or make any required finding or determination authorizing the project to proceed within 30 days" of the deadlines set forth in this act. That automatic approval is then shielded from judicial review.

To the extent that this section is not meant to refer to federal agencies that are signing a Record of Decision or other decision document but rather refers to other federal agencies that have legal responsibilities for making determinations or findings, the section is still confusing. Most findings or determinations do not "authorize" the project to proceed; in the environmental context, they provide information about the impacts of proceeding that have legal consequences but are not the kind of go/no go decision that a permit or license represents. Possibly the result would be for such agencies to issue a finding or determination reflecting the administrative record to date and then conclude that this section requires them to issue that record.

¹⁰ Note that while a federal agency may choose to combine a decision document with a Finding of No Significant Impact (FONSI), a FONSI by itself is not a decision document on a project, but rather a finding as to the level of environmental impacts anticipated by the agency. Agencies may and usually do issue a separate decision document based on the underlying statutory authority that authorizes whatever permit or license has been requested.

Issue Identification and Dispute Resolution

Section 2(j) deals with issue identification and resolution of disputes, two other important topics within the context of environmental review. Agencies are directed to work cooperatively to identify resolve issues that could delay completion or environmental review. This direction is consistent with the entire thrust of the NEPA process. But the provision goes on to direct agencies to resolve issues that could result in the denial of any approval required for a project. It provides the outlines of a dispute resolution process that would culminate in notification of a dispute to heads of participating agencies, the project sponsor and CEQ “for further proceedings in accordance with Section 204 of NEPA.”

A troubling aspect of these provisions is the language used that suggests that the only acceptable outcome of the NEPA process and other environmental laws is approval of a project. In fact, for prudential reasons agencies are required to analyze the “no action” alternative and rarely, but sometimes, choose that alternative. It is appropriate to seek resolution of disputes about the analysis and the process but it is inappropriate to tilt the decisionmaking process across the board in favor of wholesale approval. Not every proposed project is of equal value and worth and sometimes it is the role of government to say no, not least when federal funding or other public resources are squarely implicated.

Judicial Review

Finally, the bill would enact two provisions related to judicial review. The first provision, “notwithstanding any other provision of law” barring a claim arising under Federal law related to a permit, license or approval by a Federal agency unless the plaintiff “submitted a comment during the NEPA process on the issue on which the party seeks judicial review and the comment was sufficiently detailed to put the lead agency on notice of the issue” overstates current law related to NEPA claims and would also apply, as written, to all claims under any federal law, whether related to environmental laws or any other law. In NEPA cases, the Supreme Court has already made it very clear since 1978 that, “While NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors’ position and contentions. . . . The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results. . . .”, *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978). That holding has been reiterated numerous times federal courts and is well settled NEPA law. Indeed, some agencies, such as the Forest Service, regularly include the following admonition in all of their draft EISs:

“Reviewers should provide the Forest Service with their comments during the review period of the DEIS. This will enable the Forest Service to analyze and respond to the comments at one time and to use information acquired in the preparation of the final environmental impact statement, thus avoiding undue delay in the decision making process. Reviewers have an obligation to structure their participation in the National Environmental Policy Act process so that it is meaningful and alerts the agency to the reviewers’ position and contentions [citing *Vermont Yankee, Id.*]. Environmental

objections that could have been raised at the draft stage may be waived if not raised until after completion of the FEIS (*City of Angoon v. Hodel* (9th Circuit, 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334 1338 (E.D. Wis. 1980). Comments on the DEIS should be specific and should address the adequacy of the statement and the merits of the alternatives discussed (40 Code of Federal Regulations 1503.3).”

However, while the Supreme Court has been quite adamant about this rule, it also stated that the primary burden of compliance with NEPA falls on federal agencies and that and “an EA’s or an EIS’ flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.”. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 765 (2004). This ensures that agencies are not tempted to shirk their statutory responsibilities, producing shoddy or grossly inadequate draft analysis and correcting it only if members of the public can find the time to uncover and identify the deficiencies. The reach of this provision to all other laws, including laws that trigger requirements not included under the purview of NEPA, including laws that do not even have an opportunity for public comment, is extremely troubling.

Second, the bill institutes a 180 day statute of limitations for claims arising under federal law challenging a permit, license of approval, unless a shorter time is specified in underlying law. Again, the reach of this provision sweeps across dozens of statutes, some of which include mandated notice requirements prior to filing judicial review and/or administrative appeals processes that must be exhausted prior to seeking judicial review. It also extends to independent regulatory agencies, such as the Nuclear Regulatory Commission, that have formal administrative proceedings with particular time periods that would apparently be swept aside by this provision. In short, it overrides dozens of established agency procedures, appeal processes, and the exhaustion of administrative remedy doctrine and would leave many agencies such as the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the Bureau of Land Management and other agencies faced with revamping their own processes in accordance with their authorizing statutes and current administrative processes.¹¹ Among the troubling consequences of such a provision are the potential to force members of the public into court precipitously, to preserve their rights before they know whether there is any real need for litigation.

Conclusion

In summary, this bill raises a number of serious concerns. It would:

- Promote or mandate project approvals regardless of the public interest;
- Create confusion, delay and litigation caused by unclear statutory language and conflicts with numerous environmental and non-environmental laws
- Turn over government functions to private entities with inherent conflicts of interests

¹¹ While there is a 180 day statute of limitations for NEPA claims under the Safe, Accountable, Flexible, Efficient Transportation Equity Act, the current transportation authorization act, that provision, tailored to the federal and state highway processes, does not pose the same problems that this approach would for many other agencies. For one thing, there is no administrative appeals process in the context of highway construction.

- Impose “one size fits all” solutions that don’t address the cause of the issue being “solved”.

I hope that these comments are of assistance to the Subcommittee, and would be pleased to answer any questions that the Subcommittee may have on the subject of H.R. 4377.