RESPONSIBLY AND PROFESSIONALLY INVIGORATING DEVELOPMENT (RAPID) ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.R. 4377

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APRIL 25, 2012

RESPONSIBLY AND PROFESSIONALLY INVIGORATING DEVELOPMENT (RAPID) ACT OF 2012

WEDNESDAY, APRIL 25, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 12:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Dennis A. Ross (acting Chairman of the Subcommittee) presiding.

Present: Representatives Ross, Cohen, and Polis.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; John Hilton, Counsel; Travis Norton, Counsel; Omar Raschid, Professional Staff Member; Ashley Lewis, Clerk; (Minority) James Park, Subcommittee Chief Counsel; Susan Jensen-Lachmann, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. ROSS. Good afternoon. I now call the Subcommittee on Courts, Commercial and Administrative Law to order. Just to give you a quick preface, I am going to go into my opening statement and introduce the panel. We are still waiting for one more Member. So I appreciate your indulgence and respect your schedules as well. Hopefully we will be ready for your testimony very shortly.

With that, I will begin with my opening statement. Our economic recovery has been weak, to say the least. The unemployment rate hasn't been below 8 percent since January 2009, despite the President's assurance that it wouldn't rise above 8 percent if Congress would pass the $787 billion spending package. More than just losing a paycheck, millions of Americans have lost the dignity that comes from earning a living and supporting a family. No government benefit can compensate a person for that. Americans are ready to go to work.

More than any other question, what I consistently hear from my constituency is, "Where are the jobs?" The jobs are here, as our witnesses today will explain. A study of proposed projects in just one sector of the economy—the energy sector—found that if a modest number of these projects were allowed to go forward and break ground, the direct and indirect economic benefits would be tremendous: literally, hundreds of thousands of jobs and billions of dollars annually.

Another of our witnesses describes the transportation project in Orange County, California, that has been under review for 15 years. If approved, it would create 13,600 jobs in Orange County and another 3,800 statewide. Imagine, waiting 15 years to build a 16-mile highway in one of the most congested traffic areas of the country. And that road is still not built. If the workers are here and the jobs are here, then what is keeping the American workers idle? An outdated, burdensome Federal permitting process that has become more focused on analysis and process for its own sake than on making decisions in a reasonable period of time.

The National Environmental Policy Act of 1969 serves important goals which should be preserved. Federal agencies ought to know how their actions affect the environment and this decision-making process should be transparent to the public. But today's opaque, unpredictable, nearly interminable environmental review process does not even remotely resemble the commonsense one envisioned by the authors of NEPA. As often happens with government, over the years the machinery has slowed as more and more steps have been added to the process, ad infinitum analysis with environmental reviews not uncommonly taking up to a decade or more to complete; the records of decision thousands of pages long, incomprehensible to anyone but a specialist; agencies working at cross-purposes rather than cooperatively; permit applications suddenly denied by an agency that had participated seemingly in good faith in the environmental review; lawsuits brought years later by "not in my backyard" activist organizations that have been eagerly waiting for an opportunity where an agency forgets to cross a T or dot an I.

This paralysis costs job creators millions of dollars in fees to hire consultants and lawyers. But the real losers are the American workers who could be putting food on the table while contributing to the country's economic progress.

It his most recent State of the Union speech President Obama said, "We don't have to choose between our environment and our economy." I agree wholeheartedly. Far too often Americans are given a false hope between all of one thing or of another, with nothing in between. The key is balance. By striking the right balance between conservation and development we can preserve the environment for future generations and ensure that those generations are also able to enjoy the quality of life that we all too often seem to take for granted.

My bill, the RAPID Act of 2012, aims to restore the balance between thorough analysis and timely decision-making in the Federal permitting process. It does not put a thumb on the scale or try to force agencies to approve more or fewer permit applications. It simply says: Make a decision, approve or deny the project. But either way, follow a rational basis and make a decision in a reasonable, predictable period of time.

Job creators and workers alike deserve to know that a decision will be made by a date certain. When a project appears to be stuck in limbo, investors walk and jobs are lost. The RAPID Act does not bring many or even any really new ideas to the table. It simply makes the Federal environmental review and permitting process work like we all know it should.

The RAPID Act is modeled on existing NEPA regulations and guidance, including guidance from this Administration issued to agency heads just last month, as well as recommendations for the President's own Jobs Council and the permit streamlining section of the transportation bill adopted by Congress in the 109th Congress. The Federal Highway Administration has found that this legislation cut the time for conducting environmental reviews on transportation projects nearly in half.

Americans are ready to go back to work. The RAPID Act will give job creators the confidence to take projects off the drawing board and onto the work site.

In closing, I want to thank my cosponsors, Chairman Smith, Mr. Coble, and Mr. Peterson for their support. Thank you especially to Mr. Coble for calling this hearing and giving me the opportunity to chair it. And thanks to our witnesses for attending and sharing their experience with us.

I now reserve the balance of my time. With that, I would like to take a moment and introduce our panel of witnesses.

And also for the record I would note that when Mr. Cohen arrives, I will give him 5 minutes for his opening statement as well.

[The bill, H.R. 4377, follows:]

I

112TH CONGRESS
2D SESSION

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.

IN THE HOUSE OF REPRESENTATIVES

APRIL 18, 2012

Mr. ROSS of Florida (for himself, Mr. SMITH of Texas, Mr. COBLE, and Mr. PETERSON) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for improved coordination of agency actions in the preparation and adoption of environmental documents for permitting determinations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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 under-

taking 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;

"(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 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) ROLE OF PROJECT SPONSOR.—

"(1) PREPARATION OF ENVIRONMENTAL DOCUMENTS.—Upon the request of any project sponsor to 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.

"(2) AUTHORITY TO ACCEPT CONTRIBUTIONS OF FUNDS.—A lead agency is authorized to accept

voluntary contributions of funds from a project sponsor, which the lead agency shall use solely 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.

"(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, 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) Lead agencies shall 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 shall 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 30 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).

"(c) 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 shall invite such identified agencies and Governors 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.—

"(A) Any agency that declines a designation or invitation by the lead agency to be a participating agency shall be precluded from submitting comments on or taking any measures to oppose—

"(i) the project;

"(ii) any document prepared under NEPA for that project; and

"(iii) any permit, license, or approval related to that project.

"(B) A lead agency shall disregard and shall not respond to or include in any document prepared under NEPA, any comment submitted by an agency that has declined an invitation or designation by the lead agency to be a participating agency.

"(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 par-

ticipating 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 in-

viting 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 REQUIREMENT TO EVALUATE CERTAIN ALTERNATIVES.—No Federal agency shall be required to evaluate any alternative that was identified but not carried forward for detailed evaluation in an environmental docu-

ment 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, 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.

"(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 deter-

mines 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 a record of decision 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 a record of decision 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 make a determination or finding regarding, a project prior to the record of decision or finding of no significant impact, such Federal agency shall make such determination, finding, or approval not later than 90 days 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 determination, approval, or finding of a Federal agency that is not subject to subparagraph (A), each Federal agency shall make any required determination or finding or otherwise approve or disapprove the project not later than 180 days 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 disapprove the project, or make a required finding or determination, within the applicable deadline described in subparagraphs (A) and (B), 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 applicable deadline described in subparagraph (A) and (B).

"(D) FINAL AGENCY ACTION.—Any approval, determination, finding, or issuance of a permit 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 al-

ternatives 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 meet-

ing 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 project for which an environmental review was conducted, 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 spec-

ified 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 chapters 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".

(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.

○

Mr. ROSS. Our first witness that we have today is William Kovacs of the U.S. Chamber. Mr. Kovacs provides the overall direction, strategy, and management for the Environment, Technology, and Regulatory Affairs Division at the U.S. Chamber of Commerce. Since he joined the Chamber in March 1998, Mr. Kovacs has transformed a small division concentrated on a handful of issues in committee meetings into one of the most significant in the organization. His division initiates and leads multidimensional national issue campaigns on energy legislation, complex environmental rulemakings, telecommunications reform, emerging technologies, and applying sound science to the Federal regulatory process. Mr. Kovacs previously served as chief counsel and staff director for the House Subcommittee on transportation and commerce. He earned his J.D. from the Ohio State University College of Law and a bachelor of science degree from the University of Scranton, magna cum laude. Welcome, Mr. Kovacs. We thank you for being here.

Gus Bauman. Mr. Bauman is an attorney at the law firm of Beveridge & Diamond where he focuses on land use and environmental issues, advising clients on such matters as comprehensive planning, project development, and natural resource regulation. He has been deeply involved in the Supreme Court lands use and wetland cases since 1980. In 2006 and 2007, Mr. Bauman chaired the joint development task force to reform the development of the region's Metrorail stations. His writings have been cited by the Supreme Court in several cases and his leadership in the field including numerous articles and conferences on land use, housing, growth management, and environmental issues has gained him a national reputation in land use law and policy. He is a highly rated faculty member of the Annual Land Use Institute for the American Law Institute, American Bar Association. Mr. Bauman earned a B.A. from Clark University and a J.D. from Washington University. Mr. Bauman, thank you for joining us today.

Mr. Thomas Margro joined the Transportation Corridor Agencies in Irvine, California, as CEO in July 2007. Mr. Margro has a bachelor of science degree in electrical engineering from Syracuse University and a master of science degree in electrical engineering, systems engineering and operations research from the University of Pennsylvania. Prior to being selected to head Orange County's 67-mile toll road system, Mr. Margro was the general manager for the Bay Area Rapid Transit district, or BART, in Oakland. He began his career at BART in 1990 as assistant general manager for development. Prior to joining BART, he held the positions of Assistant General Manager and chief engineer of the Southeastern Pennsylvania Transportation Authority in Philadelphia. He also served as an engineer and director of maintenance and engineering services for the New Jersey Turnpike Authority. We look forward to hearing from you, Mr. Margro.

Are you a Phillies fan or an A's fan?

Mr. MARGRO. Phillies fan all the way.

Mr. ROSS. Thank you. Our fourth witness is Dinah Bear, former general counsel on environmental quality. Dinah Bear is an attorney based in Washington, D.C. She served for 25 years as general counsel to the Council on Environmental Quality, which is the environmental agency in the Executive Office of the President. Ms.

Bear has chaired the American Bar Association standing committee on environmental law and the District of Columbia Bar Association section on environment and natural resources. She has received the distinguished service award from the Sierra Club and an award for distinguished achievement in environmental law and policy form the American Bar Association. She currently serves on the boards of Defenders of Wildlife, the Mount Graham Coalition, and Humane Borders. Ms. Bear has a bachelor's of journalism from the University of Missouri and a J.D. from the McGeorge School of Law. Thank you for your testimony today, Ms. Bear.

And with that, I think we are still going to wait for one more Member. Thank you.

[Recess.]

Mr. ROSS. I will call the Subcommittee back to order and recognize the distinguished gentleman from Tennessee, the Ranking Member of the Subcommittee, Mr. Cohen, for an opening.

Mr. COHEN. Thank you, Mr. Chairman. And I apologize for holding things up. There was a memorial service for the late and great Donald Payne, a gentleman who cared about helping people all over the globe. It was important I think that we attend.

H.R. 4377, the "Responsibly And Professionally Invigorating Development Act of 2012," better known—or I hope for it to be better known as RAPID—creates a new subchapter of the Administrative Procedure Act to prescribe how the environmental reviews required by the National Environmental Policy Act, or NEPA, should be conducted for Federal construction projects. The bill also imposes deadlines for the granting of permits once the NEPA review process is completed.

NEPA was signed into law by President Nixon. It went into effect on January 1, 1970. Among other things, NEPA requires that for proposals for legislation and other Federal actions significantly affecting the quality of the human environment, Federal agencies must prepare a detailed environmental review. NEPA also created the Council on Environmental Quality which issues regulations and guidance implementing NEPA. While NEPA itself is a short law, its regulations, which are 40 years of case law, that they define the details of how environmental reviews required by NEPA are carried out. H.R. 4377 appears to codify some of what is already in there in terms of how NEPA reviews are conducted. In other ways, however, this law appears to be a significant departure from current practice.

I look forward to our witnesses discussing the subjects and merits of H.R. 4377. As the Ranking Member of the Subcommittee with jurisdiction over the APA, however, I do think it is important to raise one concern at the outset: It is unclear to me why all changes to our codifications of NEPA practice contemplated in this RAPID bill belong in the APA. If RAPID's proponents would like to amend or add to NEPA's environmental review requirements, they should simply go ahead and amend NEPA. I am very weary of using the APA as a backdoor way of amending other statutes or substance of law. And as I have said many times before, the APA is administrative constitution. And like the actual Constitution, we should be very careful in tinkering with it.

I am concerned H.R. 4377 as drafted opens the door to amending other statutes or substance of law by simply adding subchapters to the APA. This is not the purpose or function of the APA, and we ought to guard against that temptation. I look forward to your comments.

I thank our witnesses for being here today. And in particular, I would like to acknowledge Gus Bauman, a lifelong friend, an accomplished lawyer since the days we knew each other as elementary school mates at Idlewild, a great school in Memphis Tennessee, and an expert on this subject who has done much law practice in this area.

I would also like to acknowledge Dinah Bear who served for a quarter century as the general counsel for the Council on Environmental Quality and, therefore, knows NEPA and its associated regulations, case law, and guidance probably as well, if not better, than anybody else. So I thank you for appearing also. I welcome all of our witnesses and look forward to the testimony.

Mr. ROSS. Thank you, Mr. Cohen.

I now recognize Mr. Kovacs for opening testimony. Just for the record, please note that your written testimony has been submitted. And in the interest of time we would request that your opening statements be limited to 5 minutes. But we will be pretty lenient on that.

Mr. Kovacs, you are recognized for 5 minutes.

TESTIMONY OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. KOVACS. Thank you, Chairman Ross and Ranking Member Cohen. It is a pleasure to talk about the RAPID Act. It addresses the administrative backlogs that have been happening with environmental reviews through three commonsense ways.

One is it requires the lead agency to actively manage the process so that we complete the environmental reviews in specified time frames. It mandates concurrent rather than sequential reviews, and it conforms the statute of limitation for bringing lawsuits under NEPA to the general Administrative Procedure Act criteria which is 6 months, rather than general statute of limitations under Federal law which is 6 years, which is one of the reasons the projects expand and go out so long. These very simple procedural changes will help our country create millions of jobs and get rid of excessive delay.

Several years ago, the Chamber—when we were talking to our members and listening to the projects, we did a literature search to see if there was a study on how many projects were actually being stopped or delayed and for how long. And there is very little information. So we undertook a study called Project No Project, and we focused on electric generating facilities because it was easier to find the data that we needed. And we found as of March 2010, there were 351 electric generating and transmission projects around the country that were seeking permits but could not secure the permits. Most surprising, especially at the time when we were trying to create more green energy, was that 140 of the 351

projects were renewable projects, and only 111 were coal-fired power plants.

So what we did is, we cataloged all the projects, put the projects on our Web site. And we did several things. One is, we tried to do an analysis of how these projects got stuck. And what we found is that the opponents of the projects brought a series of administrative and legal challenges against the projects which stretch out the projects through both sequential challenges as well as long statute of limitations. And in those instances, the projects either lost financing or the project sponsor abandoned the project.

After cataloging the projects, we wanted to determine what was the economic impact of these 351 projects. We were able to do a study following traditional Department of Commerce methodology to find that if these projects had been built, there would have been direct investment in the 2010 time frame 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.

So why does RAPID really take the initiative and streamline these projects in a way in which we think would be very successful? First of all, it adopts the proven environmental streamlining structure that the Congress has already adopted through SAFETEA-LU which was overwhelmingly approved by the Congress. And the studies out of the Department of Transportation show that the time for a NEPA review, based on the SAFETEA-LU factor, has been cut in half. It has been cut from 72 months to 36 months.

Second, it tracks really the Administration's efforts on March 4, 2012, in their guidance document. But there is one big difference. The Administration is working very hard to try to get its hands around the permitting business too, and they have done several things, several Executive orders, a Presidential memorandum. But all of this as guidance puts us in a position in which it is not mandatory and it is not followed by the agencies. By the fact that your bill would actually put hard deadlines on, you begin to actually move the process forward so the agencies have to cooperate. It follows the recommendations of President Obama's Council on Jobs and Competitiveness, which he issued both in its interim report and its final report very strong recommendations for permit streamlining.

And finally and I think most importantly, it implements the original congressional intent. For this hearing, we did a very close examination of what happened in 1969. And one of the things you are going to find is the entire purpose of NEPA was not to have long delays. And in fact, when Congress was debating the issue, they were talking about time frames like 90 days.

In 1981 CEQ thought that it could all be done in a year. Well today, with the latest study, the DeWitt study, they find that the average NEPA goes somewhere from a few months to 18 years, and it is increasing at the rate of about 37 days per year. And that is really the part of the process that we are trying to go after. So RAPID is a commonsense, proven solution that has actually been used in several other ways.

And since I have 20 seconds, similar permit streamlining was also used in the Stimulus Act, with the Boxer-Barrasso amendment. And out of the 194,000 projects that went through the stimulus project, over 184,000 of them went through the permit streamlining process. So it is a very important bill. Thank you very much for being able to testify.

Mr. ROSS. Thank you Mr. Kovacs. And your timing was impeccable on that.

[The prepared statement of Mr. Kovacs follows:]

100 Years Standing Up for American Enterprise

U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

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

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

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

DATE: APRIL 25, 2012

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

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

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

April 25, 2012

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

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

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

I. Defining the Problem

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

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

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

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

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

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

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

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

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

B. The Economic Study

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[18] 5 U.S.C. §§601-612.

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

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

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

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

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

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

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

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

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

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

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[23] The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, *available at* http://ceq.hss.doe.gov/ceq_reports/reports_congress_nov2011.html.

[24] *Id.*

[25] *Id.*

[26] 40 C.F.R. § 1508.4.

[27] To be clear, NEPA applied to almost everything covered by the Recovery Act. CEQ reports that only 4,280 projects were categorized as "NEPA not applicable," meaning departments and agencies act in a ministerial capacity to distribute funds and do not control the use of the funds or are acting under statutes for which their actions are exempted from NEPA review.

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

III. Permit Streamlining: A Bipartisan Solution

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

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

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

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

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

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

[29] *Id.*

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

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

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

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

III. The RAPID Act: Modeled After Existing Law

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

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

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

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

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

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

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

IV. The RAPID Act is Effective Permitting Reform

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

Important reforms made by the RAPID Act include:

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

Mr. ROSS. Mr. Bauman, you are now recognized for 5 minutes for an opening.

TESTIMONY OF GUS BAUMAN, ESQ.,
BEVERIDGE & DIAMOND, P.C.

Mr. BAUMAN. Thank you Mr. Ross and Mr. Cohen, especially.

The remarks that I offer today reflect my personal views and are not being made on behalf of and are not intended to reflect the views of Beveridge & Diamond or any other entity.

The National Environmental Policy Act, NEPA, has been with us for 42 years. The Administrative Procedure Act, APA, has been with us for 66 years. NEPA is a procedural statute that requires Federal agencies to pause and take a hard look at the environmental consequences of their proposed actions. APA is a procedural statute that regulates the manner and process of Federal agencies in their rulemaking and decision-making. While both NEPA and APA are largely procedural in nature, their day-to-day workings have profound impacts not only on the Nation, but also on the rights of citizens as well as the authority of States and localities to perform their governmental functions.

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.

A 1994 GAO report found that NEPA review of a highway project, for example, took an average 4.4 years to complete. If an Army Corps section 404 permit was involved because of the presence of waters of the United States, then NEPA review took an average 5.6 years to complete. Since that GAO report, nothing has gotten any simpler. Indeed, a 2005 study of NEPA reviews of Oregon highway projects presented to the Transportation Research Board of the National Academy of Sciences by Dr. J. Dill of Portland State University, found it took an average 6.1 years to complete. Of course litigation, or just its threat, stretches the process much further, exacerbating the costs of delay for needed projects.

According to the 2007 CRS Report for Congress, called Streamlining NEPA, in 2004, 170 NEPA cases were filed in court to stop a project. Just 6 percent of them resulted in an injunction. I am firmly convinced from professional experience, having worked in and out of government, that the Congress and President of 1969 never intended that an environmental impact statement process—a statement, mind you—the more expansive terms "report" or "study" were not even used—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.

Key elements of this RAPID bill would restore to NEPA a more rational and manageable process without undercutting the law's environmental review elements. Under the bill, the agencies participating in the review of a proposed construction project would have to work concurrently rather than, as is often the case, consecutively. They would have to follow an agreed-upon schedule with deadlines. If an agency chooses to file comments late in the agreed-upon schedule when the decisions have been assessed, then

reached and relied upon, the lead agency shall not regard such late commentary. Additionally, an environmental impact statement shall be done within 2 years; an environmental assessment within 1 year. Extensions of time are allowed for good cause.

These basic reforms, taken together, would force all the agencies to hear each other out from the get-go, would deter an agency from holding back its views until late in the process, and would enforce a rigor of review and comment where too often little exists today.

The streamlining bill also introduces the helpful concept that agencies put forward issues of concern as early as practicable so that they may be assessed and resolved; and once resolved, not reopened. And where resolution is not achieved, the lead agency shall notify the heads of the participating agencies as well as the Council on Environmental Quality. In that way, when reviews get bogged down and inordinately stretched out by lower-level agency people who sometimes refuse to see the forest for the trees, elevation of an issue can bring needed national or State perspective to the table. And requiring an annual report to the Congress on the workings of NEPA, including the status of litigation, is an excellent way to keep our elected representatives on top of the NEPA process.

Finally, the streamlining bill takes the 180-day statute of limitations established in the Transportation Act of 2005, called SAFETEA-LU, and extends it to all NEPA claims seeking judicial review of an approved construction project. Now this makes eminent sense. No project sponsor, having endured the entire NEPA process with all that that entails, given the myriad statutory and regulatory requirements culminating in the final agency action, should have to wonder beyond 6 months of time if someone might appeal the project decision to court. Thank you.

Mr. ROSS. Thank you Mr. Bauman.

[The statement Mr. Bauman follows:]

STATEMENT OF

GUS BAUMAN

OF COUNSEL
BEVERIDGE & DIAMOND, P.C.
WASHINGTON, D.C.

April 25, 2012

On the
RAPID Act of 2012
H.R. 4377

Before the
Subcommittee on Courts, Commercial and Administrative Law

Committee on the Judiciary
U.S. House of Representatives

The remarks I offer today reflect my personal views and are not being made on behalf of, and are not intended to reflect the views of, Beveridge & Diamond or any other entity.

The National Environmental Policy Act (NEPA) has been with us for 42 years. The Administrative Procedure Act (APA) has been with us for 66 years. NEPA is a procedural statute that requires federal agencies to pause and take a "hard look" at the environmental consequences of their proposed actions. The APA is a procedural statute that regulates the manner and process of federal agencies in their rulemaking and decisionmaking. While both NEPA and APA are largely procedural in nature, their day-to-day workings have profound impacts not only on the nation but also on the rights of citizens as well as the authority of states and localities to perform their governmental functions.

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. A 1994 GAO Report found that NEPA review of a highway project took an average 4.4 years to complete. If an Army Corps Section 404 permit was involved because of the presence of waters of the United States, then NEPA review took an average 5.6 years to complete. Since that GAO Report, nothing has gotten any simpler. Indeed, a 2005 study of NEPA reviews of Oregon highway projects, presented to the Transportation Research Board by Dr. J. Dill of Portland State University, found it took an average 6.1 years to complete. Of course, litigation or just its threat stretches the process much further, exacerbating the costs of delay for needed projects. According to the 2007 CRS Report for Congress "Streamlining NEPA," in 2004, 170 NEPA cases were filed in court to stop a project. Just six percent of them resulted in an injunction.

I am firmly convinced from professional experience, having worked in and out of government, that the Congress and President of 1969 never intended that an Environmental Impact Statement process (a "statement," mind you; the more expansive terms "report" or "study" were not even used) would devolve over time into a multi-year, incredibly arcane thicket of rules, humongous 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 for years without providing in return any meaningful measure of environmental accounting for all that documented pulling of hair and gnashing of teeth. The needless waste of precious time, money, and other resources (including mountains of paper) is simply extraordinary.

The RAPID bill would restore to NEPA a more rational and manageable process without undercutting the law's environmental review elements. Under the bill, the agencies participating in the review of a proposed construction project would have to work concurrently rather than, as is often the case, consecutively. They would have to follow an agreed-upon schedule with deadlines. If an agency chooses to file comments late in the agreed-upon schedule, when decisions have been assessed then reached and relied upon, the lead agency shall not regard such late commentary. Additionally, an Environmental Impact Statement shall be done within two years, an Environmental Assessment within one year. Extensions of time are allowed for good cause. These basic reforms, taken together, would force all the agencies to hear each other out from the get-go, would deter any agency from holding back its views until late in the process, and would enforce a rigor of review and comment where, too often, little exists today.

The streamlining bill also introduces the helpful concept that agencies put forward issues of concern as early as practicable so that they may be assessed and resolved, and once resolved, not re-opened. And where resolution is not achieved, the lead agency shall notify the heads of

the participating agencies as well as the Council on Environmental Quality. In that way, when reviews get bogged down and inordinately stretched out by lower-level agency people who refuse to see the forest for the trees, elevation of an issue can bring needed national or state perspective to the table. And requiring an annual Report to the Congress on the workings of NEPA, including the status of litigation, is an excellent way to keep our elected representatives on top of the NEPA process.

Finally, the streamlining bill takes the 180-day statute of limitations established in the transportation act of 2005 (called SAFETEA-LU) and extends it to all NEPA claims seeking judicial review of an approved construction project. This makes eminent sense. No project sponsor, having endured an entire NEPA process, with all that that entails given the myriad statutory and regulatory requirements, culminating in a final agency action, should have to wonder beyond six months of time if someone might appeal the project decision to court.

The reforms outlined above will save meaningful time and take nothing away from legitimate environmental protection. They are rational. Sometimes being rational makes sense.

Mr. ROSS. Mr. Margro, you are now recognized for 5 minutes.

TESTIMONY OF THOMAS MARGRO, CEO, TRANSPORTATION CORRIDOR AGENCIES

Mr. MARGRO. Thank you, Mr. Chairman and Congressman Cohen. My name is Tom Margro. I am the chief executive officer of the Transportation Corridor Agencies. We are two joint powers authorities formed by the California Legislature to plan, finance, construct and operate toll roads in Orange County, California.

Thank you for the opportunity to speak before you today to discuss our agency's ongoing challenges over more than 15 years to secure the Federal approvals needed to complete the 241 toll road. Not only is this project critical to alleviating congestion in Orange County, but it will create over 17,000 jobs and requires no Federal, State, or local funding.

TCA recently retained the firm of Beacon Economics to do an economic benefits analysis of our project for the purposes of highlighting the importance of the project to the region and the State. The report found that designing and building this $1.7 billion project will create more than 13,600 jobs in Orange County alone, and an additional 3,800 jobs statewide. It will also generate more than $3 billion in economic output in California and create almost $160 million annually in local and State tax revenues. The recession has severely impacted our local economy. And the Orange County and L.A. Building and Construction Trades Council is reporting unemployment rates of 40 to 65 percent for their members.

I commend Congressman Ross for introducing H.R. 4377 and the Subcommittee for holding this hearing. I have reviewed the bill, and I believe it makes important reforms that will allow critical projects like ours to move forward expeditiously without compromising environmental protections and the public input.

The TCA completed the first 51 miles of our planned 67-mile toll road system in 12 years. However, the last 16 miles has been mired in the Federal environmental review and permitting process for over 15 years. The project was intended to be a model for improving the complex Federal environmental process by integrating reviews under the NEPA Act, the Clean Water Act, the Endangered Species Act, and other Federal environmental laws.

The review process was undertaken through the formation of a voluntary collaborative of State and Federal agencies, working through a memorandum of understanding among the Federal Highway Administration, the EPA, the Army Corps of Engineers, and the U.S. Fish & Wildlife Service, with Federal highways being the lead agency. Key provisions of this MOU were the commitment by all agencies to reach consensus at key decision points and included language precluding agencies from revisiting their concurrence, except in very limited circumstances.

This process actually involved two stages. In the first stage, the collaborative developed the Purpose and Need Statement and identified 24 alternatives for initial evaluation. This took 4 years. The second stage took 6 years, during which technical studies were performed, and these alternatives were refined, developed, and evaluated to arrive at the final 10 alternatives that would be carried forward in full analysis in the environmental impact statement.

The last steps of stage two included the identification by the collaborative of agencies of an environmentally preferred alternative which is designated for corps purposes as the preliminary LEDPA, or least environmentally damaging practicable alternative.

Having been part of the collaborative process, the U.S. Fish & Wildlife Service could now complete their evaluation within the mandated 135 days. However, it still took an additional 3 years to receive our biological opinion which, fortunately, came out to be one of no jeopardy.

When the TCA 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.

Our experience with this voluntary collaborative demonstrates that the Federal environmental process needs fundamental reform. Despite over a decade of effort by these agencies and the expenditure of over $20 million by the project sponsor, ourselves, this voluntary collaborative process failed as there was no agreement on a preferred alternative. The TCA is committed to working with all stakeholders to complete the project in an environmentally responsible manner while creating new jobs. The current process, however, serves as a disincentive for project opponents to work cooperatively with project sponsors to address issues, since opponents can delay or stop projects under the current process without any repercussions.

Unfortunately, projects around the country have faced similar delays because of this unwieldy process which allows an endless and duplicative review of alternatives, with regulatory agencies getting numerous bites at the apple. This results in added costs and stops, or delays projects that would provide much-needed economic benefits and congestion relief.

Based on our experience and frustration with the NEPA review and permitting process for our project, we strongly support the provisions in Congressman Ross' RAPID Act of 2012. Thank you.

Mr. ROSS. Thank you Mr. Margro.

[The prepared statement of Mr. Margro follows:]*

*See Appendix for the attachment submitted with this statement.

Transportation Corridor Agencies

Written Statement of

Thomas Margro

Chief Executive Officer

Transportation Corridor Agencies

before the

House Committee on the Judiciary

Subcommittee on Courts, Commercial and Administrative Law

United States Congress

The Responsibly and Professionally Invigorating Development (RAPID) Act of 2012

April 25, 2012

Transportation Corridor Agencies

125 Pacifica, Suite 100

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Mister Chairman, Members of the Subcommittee, my name is Tom Margro and I am the Chief Executive Officer of the Transportation Corridor Agencies, two joint powers authorities formed by the California legislature to plan, finance, construct, and operate toll roads in Orange County, California. Thank you for the opportunity to speak before the House Committee on the Judiciary's Subcommittee on Courts, Commercial and Administrative Law to discuss our agency's ongoing challenges over more than 15 years to secure the federal approvals needed to build the 241 toll road. Not only is this project critical to alleviating congestion in Orange County, but it is a project that will: (1) create over 17,000 jobs and (2) that requires no government funding. Funding is provided through non-recourse tax-exempt municipal bonds via private investment.

TCA recently retained Beacon Economics to do an economic benefits analysis of the project for the purposes of highlighting the importance of the project to the region and state. The report found that designing and building the road will create more than 13,600 jobs in Orange County and an additional 3,800 jobs statewide. It will also generate more than $3 billion in economic output in California and create almost $160 million annually in local and state tax revenues. The recession has severely impacted our local economy and the LA Building and Construction Trades Council is reporting unemployment rates of 40 to 65 percent for their members.

Based on our experiences with the 241 project, we agree with the recommendations in HR 4377 for improving the environmental review process to expedite project delivery and reduce costs on projects around the United States.

Introduction

The 241 toll road in Orange County has been in the planning process since 1981. It is designed to provide an alternative north-south route to Interstate 5 in southern Orange

County and northern San Diego County – one of the most congested Interstate Highways in the nation. While the TCA completed the first 51 miles of the toll road system in 12 years, the last 16 miles has been mired in the federal environmental review and permitting process for 15 years. The project was intended to be a model for improving the complex federal environmental process by integrating reviews under the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA) and other federal environmental laws. The state and federal agencies formed what is known as the "Collaborative" under a Memorandum of Understanding (MOU) among the Federal Highway Administration (FHWA), the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (F&W). FHWA served as the lead agency.

Rather than serving as a model for how to make the federal environmental process more efficient, the experience with the Collaborative demonstrates that the federal environmental process needs fundamental reform. Despite over a decade of effort by these agencies, and the expenditure of over $20 million by the project sponsor, TCA, the process failed.

Project Conception and Planning

Orange County completed initial studies of the need for an alternative to Interstate-5 in the 1970s and 1980s. After approving a conceptual corridor in the early 1980s, local government realized that traditional state and federal funding sources would not be adequate to fund the construction of new regional transportation facilities. In 1986, the California State Legislature established the Transportation Corridor Agencies, public joint-powers agencies, with the task of financing, constructing and operating the 241 and other toll roads.

TCA financed the construction of 51 miles of new regional toll highways -- The San Joaquin Hills (73), Foothill (241), and Eastern (241/261/133) by issuing non-recourse bonds – backed solely by toll revenues and development impact fees collected from new development in the area of the projects. No federal highways dollars were used to construct the projects. Since the bonds are not backed by the government, taxpayers are not responsible for repaying the debt if future toll revenues fall short. Instead, toll and development impact fee revenue go towards retiring the construction debt. **TCA was able to construct 51 miles of toll roads in 12 years.**

The NEPA/404 Collaborative Process

TCA conducted further studies and environmental evaluation of the 241 between 1989 and 1991 and the TCA completed an Environmental Impact Report (EIR) under the California Environmental Quality Act – the state version of NEPA – and, in 1991, adopted a locally-preferred alternative. TCA then embarked on the federal environmental process, including the preparation of a federal Environmental Impact Statement (EIS) and other studies required to comply with the federal Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Coastal Zone Management Act and several other federal laws. FHWA acted as the lead federal agency.

The TCA and FHWA initiated the Collaborative process to implement a 1993 agreement (the NEPA/404 Memorandum of Understanding, or NEPA/404 MOU) among the FHWA, the Corps, F&W and the EPA. The stated purpose of the MOU is to improve interagency coordination and integrate environmental permitting and analysis procedures. It attempts to do this by giving all of the federal environmental agencies a seat at the table, and decision-making authority, throughout the federal environmental process. A key aspect of the MOU is the commitment by all agencies to reach consensus on key decision points throughout the environmental process, including agreement on purpose and need, alternatives to be evaluated in the draft EIS, selection of the preferred alternative that

would comply with NEPA, the Clean Water Act and the ESA, and, finally, agreement on mitigation measures. **These key decision points document the collective agreements that the information was adequate for that stage and the project may proceed to the next stage without modification. The MOU includes language preventing agencies from re-visiting their concurrence except in limited circumstances relating to significant new information or other significant changes.**

For the SR 241 Completion, the NEPA/404 MOU included 2 stages. An outside facilitator was hired to assist the Collaborative in their deliberations, and the Collaborative developed the Purpose and Need statement and the Alternatives for initial evaluation. This first stage took four years. In the second stage, the technical studies were prepared, alternatives were developed and evaluated; and decisions were made about which alternatives to carry forward for full analysis in the EIS. The last steps of Stage 2 included the identification of an environmentally preferred alternative and agreement on mitigation measures.

The Collaborative agencies and the TCA worked together for an additional six years (over 10 years in total) on the second stage. After release of the draft EIS, the Collaborative evaluated and screened 10 alternatives to identify a practicable alternative that would comply with the requirements of section 404 of the Clean Water Act (the "Least Environmentally Damaging Practicable Alternative" or "LEDPA"). In November 2005, the Collaborative agencies **confirmed in writing** their earlier agreement on a preliminary LEDPA, referred to as the "Green Alignment." The Collaborative found that other alternatives, including widening I-5 and only making arterial improvements, were not practicable or would have greater environmental impacts than the Green Alignment. Subsequently, the National Marine Fisheries Service concurred with FHWA that the project would not likely adversely affect endangered or threatened fish species (the steelhead trout).

The NEPA/404 MOU contemplated that, concurrently with the identification of the LEDPA, F&W would complete a biological opinion under the ESA and determine whether the LEDPA is not likely to jeopardize the continued existence of federally listed species or adversely modify critical habitat. Since F&W had been at the table throughout the Collaborative process, the NEPA/404 MOU contemplated that the Service would be able to prepare a biological opinion within the 135-day deadline established by the ESA. While F&W eventually did produce a biological opinion, with a finding of No Jeopardy, it did so nearly THREE YEARS AFTER the Collaborative agencies had identified the environmentally preferred alternative.

The next step in the process was for TCA to obtain a consistency certification for the preferred alternative under the Coastal Zone Management Act. While none of the preferred alternative is within the federal coastal zone, a small portion of the project comes within about a half-mile of the coastal zone.

When TCA applied for the consistency certification, project opponents, including environmental groups, objected to the project despite the fact that they offered no credible evidence that the project would impact the coastal zone. Project opponents produced a study by Smart Mobility Inc. (SMI) with recommendations disputing the previous 10 years of analysis by the Collaborative. In the face of this controversy, EPA and Army Corps abandoned the unanimous selection of the Green Alignment as the preferred alternative, asserted the need for additional environmental studies and reopened the debate concerning other alternatives. Subsequent analysis of the SMI study by TCA, CALTRANS and FHWA found the report to be flawed. FHWAs then issued a letter dated October 24, 2008 stating, "We have determined in our technical design review that the SMI recommendations...are not reasonable and feasible."

Conclusion

TCA committed 10 years and $20 million to the Collaborative process. Despite extraordinary efforts to reach agreement with the federal environmental agencies, the process failed. The "streamlined" process envisioned in the NEPA/404 MOU worked initially as intended. The Collaborative agencies developed and evaluated alternatives and eventually agreed on a preliminary LEDPA. But, the federal environmental agencies failed to carry through on the requirements of the MOU or on the decisions reached through the Collaborative process. In the face of controversy over the project, the federal environmental agencies refused to defend the process that they themselves developed and touted as the solution to the lengthy environmental approval and permitting process. Not only did they refuse to defend the process, but EPA and Army Corps backtracked from their prior agreements regarding the identification of a preferred alternative. And, rather than resolving differences through the Collaborative process, some of the federal agencies publicly questioned the project during the Coastal Zone Management Act process.

TCA is committed to working with all stakeholders to complete the project in an environmentally responsible manner while creating new jobs. The current process, however, serves as a disincentive for project opponents to work cooperatively with project sponsors to address issues since opponents can delay or stop projects under the current environmental review process without any repercussions.

Based on our experience with the 241 toll road we strongly support the following reforms in the bill:

1. Allow states like California with stringent environmental review laws to provide the compliance with NEPA.
2. Prohibit a federal agency from rescinding its previous concurrence or approval if the decision was made as part of a coordinated environmental review. If new facts come to light then a supplemental environmental impact statement may be prepared.

3. Require the lead agency to identify the Reasonable Range of Alternatives and do not require cooperating agencies to evaluate options that the project sponsor cannot feasibly undertake.
4. Prohibit agencies from reconsidering issues addressed in prior NEPA documents concerning the project or action.
5. Limit resource agency determinations to issues within their own jurisdiction and expertise.

We have appended to the testimony a chronology of events associated with this project and certain relevant letters and documents. We thank you for the opportunity to provide testimony and look forward to answering your questions.

Mr. ROSS. Ms. Bear, you are recognized for 5 minutes. Thank you.

STATEMENT DINAH BEAR, ESQ., FORMER GENERAL COUNSEL, COUNCIL ON ENVIRONMENTAL QUALITY

Ms. BEAR. Thank you very much, Mr. Chairman and Ranking Member Cohen. My name is Dinah Bear. I have had 25 years of experience serving at CEQ, helping to oversee the National Environmental Policy Act. The purpose of NEPA is not to promote or stop projects, but rather to provide information to the decision maker and to involve the public in that process. There are delays caused by the NEPA process, and I want to talk about delays for a few minutes here, not very long.

There are some delays that are warranted. They are consistent and add value to the purpose of NEPA because they involve important issues that the public and the decision maker need to understand. And in that regard, I would like to quote from a transcript from the House Armed Services Committee, April 28, 1992, from Admiral James Watkins when he was serving as Secretary of Energy. When he came in as Secretary of Energy, I can tell you from personal experience that he was not a fan of NEPA. But after going through the process for a complicated decision involving the production and construction of facilities for tritium, he had this to say at this congressional hearing in front of the House Armed Services Committee, "And looking back on it, thank God for NEPA, because there were so many pressures to make a selection for a technology that it might have been forced upon us, and that would have been wrong for the country because as the stockpile requirements come down in tritium, you change technologies, perhaps. The old technologies, the heavy water reactor, the modular high-temperature gas-cooled reactor, may not be the best technologies for a quarter of the original goal of tritium. And that is what it is all about," speaking of the NEPA process.

There are delays that are caused by extraneous factors that are not within the agency's control. There are also delays that are caused by internal circumstances in the agencies. It is true that, as Mr. Kovacs said in his written testimony, CEQ did say in 1981 that many EISs could be produced within 12 months. That statement was made in guidance issued in January 1981. Later in that year, we saw two trends starting to develop that really were at odds with each other. One very serious trend that has had a very deleterious effect on agencies' ability to comply with NEPA and other environmental laws in a timely manner is a dramatic decrease in internal agency resources.

When I first started at CEQ in early 1981, there were several agencies and departments that had well-staffed offices for NEPA compliance, and those offices no longer exist today. There are many situations where agencies are using staff that are not well trained in NEPA. Many training elements of agency programs have been eliminated over the years. And this is on a bipartisan basis, I might add.

And as a result of the reduction in much of the staff doing NEPA, a number of EISs—particularly EISs for large construction projects—are done by consultants or contractors. In my—and I

mean absolutely no disrespect to contractors or consultants. There are many, many fine consultants in the field. But in my experience, the fastest EISs are done in-house by agencies. I have seen EISs done in less than 12 months. But every time I have seen that happen, it has been done by staff within the agency. When you have a consultant involved, it just adds an extra layer of time where the consultant has to get approvals and consult with the agency and that inevitably takes a longer time.

At the same time that agencies were getting this reduction in staff, which hampered their ability to carry out NEPA and shifting much of the NEPA compliance to consultants, CEQ and many others involved in the NEPA process began promoting much more heavily the integration of all other environmental compliance laws within the NEPA framework. For a number of reasons, that makes a lot of sense. But it also makes it harder to meet shorter timelines and shorter page limits, for that matter. Both of those trends have continued since 1981.

Let me take a minute or two and talk about concerns with the bill. I have serious concerns about eliminating CEQ's conflict-of-interest provisions for projects at the EIS level. I think it is extremely bad policy. I have concerns with the project default provisions in the bill, the approval default. I have concerns with the omission of all involvement of county governments and tribal governments in this bill. The bill does not codify the recent CEQ guidance, as has been suggested. It picks up many of the same themes in kind of bullet point, but the details are quite different. SAFETEA-LU was written specifically for highways, which has some very unique constructs on how NEPA is done in the highway situation and cannot easily be translated to many other agencies, including independent regulatory agencies and agencies with an administrative appeals process. And there are a number of ambiguities in the bill that make it difficult to understand how it would actually work.

I see my time is out. Thank you very much. I would be happy to answer any questions.

Mr. ROSS. Thank you Ms. Bear.

[The prepared statement of Ms. Bear follows:]

Prepared Statement of Dinah Bear, Esq., former General Counsel, Council on Environmental Quality

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

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[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 need[9]. 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 of 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 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 document[10]. 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.

Mr. ROSS. And I will now recognize myself for 5 minutes of questions.

Ms. Bear are you suggesting then that the status quo is okay?

Ms. BEAR. No, I am not suggesting that the status quo is okay. First of all, I think it is imperative to give agencies adequate resources to actually comply with environmental laws.

Mr. ROSS. And those are the same agencies that would issue their EISs within 12 months?

Ms. BEAR. Yes. And in fact, I think one thing that several of the witnesses here, including myself, agree on is that SAFETEA-LU has made some improvements in the process.

Mr. ROSS. In fact you hit on something right there. Process. I think what we are lacking ultimately now is any due process for resolution of these permitting projects.

Ms. BEAR. Right. But one of the innovations that has taken place in the highway field—and I don't remember if it was Mr. Kovacs or Mr. Bauman who talked about the reduction in time—one of the innovations in the highway situation has been provisions allowing the highway agencies to fund additional staff for the resource agencies so that they can work on those permits.

Mr. ROSS. And wouldn't concurrent as opposed to sequential review assist in that regard?

Ms. BEAR. Yes.

Mr. ROSS. And in fact, wouldn't sharing data also be something that should be done? And it is not being done now?

Ms. BEAR. Yes. Concurrent review and sharing data is already part of the CEQ regulations. But you have to have somebody at the desk and at the phone to do that. So sharing the funding has helped the highway situation.

Mr. ROSS. Mr. Bauman, it is interesting, as a lawyer, I think that the process is real important. I guess my concern here is that under the current structure that we have today, there appears to be no process, no due process available to someone seeking to have a project permitted at—I guess there is no recourse other than if you want to stand on the sidelines and 6 years later object and file suit. I mean, doesn't this RAPID Act at least provide the procedural infrastructure that is necessary in order to expedite the permitting process?

Mr. BAUMAN. Right. Well, what it does—and I was speaking to the core of it, that so many people who have to deal with this every day have always advocated is that it would require everyone to stick to a schedule. Everyone knows what the deadlines are. And then if someone is unhappy, then you go to court. But then that is done within just a few years—not to have many years go by before the person goes to court to contest the final decision. It is that enormous time that goes by now. Either way, you are going to go to court relatively soon or much, much later. If it is much, much later, the delays that then go on extend onward. That is the reality of what happens.

Mr. ROSS. And the ripple effect of that is that the investment is not made, the jobs are not created.

Mr. BAUMAN. Right.

Mr. ROSS. And if the developer or whomever it is that is putting their capital at risk can't use this process, they will go elsewhere.

Mr. BAUMAN. Well, the people who make a lot of money on this process are the environmental consulting companies and the lawyers.

Mr. ROSS. Mr. Kovacs, you describe in your written testimony how NEPA does not function as it was designed to function when it was adopted in 1969. In your opinion what has caused the envi-

ronmental review process to get so far out of hand? And how will the RAPID Act help get things back on track?

Mr. KOVACS. Well, when Congress passed NEPA in 1970 it was a very straightforward statute that expected there to be a review of the environmental issues and for those issues to be balanced by the agencies and to take any mitigating action. Congress in fact, even in the original NEPA, did not even have a private cause of action and never anticipated any of this litigation. And if you go back and you read what Scoop Jackson or Ed Muskie were saying, they were talking about a process where the agencies were not doing any environmental review, and they needed to have that environmental review forced on them. Congress did a wonderful job of doing that.

What seemed to happen after that is the courts took control of the process, and then I believe it was Judge Skelly Wright recognized for the first time that there was a private cause of action because Congress actually did not delegate the absolute discretion to the agencies. And from that point, it just exploded. It was this little tiny ball with one lawsuit. And now it is one of these issues where there is complete uncertainty because you never know if you have examined enough issues and enough alternatives to satisfy the courts. So what happens is, because you don't know how to satisfy the courts and you don't know what the next alternative is going to be, you do study after study. And that is what brings the uncertainty into the process.

Mr. ROSS. The Project No Project report that you did that I had a chance to review is nondiscriminatory. It addressed energy projects that are not only carbon-based and contemporary but also renewable green energy projects that could not pass this permitting process and then would give it up. I mean, this has an impact on everything that we want to do in terms of the permitting process regardless of how good the idea is.

Mr. KOVACS. That is correct. We did not. We could have done big box stores. We could have done cell towers. There were a lot of things. They are all having the same problems. So it is not just even energy facilities. We did not discriminate. And in fact, as I mentioned, I think the biggest surprise we had is that far more renewable projects were actually caught up in this process. And if you just look at Cape Wind, for example, they are now on I think their 11th year, and they have had the Federal Government approve the permit several times and they still can't get the permit through.

Mr. ROSS. Amazing. Thank you. I see my time is up. I will recognize the Ranking Member from Tennessee, Mr. Cohen for 5 minutes.

Mr. COHEN. Thank you, Mr. Ross. Ms. Bear, you seem to have a lot of information and not enough time. Before I ask you just a general question, you mentioned something about a conflict-of-interest provision. Can you explain that to me and why you think that is a problem?

Ms. BEAR. Yes. Under the current CEQ regulations, consultants or contractors hired to prepare environmental impact statements have to sign a disclosure statement avowing that they have no financial or other interest in the outcome of the project. This is be-

cause these are the projects with the most serious environmental impacts, and the feeling has always been that the public and decision makers need to have that information from a source that is both unbiased and has the appearance of not being biased. H.R. 4377 allows the project sponsor themselves—whether it is a private sponsor or a public agency—to actually prepare the environmental impact statement. Obviously a private sponsor has a financial interest in the project.

Mr. COHEN. That would kind of be like having TransCanada do the impact statement for the Keystone XL pipeline?

Ms. BEAR. Precisely.

Mr. COHEN. Wow. That wouldn't be too unbiased, would it?

Ms. BEAR. Not in my view.

Mr. COHEN. For the other three panelists, how do you explain that? Is that not an inherent conflict? Mr. Bauman.

Mr. BAUMAN. Mr. Cohen, that provision is in there. I didn't write the bill. It is in the bill. I didn't speak to that. To me, it is completely unnecessary to the issue of inordinate delay that we did speak to. That is a separate issue. I don't disagree with the Congressman's question about it.

Mr. COHEN. Mr. Kovacs, do you think that is a good idea to just eliminate the conflict of interest and let the project folk hire their guns?

Mr. KOVACS. I think before we throw out the entire provision, I think when you get to the conflict of interest—first of all, there should be conflict-of-interest provisions. I have no problems with that. But I think that the overall writing provision that I think Ms. Bear is addressing is the fact that a sponsor, for example, could actually either pay for the EIS or actually make a voluntary contribution. There are States like California that do that. I mean you can't keep continuously talking about a lack of resources but then not find some way in which to get the person responsible for it to pay for it.

For example, in my very young days I was chairman of the Virginia Hazardous Waste Siting Board, and the actual applicants paid for the application itself for us to process, so that there was some financial ability for the State to carry on this kind of an argument.

So you have two things in the bill: One is, you have the project sponsor to pay for it. But if you read further down, there are provisions where the agency must exercise independent judgment and it must evaluate it independently. Well, I would suggest, Congressman, that virtually every agency from EPA down uses outside sources of information when they are doing a rule. The rule isn't that they can't do it or that they can't adopt this by reference or take someone else's study. They have to exercise independent judgment. So this just tracks that. And the second thing is in terms of voluntary contributions; if you are upset with the project sponsor doing it, then ask for a voluntary contribution so that the agency can handle it and get the proper staff.

Mr. COHEN. Does the voluntary contribution in itself raise some issue about conflict? I mean, who pays—you work for the Chamber.

Mr. KOVACS. That is correct.

Mr. COHEN. So you have got certain perspectives that are the Chamber's perspectives. But if you worked for the Sierra Club and they paid your salary, I am sure you would be just as good an advocate. So it does make a difference on who pays.

Mr. KOVACS. I think the question is—and it seems to be the legal standard. I will let the real practicing lawyers answer that.

The standard is, is the agency exercising independent judgment? And the courts review this all the time. If the agency just adopts it without looking at it, the courts are probably going to set it aside. But the question is independent judgment and control; not necessarily is the process wrong.

Mr. COHEN. Ms. Bear, have you been won over by Mr. Kovacs' arguments and now think this is a great idea?

Ms. BEAR. No.

Mr. COHEN. Surprise, surprise.

Ms. BEAR. I know you are shocked.

First of all, agencies—because of the constraint on agency resources, it is already the case that many EISs are paid for by the project applicants. For example, their processes are generally referred to as the third-party process, where the applicant pays for a consultant who is chosen by the lead agency and who works under the direction of the lead agency as opposed to the proponent. And in those situations, there is usually either an MOU or a memorandum of agreement or a memorandum of understanding setting out constraints between communications between the applicant and the EIS consultant, because the EIS consultant, even though the firm is being paid for by the applicant, is actually working for the agency.

But there is one other thing I want to clarify here. While the bill does have a provision where agencies could directly accept a series apparently of voluntary contributions from the applicant, it also specifically says, "Upon the request of any project sponsor to the lead agency, the project sponsor shall be authorized to prepare the document." So they can both prepare the document directly or they can offer these payments directly to the agency, which most of the time, agencies cannot do today—that is true.

There are prohibitions in appropriations laws and a variety of other laws, including I believe some ethics constraints about agencies taking money directly from the private sector.

Mr. COHEN. Thank you. Mr. Ross, I would like to ask unanimous consent that a letter I have here from Ms. Nancy Sutley, who is the chair of the Council on Environmental Quality, be entered into the record.

Mr. ROSS. Without objection, so ordered.

[The letter referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

April 24, 2012

The Honorable Howard Coble
Chairman
House Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative Law
517 Cannon HOB
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
House Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative Law
517 Cannon HOB
Washington, DC 20515

Dear Chairman Coble and Ranking Member Cohen:

I am writing to you to provide the Council on Environmental Quality's (CEQ) views on H.R. 4377, the "Responsibly and Professionally Invigorating Development Act of 2012." Although the bill purports to streamline environmental reviews, we believe the legislation is deeply flawed and will undermine the environmental review process. If enacted, these changes could lead to more confusion and delay, interfere with public participation and transparency, and hamper economic growth.

The National Environmental Policy Act (NEPA) was signed into law by President Richard Nixon after passing Congress with overwhelming bipartisan support. NEPA ushered in a new era of citizen participation in government, and it required the government to elevate the consideration of the environmental effects of its proposed actions. It remains one of the cornerstones of our Nation's modern environmental protections.

NEPA is as relevant and critical today as it was in 1970. NEPA focuses and informs decision makers, policy makers, and the public on alternatives and the tradeoffs involved in making decisions. Today, we take for granted that governmental decision making should be open, that government actions should be carefully thought out and their consequences explained, and that government should be accountable. Prior to the enactment of NEPA, this was not the case. H.R. 4377 would undo more than four decades of transparent, open, and accountable government decision making.

The Administration believes that America's economic health and prosperity are tied to the productive and sustainable use of our environment, and the President has stressed these principles since his first day in office. NEPA remains a vital tool for the Nation as we work to protect our environment and public health and revitalize our economy.

The President also takes seriously the need for efficient permitting and decision making by Federal agencies. American taxpayers, communities and businesses deserve nothing less. However, we reject the notion that NEPA and other Federal environmental laws and regulations hinder job creation.

For example, the Federal Highway Administration (FHWA) has found that 96.5 percent of federally funded highway projects are approved under the least intensive, shortest and quickest layer of NEPA analysis, namely categorical exclusions (CEs). CEs can take as little as a few days to a few months to complete, not years, and are usually done concurrently with other aspects of the project review process so that the entire review process is completed quickly. Only 0.3 percent of FHWA projects require a full environmental impact statement (EIS), the most detailed study under NEPA. When there are project delays, they are typically caused by incomplete funding packages, local opposition, and low local priority, or compliance with other laws and requirements considered during the NEPA process, but rarely NEPA itself.

We continue to identify new ways to improve agency decision making and new opportunities to improve efficiency and reduce delays. On March 22, 2012, President Obama signed an Executive Order directing Federal agencies to expedite regulatory review and permitting decisions for key infrastructure projects – a critical step in improving our Nation's infrastructure and maintaining our competitive edge. In addition, CEQ has taken several steps to improve and make more efficient Federal agency decision making (see attachment for CEQ NEPA Modernization Initiatives).

H.R. 4377 would make a number of considerable changes to Federal agency regulatory review, permitting and environmental analysis that undercut the core principles embodied in NEPA, including reasoned decision-making and public involvement. The legislation seeks to implement these changes to Federal agency decision making under the Administrative Procedure Act (P.L.79-404). The passage of this legislation would lead to two sets of standards by which Federal agencies would be expected to comply, one for "construction projects" under the APA and one for all other federal actions, such as rulemaking or planning, under NEPA. This would lead to confusion, delay, and inefficiency.

Moreover, the legislation would direct agencies, upon the request of a project sponsor, to adopt State documents if the State laws and procedures provide environmental protection and opportunities for public involvement "that are substantially equivalent to NEPA." In our view, it is difficult to determine whether a State statute is substantially equivalent to NEPA and the legislation contains no requirement for agencies to determine if the State documents are adequate for NEPA purposes. More importantly, the State document may have looked at a different purpose and need for the project, a different set of alternatives than the Federal agency would have looked at, and relied on different standards for analysis. The State, for example, may not have looked at the same factors that Federal agencies are required to consider, such as

environmental justice and wetlands protection. Finally, no two State processes are alike, compounding confusion for projects that cross State lines. Thus, a Federal agency's reliance on State documents may lead to inconsistencies between Federal projects and agencies, different environmental goals and protections, confusion among the public and unclear results for businesses and permittees.

The legislation also establishes arbitrary deadlines for the completion of NEPA analyses. Factors such as feasibility and engineering studies, non-Federal funding, conflicting priorities, or applicant responsiveness are just a few examples of delays outside of the control of an agency. Arbitrary deadlines and provisions that automatically approve a project if the agency is unable to make a decision due to one of the factors described above will lead to increased litigation, more delays and denied projects as agencies will have no choice but to deny a project if the review and analysis cannot be completed before the proposed deadlines.

These comments illustrate a few of the many concerns we have with the legislation. The Administration would be happy to provide the Committee with a more thorough and exhaustive list of our substantive concerns with the legislation at the request of the Committee.

In closing, when properly implemented, NEPA improves collaboration, consensus, accountability and transparency surrounding government decision making and actions. Our Nation's long-term prosperity depends upon our faithful stewardship of the air we breathe, the water we drink, and the land. Our country has been strengthened by the open, accountable, informed and citizen-involved decision-making structure created by NEPA, and our economy has prospered.

Sincerely,

Nancy H. Sutley, Chair
Council on Environmental Quality

cc: Chairman Lamar Smith
Ranking Member John Conyers, Jr.

Enclosure

CEQ NEPA Modernization Initiatives

April 24, 2012

- In May 2010, CEQ issued guidance on Emergencies and NEPA that addressed how agencies can ensure efficient and expeditious compliance with NEPA when agencies must take exigent action to protect human health or safety and valued resources in a timeframe that does not allow sufficient time for the normal NEPA process. This guidance also addressed how agencies, in any situation including emergencies, can develop focused and concise Environmental Assessments (EAs) to provide an expeditious path for making decisions when the proposed action does not have the potential for significant impacts.

- In November 2010, CEQ finalized guidance on how to establish and use CEs for activities—such as routine facility maintenance—that do not need to undergo intensive NEPA review because the activities do not individually or cumulatively have significant environmental impacts. The CE guidance reinforced the value of categorical exclusions.

- In January 2011, CEQ issued guidance on the use of mitigation and clarified the appropriateness of using mitigation to conclude Environmental Assessments with a Finding of No Significant Impact (FONSI). A mitigated FONSI allows agencies to use EAs to identify and commit to mitigation measures that, when implemented, will eliminate potential significant impacts and meet NEPA requirements without the need to prepare a more intensive Environmental Impact Statement (EIS).

- In March 2011, CEQ initiated a NEPA Pilot Program to solicit ideas from Federal agencies and the public about innovative time- and cost-saving approaches to NEPA implementation. Under this process, CEQ is working to identify innovative approaches that reduce the time and costs required for effective implementation of its NEPA regulations. These innovative approaches promote faster and more effective Federal decisions on projects that create jobs, grow the economy, and protect the health and environment of communities. We expect that this effort will result in faster and more effective Federal decisions on projects that create jobs, promote economic growth, and protect the health and environment of communities.

- In March 2012, CEQ issued new guidance for public comment on improving the efficiency of the NEPA process overall, by integrating planning and environmental reviews, avoiding duplication in multi-agency or multi-governmental reviews and approvals, engaging early with stakeholders, and setting clear timelines for the completion of reviews.

Mr. COHEN. And I yield back the balance of my time. Or the proverbial "my time is out," and I yield back.

Mr. ROSS. Thank you. The distinguished gentleman from Colorado, Mr. Polis, is recognized for 5 minutes.

Mr. POLIS. I thank the Chair. I appreciate the hearing on this important topic. My constituents have certainly voiced to me a frustration with an open-ended and often interminable NEPA

project for—whether it is transportation or infrastructure projects or renewable energy projects that have strong support on the ground.

And I was enheartened in part by the 2006 NEPA task force and also by President Obama's Council on Competitiveness recommendations around streamlining. And I think it is critical to strike the right balance in this regard. So hopefully we can find a way to accelerate an often interminable process.

I want to ask about some of the differences between the 2006 task force and this proposed bill. It is my understanding that the task force recommended that there be a timeline; namely, that the agencies have 18 months to complete EIS and 9 months to complete an EA. And I don't know what the right time should or shouldn't be. But it is my understanding that the mechanism in this bill is actually automatic approval if the timeline isn't met, versus simply requiring that a certain timeline is met.

Is there any problem with requiring under statute a certain timeline that is met rather than holding a gun to the head and saying it is automatically approved if it is not met? Is there a distinction between those two? Or do you think it would be consistent with meeting the needs of this legislation if we simply require the agencies to meet a timeline without getting into what the timeline is? I will address that to Mr. Bauman.

Mr. BAUMAN. I would take anything that Congress could do just to say there shall be a schedule, there shall be deadlines. You can set them out. You have done it in other environmental statutes, like the Clean Air Act. So just doing that, you would be shocked at how behavior would change and the NEPA process, which goes on interminably and is used and abused by many folks—Dinah is right. No one ever intended that NEPA would turn into what it has become. The only way it is going to reform itself is if you put in these basic reforms, then the agencies will follow. So you don't need the automatic—it is deemed approved, I think, to change the behavior of "get the process done." Thank you.

Mr. POLIS. Reclaiming my time, the main issues that I have had have been less around outcomes or changes; more around the interminable timeline of approval. And again, a lack of certainty around what that timeline is.

Mr. Bauman alluded to the history of NEPA. And I would like to address this to Ms. Bear as well. As general counsel under the Reagan administration, you had a lot of oversight over the implementation of NEPA. I would like you to address how this bill will impact the existing NEPA framework that has been in place for 40 years, and also significant changes, and why are we hearing more about this now, for instance, than we did in prior incarnations?

Ms. BEAR. Okay. A complete answer would be very lengthy. So let me hit a few points and then I would be happy to submit additional thoughts for the record.

First, just for a minute, I want to address the issue of schedules, which is part of your question, although I realize your question goes much further than that. But I want to note that when CEQ issued the regulations that are binding on Federal agencies for the NEPA process in 1979, the single most requested provisions by industry representatives, including I believe the Chamber, but many

other industry business representatives, was a provision to allow the proponent to ask the agency to set a time schedule, and that the agency, upon that request, would have to set a time schedule.

In 25 years being general counsel, deputy general counsel at CEQ, no industry representative ever came to me and said, "I asked an agency to set a time schedule and they didn't." Or "I asked an agency to set a time schedule. They did, and they are not complying with it." And in fact to the best of my knowledge, the only person who has ever used that provision on behalf of their clients is the attorney who was actually responsible for writing the regulation.

Mr. POLIS. Since we have limited time, is there any way that we can make that exemption perhaps less cumbersome or easier to use? Because perhaps one of the reasons it is so rarely used is it is too difficult to use.

Ms. BEAR. All they have to do is ask. I am not quite sure what the difficulty is.

Mr. POLIS. So it is fairly easy to ask for the timeline?

Ms. BEAR. Yes. I think so.

Mr. POLIS. Is it more a mater of educating those who are applying that that should be something they ask for?

Ms. BEAR Yes. And I have spoken about this in front of a number of industry groups.

Mr. POLIS. It would be a bit of a moral hazard there, because as was alluded to, many of the attorneys involved with the process might actually profit more from an ongoing delayed process, versus the principals who would profit from a short process.

Ms. BEAR. Too many attorneys on this panel to——

Mr. POLIS. Present company excepted, of course.

I would just ask for an additional minute to allow her to finish her answer, if that is all right, Mr. Chair.

Mr. ROSS. Without objection, please go ahead.

Ms. BEAR. Okay. I don't believe you were here when I was giving my 5-minute summary. But one of the difficulties that I think is affecting the timing of the NEPA process or how long it takes are agency resources. And I started CEQ in 1981. As I mentioned, there were departments and agencies that had whole offices devoted to complying with NEPA, with well-trained staff. Many of those offices are no longer there.

The NEPA process, particularly for contractor—for project proponent proposals coming from outside of the Federal Government, many EISs are done by consultants for a number of reasons. And this is not a slam at consultants. There are some very good ones out there. But it tends to slow the process down. The EISs I have seen that are done within a 12-month period are done in-house by internal agency staff, but the capabilities of agencies for doing that is vastly diminished. So that is one very important area I think that needs to be addressed.

I think schedules are good. I think dispute resolution processes are good. I have no concerns about the dispute resolution process, for example, in the SAFETEA-LU bill. I am concerned that this bill, as you said, creates a scheme that is—well, you didn't say this, but I will—a scheme that is different in many fundamental ways from the CEQ regulations. First of all, it carves out one segment

of the NEPA process, which is construction projects. NEPA applies to a lot of other things. So you have automatically two different processes. But within this process, in my view, some of the most serious problems are, as was just discussed, eliminating the conflict-of-interest provision, allowing private project proponents to prepare environmental impact statements themselves, as well as giving funding directly to agencies. The default——

Mr. ROSS. Ms. Bear, I unfortunately have got to wrap it up here. I apologize. And I don't mean to cut you off. We have a fullCommittee hearing here in 5 minutes. And believe me, I would love to explore more. I think this panel would too.

And Mr. Margro, I have got questions I would like to ask you. Unfortunately, due to the fact that we have to be out of this room in 5 minutes, we are going to have to adjourn our hearing. But I do want to state for the record that all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers will be a part of the record.

Without objection, Members will also have 5 legislative days to submit any additional materials for including in the record.

I want to thank the witnesses for being here. I apologize for the delay, but I think it was very good for us to have this. I wish you all well. And this hearing is now adjourned.

[Whereupon, at 1:25 p.m., theCommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

H.R. 4377, the "Responsibly and Professionally Invigorating Development Act of 2012," or "RAPID" Act, creates a new subchapter of the Administrative Procedure Act to prescribe how the environmental reviews required by the National Environmental Policy Act, or "NEPA," should be conducted for federal construction projects.

The bill also imposes deadlines for the granting of permits once the NEPA review process is complete.

NEPA was signed into law by President Richard Nixon and went into effect on January 1, 1970. Among other things, NEPA requires that "for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment," federal agencies must prepare a detailed environmental review. NEPA also created the Council on Environmental Quality, which issued regulations and guidance implementing NEPA.

While NEPA itself is short, it is these regulations, plus 40 years worth of case law, that define the details of how the environmental reviews required by NEPA are carried out. H.R. 4377 appears to codify some of what is already out there in terms of how NEPA reviews are conducted. In other ways, however, H.R. 4377 appears to be a significant departure from current practice.

I will leave it to our witnesses to discuss the substantive merits of H.R. 4377. As the Ranking Member of the Subcommittee with jurisdiction over the APA, however, I do think it important to raise one concern at the outset.

It is unclear to me why all the changes to or codifications of NEPA practice contemplated in H.R. 4377 belong in the APA. If H.R. 4377's proponents would like to amend or add to NEPA's environmental review requirements, they should simply go ahead and amend NEPA.

I am very wary of using the APA as a back door way of amending other statutes or substantive law. As I have said many times before, the APA is our "administrative Constitution."

And like the actual Constitution, we should be very careful in tinkering with it. I am concerned that H.R. 4377, as drafted, 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 we ought to guard against that temptation.

I thank our witnesses for being here today. In particular, I would like to acknowledge Gus Bauman, an accomplished lawyer and an old acquaintance of mine from Memphis.

I would also like to acknowledge Dinah Bear, who served for a quarter century as the General Counsel for the Council on Environmental Quality and, therefore, knows NEPA and its associated regulations, case law, and guidance better than almost anyone else.

I welcome all of our witnesses and look forward to their testimony.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The title of H.R. 4377, namely, the "Responsibly and Professionally Invigorating Development Act of 2012," or "RAPID Act," unfortunately is misleading.

Rather than effectuating real reforms to the process by which federal agencies undertake environmental impact reviews as required by the National Environmental Policy Act, or NEPA, this legislation will actually result in increasing, not expediting this process.

And, it inexplicably only addresses a subset of these reviews: those that pertain to construction projects that are federally-funded or that require federal approval.

But, more importantly, this bill is yet another effort by my friends on the other side of the aisle to undermine regulatory protections.

In fact, this is the *thirteenth hearing* at which we have considered an anti-regulatory measure this Congress.

As with all the other bills, H.R. 4377 is a thinly disguised effort to hobble the ability of federal agencies to be able to do the work that we in Congress have assigned them to do.

H.R. 4377 very much embodies many themes reflected in other anti-regulatory bills that we have considered this Congress, but at least three concerns stand out.

First, this bill—like other measures that we have previously considered—is a solution in search of a problem. It is unclear what exactly is the problem H.R. 4377 seeks to address.

While the NEPA environmental review process may not be perfect, it still remains a model for other countries throughout the world for establishing a systemic foundation for facilitating interagency collaboration, integrated decisionmaking, and public input on environmental impact statements and assessments.

Like the Administrative Procedure Act, NEPA provides a flexible review framework for *all* federal projects—not just construction projects—that require federal approval pursuant to other federal statutes like the Clean Air Act.

NEPA appropriately leaves it to individual agencies to craft regulations implementing the Act's environmental review requirement in recognition of that fact that such reviews must be tailored to specific types of projects.

H.R. 4377 instead uses a one-size fits all approach that incorporates numerous specific procedural steps that may or may not work well in all instances. This is an undertaking that we should be very wary of taking.

In response to the complaint of H.R. 4377's proponents that NEPA reviews sometimes take too long, I say that the real problem is not with the requirements of the review process—which may vary from project to project or from agency to agency—but with the lack of resources that we give to agencies.

An agency can only move so quickly to review project proposals when it has ever-shrinking appropriations to obtain competent staff and other resources.

Yet I am willing to bet that some of the proponents of this bill would also strenuously oppose increasing funding for agencies, which would certainly help to speed up the review process.

Second, it is clear that the real motivation underlying H.R. 4377 is to shift power away from a government accountable to the public and hand it to politically unaccountable industry so that it can run roughshod over everyone else.

This general tack is highlighted by a number of the bill's provisions.

For example, H.R. 4377 facilitates potential corruption or, at a minimum, encourages an unseemly relationship between industry and regulators by allowing a lead agency to accept "voluntary contributions" from a project sponsor, which the agency must use to undertake an environmental review.

In its most gross context, this provision seems to authorize a bribe. Under current law, it is a crime to give an item of value to a federal entity in exchange for an official act.

While H.R. 4377's authorization of "voluntary contributions" perhaps may not fall squarely within the statutory definition of a bribe, this provision fails to delineate any brightlines between the two.

Even if not a bribe, such contributions could unduly taint the environmental review process and create the appearance of a conflict of interest for agencies. At a minimum, cash-strapped agencies, in particular, may prioritize reviews of projects for which sponsors have paid for the review and ignore those for which no payment was offered.

In addition, the bill appears intended to limit the opportunity for public participation and impose deadlines that may be unrealistic under certain circumstances.

Third, H.R. 4377 would create a parallel environmental review process that would only lead to confusion, delay, and litigation.

As I noted at the outset, the changes to the NEPA review process contemplated by H.R. 4377 apply only to proposed federal construction projects.

NEPA, however, applies to a broad panoply of federal actions, including fishing, hunting, and grazing permits, land management plans, Base Realignment and Closure activities, and treaties. In contrast, H.R. 4377 applies only to a subset of federal activities.

In fact, even this subset is ill-defined under H.R. 4377, as the bill has no definition for what actually would constitute a construction project.

This could lead to two different environmental review processes for the same project. For example, H.R. 4377's requirements would apply to the construction of a nuclear reactor, but not to its decommissioning or to the transportation and storage of its spent fuel.

Rather than streamlining the NEPA process, H.R. 4377 only adds complication, confusion, and potential litigation to the process.

I appreciate that the supporters of this bill have tried to reach out to the Committee minority to try to garner support. Unfortunately, I am not able to lend my support for this bill as it raises too many concerns for me.

I think the testimony of Dinah Bear, who served as the General Counsel of the Council for Environmental Quality at the White House under both Republican and Democratic administrations for a total of 25 years, will be particularly instructive.

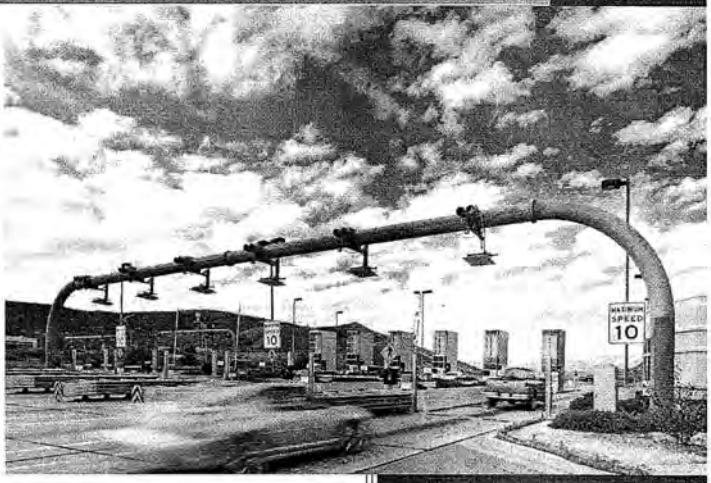
I thank her and the other witnesses for agreeing to participate in today's hearing.

Attachment to the Prepared Statement of Thomas Margro, CEO, Transportation Corridor Agencies

TRANSPORTATION CORRIDOR AGENCIES

July 2011

Economic Benefit Analysis: 241 Completion Project



Created for the
Foothill/Eastern Transportation Corridor Agency

Authored by
Beacon Economics, LLC

BEACON ECONOMICS

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Executive Summary

The Transportation Corridor Agencies (TCA) are two joint powers authorities formed by the California legislature in 1986 to plan, finance, construct and operate Orange County's 67-mile public toll road system. Fifty-one miles of the system are complete, including the 73 Toll Road (San Joaquin Hills Transportation Corridor Agency), 133, 261 and 241 Toll Roads (Foothill/Eastern Transportation Corridor Agency). Elected officials from surrounding cities and county supervisorial districts are appointed to serve on each agency's Board of Directors.

Public oversight ensures that the interests of local communities and drivers are served and that TCA continues to meet the region's growing need for congestion-free transportation alternatives. The Foothill/Eastern Transportation Corridor Agency has been working since the late 1980s to complete the state and federal environmental process for the final 16-miles of the system—the completion of the 241 Toll Road into San Diego County.

Beacon Economics has done an economic analysis of the 241 completion project and found that it will provide a significant economic impact to the County of Orange and the rest of California. Specifically, our impact study has found that:

- This project will create more than 13,600 jobs in Orange County and generate more than 3,800 jobs throughout the remainder of California through leakage.
- The $1.7 billion project will generate $3.1 billion in economic output throughout the state. $2.3 billion will accrue in Orange County from the beginning of the project through its completion. The 241 completion project will also generate more than $718 million in economic output in the remainder of California.
- $1.3 billion in value added will be created in Orange County by the $1.7 billion investment to complete the 241 Toll Road.
- We estimate that more than $121 million in tax revenues will go to state and local government as a result of the 241 completion project.

Economic Impact Summary

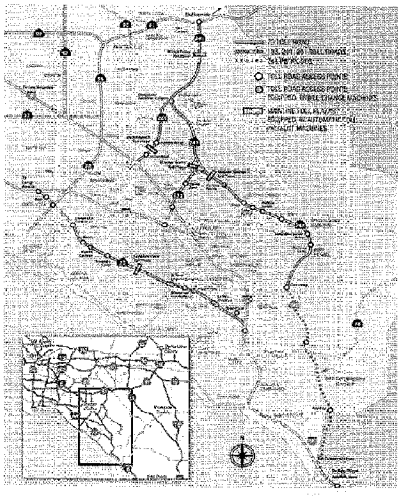
	Orange County	Remainder of California	Total
Jobs	13,663	3,878	17,541
Output ($ Millions)	2,336.4	718.1	3,054.5
Earnings ($ Millions)	862.7	231.2	1,094.0
State/Local Taxes ($ Millions)	121.5	38.1	159.5

Source: IMPLAN, Calculations by Beacon Economics

Scope of Work

TCA has contracted with Beacon Economics to conduct an economic impact analysis of the 241 completion project. The purpose of this report is to provide TCA with a better understanding of the benefits that are likely to accrue to Orange County and the state from the infrastructure investment described below. The impact to the economy is generated through several channels. First, spending related to the 241 completion project would create economic output in Orange County. Second, the project would also support employment, particularly in the construction sector. Finally, the project would also generate tax revenues for state and local government.

About the Project



The 241 completion project is the final piece of Orange County's 67-mile toll road system. The 241 Toll Road currently ends at Oso Parkway in Rancho Santa Margarita. The project would extend the 241 Toll Road from Oso Parkway to Interstate 5 south of San Clemente in San Diego County. As with the current 51 miles of toll roads in Orange County, the final 16 miles of the 241 Toll Road would be part of the California highway system, but operated as a toll facility by the Transportation Corridor Agencies.

The purpose of this project is to improve the transportation infrastructure system in Orange County. Interstate 5 is currently the only direct route between Orange and San Diego counties. The completion of the 241 Toll Road would provide an alternative to the over-burdened I-5, which is projected to become more congested due in part to population growth in Southern California. Without the completed toll road, travel from the San Diego/Orange County border to Mission Viejo is projected to take one hour in 2025. With the toll road, travel time is projected to be 25 minutes on I-5 and 16 minutes on the 241 Toll Road. Completing the toll road would also provide the redundancy needed in the event of an emergency.

The 241 completion project is also critical for goods movement from the Port of Los Angeles and Port of Long Beach to destinations across America. Over 10,000 trucks use I-5 every day, a number expected to increase as Southern California port activity grows.

Impact Overview and Methodology

This report analyzes the direct and indirect economic impacts that will stem from the planned completion of the 241 Toll Road. To estimate the economic impact of the 241 completion project, Beacon Economics used Version 3 of the IMPLAN modeling system. This is an input-output model that can be used to estimate the short-run impact of changes in the economy through the use of multiplier analysis.

Impact studies operate under the basic assumption that any increase in spending has three effects: First, there is a direct effect on the industry itself, resulting from the additional output of goods or services. Second, there is a chain of indirect effects on all the industries whose outputs are used by the industry under observation. These are the impacts generated by a business' supply chain. Third, there are induced effects that arise when employment increases and household spending patterns are expanded. These impacts are the result of the additional income that is earned in the course of producing this output, both by employees in the target industry and in those supplying it.

There are several components to the overall economic impact. First, there is an effect on value added—the net increase in the overall value of the local economy. Value added is the total increase in an industry's output less the cost of any intermediate inputs, and it is commonly used to measure an industry's contribution to local gross product. Value added consists primarily of labor income, but also includes indirect business taxes and other property income. Second, there is an impact on local employment, with the single-largest share of jobs created in the industry itself, and the others spread throughout the study area's economy. Third, is the increase in output, where the difference between value added and output is that the former concentrates on various earnings, while the latter includes the costs of intermediate inputs.

Economic Impact Highlights

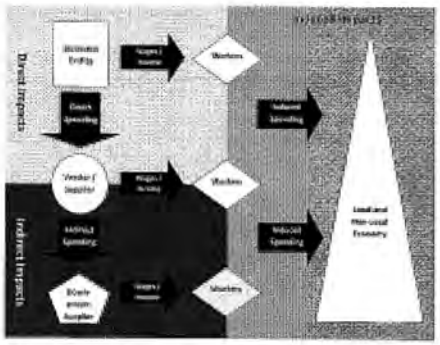
The 241 completion project will generate almost $3.1 billion in economic output throughout California:

- $1.7 billion will be spent on the 241 completion project.
- Direct spending on the project will generate over $2.3 billion in Orange County.
- The completion project will also generate more than $718 million in economic output in the remainder of California.

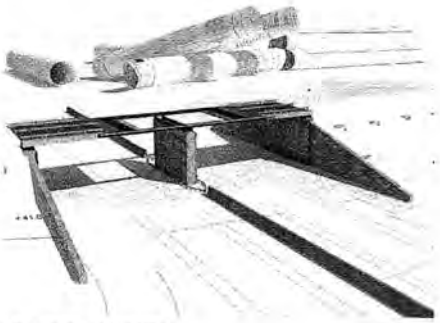
This project will also generate significant additional employment opportunities throughout the state:

- The 241 completion project will create more than 13,600 jobs in Orange County through the end of the project.
- The 241 completion project will also create more than 3,800 jobs throughout the remainder of California.

State and local government will also benefit from nearly $121 million in additional revenues per year. Another $38 million in tax revenues will be earned by state and local governments in the rest of the state.



It is also important to note that capital investments made on different types of projects can lead to different multipliers. Why? A sector can have a large multiplier if it induces economic activity in industries whose employees have a high propensity to spend from take-home pay. Also, if the sector does not import many materials from abroad or from out of state, then its multiplier effect on the local economy will be high. In essence, some of the spending in the local economy may "leak out" into other states and countries. If raw materials are imported, then a change in a local sector's level of production will result in a commensurate change in economic activity abroad. The same is true if a California business buys inputs from firms in different states.



Thus, our analysis here covers the main areas of economic impact that will accrue at the county level due to the planned $1.7 billion investment to complete the 241 Toll Road. First, the direct employment, output, and value added effects for Orange County after accounting for "leakage" out of the county. Second, we estimate the indirect effects on all the industries whose outputs are used by the proposed project as well as the induced effects arising when employment increases and household spending patterns are expanded. Finally, to measure the "leakage" out of Orange County that accrued to another part of the state, we estimate the indirect effects of the 241 completion project on the remainder of California.

Planned Investment

It is estimated that a total of $1.7 billion will be spent on the 241 completion project, including costs that have already been expended as well as future expenditures. The project's expenditures are broken out into a variety of categories. According to estimates from TCA, the capital costs, which include the cost of constructing the 241 completion project, will comprise 60 percent of the $1.7 billion in expenditures. Other costs, including right of way, construction management, planning and engineering services, and agency staffing fees account for the remaining 40 percent of the spending. Expenditures are further broken out into three time periods to distinguish between past, present, and future spending. These planned expenditures are shown in the table below.

241 Completion Project Expenditures ($ thousands)

Category	2009 and Prior	2010-11	2012 and Beyond	Total
Design and Build Contract	57.1	0.9	950.1	1,008.1
Environmental and Mitigation	143.7	1.7	137.9	283.3
Contingency	0.0	1.0	111.9	112.9
Engineering	41.4	6.6	43.0	91.0
Insurance and Toll Equipment	0.0	0.0	58.9	58.9
Right of Way	13.4	0.0	42.9	56.3
Administration and Legal	22.8	5.5	27.9	56.2
Construction Management	0.5	0.0	51.2	51.7
Utility Relocation	1.2	0.0	13.0	14.2
Total	280.1	15.7	1,436.8	1,732.6

Source: Foothill/Eastern Transportation Corridor Agency

It should be noted that $56 million of the planned expenditures on the 241 completion project are for right-of-way. This is primarily land and right-of-way services, and is akin to an asset purchase. Realistically, this is a transfer of ownership from one party to another, and as such it does not generate any significant economic impact for Orange County. Additionally, $113 million is allocated for contingency purposes. This spending has the potential to generate an economic impact for Orange County if it were used. But because it is unclear how these funds will be spent, or whether they will be spent at all, it is not possible to allocate this amount to any particular category. Thus, our impact analysis detailed herein excludes a total of $169 million in right-of-way and contingency expenditures.

Economic Impact

Based on these data, we have found that the completion of the 241 Toll Road will provide a significant economic impact to the County of Orange as well as the remainder of California. Specifically, we estimate that this project will create over 13,600 jobs in Orange County between commencement of the project prior to 2009 and completion of the work. This includes 8,600 jobs directly created as a result of the construction work, and 4,900 jobs created through indirect and induced effects of the project. Of these 4,900 jobs, 2,800 will be created by indirect effects on all the industries whose outputs are used in the construction of the 241 Toll Road. Another 2,100 jobs will be created when employment increases and household spending patterns are expanded as a result of the project. In addition to the jobs created within Orange County, this project will generate another 3,800 jobs throughout the remainder of California through leakage, as some of the $1.7 billion investment will go toward goods and services located outside of the county.

We have determined that this $1.7 billion project will generate $3.1 billion in economic output throughout the state. $2.3 billion will be generated through direct spending on the construction in Orange County between now and the completion of the project, which will in turn generate more than $773 million in indirect and induced output from the projects' consumption of goods and services sourced from within the county. The 241 completion project will also generate $718 million in economic output in the remainder of California. It should be noted that the indirect and induced effects of this project in the remainder of California are very large, and in some cases are even larger than the secondary impacts within Orange County. This points to the fact that much of the materials and services that will be used as a result of the completion will be sourced from outside of Orange County but within California.

The $3.1 billion in economic output created by the 241 completion project will lead to a significant increase in value added. Value added consists of employee compensation, proprietor income for self-employed and unincorporated businesses, corporate profits, rent payments and dividend income. Based upon our analysis, nearly $1.7 billion in value added will be created by the $1.7 billion investment. This includes $850 million in direct value added to Orange County as a result of the project as well as $458 million in indirect and induced value added locally. Again, a sizable share ($371 million) of the additional value added will accrue to regions outside of Orange County due to leakage.

Not only does the 241 completion project create a sizable effect on value added in Orange County and California, it should be noted that a majority of this value added is comprised of additional labor income. To illustrate, $863 million of the additional $1.3 billion, or two-thirds, in value added is additional income earned by employees and proprietors' within Orange County. The same is true in the remainder of California, where 62 percent of the additional value added is in the form of additional labor income.

Economic Impact Summary

	Orange County	Remainder of California	Total
Jobs	13,663	3,878	17,541
Output ($ Millions)	2,336.4	718.1	3,054.5
Earnings ($ Millions)	862.7	231.2	1,094.0
State/Local Taxes ($ Millions)	121.5	38.1	159.5

Source: IMPLAN, Calculations by Beacon Economics

Finally, this project will generate additional tax revenues in Orange County and throughout the rest of the state. We estimate that close to $121 million in tax revenues will go to state and local government between now and the completion of the project. This consists of taxes on employee compensation, indirect business taxes, taxes paid by households, and by corporations. An additional $38 million in tax revenues will be earned by state and local governments in the rest of the state.

In sum, the 241 completion project will have a significant impact on the local and statewide economy. In addition to the reduced congestion and time savings, the work itself will help the Orange County economy climb out of this recession. Not only will the 241 completion project create a relatively large number of jobs, the region will see additional value added and income for its residents, and local governments can expect more tax revenues as a result.

Conclusion

This report finds that the 241 completion project would generate over $2.3 billion in economic output and support 13,663 jobs in Orange County. Labor income would increase by $862.7 million. The benefits of the project would not be limited to Orange County. The rest of the state would also benefit from spillover impacts generated by the 241 completion project. The remainder of California would see an increase in economic output of $718.1 million. 3,878 jobs would be supported, resulting in $231.2 million in additional labor income. California and local governments would benefit from $159.5 million in tax revenues.

Detailed Results

Economic Impact of 241 Completion Project
Impact on Orange County

	2009 and Prior	2010-11	2012 and Beyond	Total Impact
Employment				
Direct	1,370	81	7,202	8,653
Indirect	475	25	2,366	2,866
Induced	355	24	1,746	2,124
Multiplier	1.61	1.60	1.57	1.58
Total	2,200	130	11,314	13,644
Output				
Direct	$266,596,004	$14,708,300	$1,282,094,303	$1,563,398,607
Indirect	$77,650,567	$4,014,940	$355,769,038	$437,434,545
Induced	$56,090,313	$3,764,840	$275,720,413	$335,575,566
Multiplier	1.50	1.53	1.49	1.49
Total	$400,336,884	$22,488,080	$1,913,583,754	$2,336,408,718
Value Added				
Direct	$138,629,857	$8,398,564	$703,089,156	$850,117,577
Indirect	$43,844,515	$2,359,890	$208,953,846	$255,158,251
Induced	$33,916,232	$2,276,948	$166,727,203	$202,920,383
Multiplier	1.56	1.55	1.53	1.54
Total	$216,390,604	$13,035,401	$1,078,770,205	$1,308,196,210
Labor Income				
Direct	$99,534,410	$7,129,064	$495,373,678	$602,037,151
Indirect	$27,028,299	$1,404,941	$127,469,095	$155,902,336
Induced	$17,516,966	$1,175,528	$86,095,991	$104,788,486
Multiplier	1.45	1.36	1.43	1.43
Total	$144,079,676	$9,709,533	$708,938,764	$862,727,973
State and Local Tax Revenues				
Employee Compensation	$411,109	$25,869	$1,922,603	$2,359,582
Indirect Business Tax	$11,839,721	$537,398	$51,408,668	$63,785,784
Households	$6,003,029	$406,699	$29,655,406	$36,065,134
Corporations	$3,031,716	$139,887	$16,075,967	$19,247,570
Total	$21,285,575	$1,109,853	$99,062,644	$121,458,070

Source: IMPLAN, Calculations by Beacon Economics

Economic Impact of 241 Completion Project
Impact on Remainder of California

	2009 and Prior	2010-11	2012 and Beyond	Total Impact
Employment				
Direct	0	0	0	0
Indirect	456	21	2,046	2,523
Induced	243	13	1,099	1,355
Multiplier	0.51	0.41	0.44	0.45
Total	699	33	3,146	3,878
Output				
Direct	$-	$-	$-	$-
Indirect	$91,277,123	$3,925,745	$384,827,213	$480,030,077
Induced	$42,481,807	$2,253,113	$193,368,247	$238,103,162
Multiplier	0.50	0.42	0.45	0.46
Total	$133,758,929	$6,178,858	$578,195,459	$718,133,240
Value Added				
Direct	$-	$-	$-	$-
Indirect	$44,957,374	$2,016,754	$193,224,949	$240,199,075
Induced	$23,303,046	$1,224,350	$105,774,828	$130,302,222
Multiplier	0.49	0.39	0.43	0.44
Total	$68,260,420	$3,241,104	$298,999,778	$370,501,297
Labor Income				
Direct	$-	$-	$-	$-
Indirect	$29,038,509	$1,290,761	$125,744,999	$156,074,268
Induced	$13,407,329	$712,007	$61,054,265	$75,173,600
Multiplier	0.43	0.28	0.38	0.38
Total	$42,445,838	$2,002,768	$186,799,264	$231,247,867
State and Local Tax Revenues				
Employee Compensation	$191,261	$8,894	$834,038	$1,034,193
Indirect Business Tax	$4,110,438	$187,726	$17,544,453	$21,842,617
Households	$1,702,479	$80,410	$7,497,099	$9,279,988
Corporations	$1,094,838	$53,086	$4,777,838	$5,925,761
Total	$7,099,016	$330,116	$30,653,428	$38,082,559

Source: IMPLAN, Calculations by Beacon Economics

About Beacon Economics

Beacon Economics is an independent economic research and consulting firm with offices in Los Angeles and the San Francisco Bay Area. We deliver economic analysis and data sites that help our clients make informed, strategic decisions about investment, growth, revenue, policy, and other critical economic and financial issues. Our nationally recognized forecasters were among the first to predict the collapse of the housing market and foretell the onset and depth of the economic downturn that followed. Our core areas of expertise include economic and revenue forecasting, market and industry analysis, economic impact studies, economic policy analysis, and international trade analysis.

Services

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- Expert Testimony

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CHRONOLOGY

The Toll Roads
Stop sitting. Get moving.

Collaborative Participants

- The Collaborative members included: the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Federal Highway Administration and California Department of Transportation; the U.S. Marine Corps also participated actively on issues relevant to the U.S. Marine Corps Base at Camp Pendleton.
- The TCA participated as the lead agency for the SR 241 Completion project under the California Environmental Quality Act.
- The chronology below does not list all 80+ Collaborative meetings or all the other meetings held with various Collaborative participants, such as meetings with the U.S. Fish and Wildlife Service on the Endangered Species Act consultation.

1993-1996
Began NEPA process

1996-2000
Began process pursuant to NEPA 404 MOU

Collaborative agreed on Purpose and Need evaluation criteria, types of alternatives and the draft project alternatives to be evaluated in the technical studies for the EIS

24 alternatives, consisting of 19 toll road alternatives, 3 non-toll road alternatives and 2 no action alternatives).

2001-2002
Collaborative agreed on content and methodology for technical studies, criteria for elimination of alternatives. Informal consultation with U.S. Fish and Wildlife Service.

2002-2003
Collaborative studied alternatives and their impacts. Removed two alternatives that went further east into Marine Corps Base Camp Pendleton from further consideration.

June-August 2003
Eliminated eight alternatives from additional detailed consideration in Draft EIS, based on several evaluation parameters.

2003-2004
Conducted practicability analysis and determined that three toll road alternatives were practicable. Refinements to alternatives to reduce impacts and Collaborative input on refinements and mitigation measures to reduce impacts.

May-August 2004
Public review of Draft Environmental Impact Statement.

February 2005
FHWA requested formal Endangered Species Act Section 7 consultation with the U.S. Fish and Wildlife Service.

September 2005
U.S. Fish and Wildlife Service issued preliminary conclusion that the project is not likely to jeopardize the continued existence of any endangered or threatened species or to adversely modify any critical habitat.

2004-2005
The Collaborative unanimously agreed that the "Green Alternative" was the preliminary Least Environmentally Damaging Practicable Alternative (LEDPA).

February 2006
TCA Board of Directors certified Environmental Impact Report under California Environmental Quality Act.

November 2006
Last formal Collaborative meeting (by teleconference) pending coastal consistency certification

May 2007
National Marine Fisheries Service issues concurrence with Federal Highway Administration determination that project would not likely adversely affect the Southern California DPS of steelhead or its critical habitat.

February 2008
California Coastal Commission objects to TCA's coastal consistency certification.

March 2008
TCA appeals Coastal Commission objection to Secretary of Commerce.

April 2008
U.S. Fish and Wildlife Service issued Biological and Conference opinion finding that the project is not likely to jeopardize the continued existence of federally listed species or adversely modify proposed or designated critical habitat.

December 2008 – Secretary of Commerce sustains Coastal Commission objection to TCA's consistency certification.

2008
EPA, Army Corps and USFWS publicly question their prior agreement on LEDPA and submit comments to Secretary of Commerce that contradict prior Collaborative agreements and seek to distance themselves from the Collaborative process.

2000 | 2002 | 2004 | 2006 | 2008

May 25, 1961
President John F. Kennedy threw the gauntlet down to Congress – let the first man to walk on the moon be an American, and not a Russian.

July 20, 1969
Neil Armstrong became the first man on the moon.

1961 | 1962 | 1969

September 12, 1962
President Kennedy proclaimed America's goal of putting a man on the moon in that decade.

CINCO CITIES MEETING

April 21, 2005

12:00 – 1:30 p.m. – TCA Committee Conference Room

Minutes

Jim Thor	Bill Woollett	Kate Keena
Jim Dahl	Macie Cleary-Milan	Brian Lochrie
Lance MacLean	James Brown	Mike Erickson
Lara Anderson	Lisa Telles	Miko Shulz
Doug Chotkevys	Marie Levario	Steven John
Bill Huber	Paul Bapp	
Holly Veale	Dale Todd	
	Jen Johnson	
	Jeff Bott	
	Clare Climaco	

The meeting commenced at 12:08 pm.

Macie welcomed EPA's outgoing Director Mike Schulz, and their incoming Director Steven John. Introductions were made and congratulations and best wishes were given to both.

1. EPA presentation ..... Mike Schulz & Steven John

EPA gave a presentation about their experience in working with the SOCTIIP Agencies' Collaborative. EPA believes the SOCTIIP Collaborative process has benefited the project and the environmental process. EPA indicated that the TCA did an outstanding job in reducing environmental impacts, especially for wetlands.

EPA discussed themes for Air Quality improvement in southern California. Some of the themes discussed could pertain to the FTC-S project, however, most were ideas for local agencies to consider. EPA provided sources of information that discuss the themes in more detail.

2. Collaborative Update ..... Macie

A meeting with the US Fish and Wildlife Service has been set for Monday, April 25th, to discuss the Section 7 Consultation, which addresses the endangered species impacts to the FTC-S Project. Federal Highways is the lead agency and will track the progress of the discussions.

3. May Board Report on TCA/USFWS Agreement ..... Macie

A Staff Report will be going before the May Board for approval for money to provide a staff person to USFWS to facilitate USFWS' review of the Section 7 Consultation.

4. Firefighter Jim's Tip of the Day ..... Jim

Did you remember to put new batteries in your smoke detector? Lowes has a lithium battery that lasts for 10 years. Cost is $6.99.

5. Other Items

San Clemente is concerned about gridlock in traffic. It is starting at 3:00 pm not only south-bound, but north-bound. Summers will be difficult. Accident reports are constant.

The meeting adjourned at 1:14 pm.

The next Cinco Cities meeting is scheduled for May 19, 2005.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, California 92011

In Reply Refer To:
FWS-OR-1041.22

SEP 30 2005

Mr. Gene K. Fong, Division Administrator
U.S. Department of Transportation
Federal Highway Administration, California Division
650 Capitol Mall, Suite 4-100
Sacramento, California 95814

Attention: Mary Gray and Stephanie Stoermer

Subject: Preliminary Conclusions for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), A7C-FEC-M Initial Alignment, Orange and San Diego Counties, California

Dear Mr. Fong:

In our letter dated August 17, 2005 (FWS-OR-1041.20), regarding our formal consultation and conference in accordance with section 7 of the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*), on the referenced project, we indicated we would provide you with preliminary conclusions for listed species and identify any outstanding issues by September 30, 2005. You had specifically requested that we provide a "preliminary" jeopardy/non-jeopardy determination on the endangered Pacific pocket mouse (*Perognathus longimembris pacificus*, "PPM") to further the National Environmental Policy Act process for the project.

Based on our draft analyses, we have determined in our preliminary conclusions that the construction and maintenance of the SOCTIIP A7C-FEC-M Initial Alignment (the "proposed action") will not jeopardize the continued existence of the Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), tidewater goby (*Eucyclogobius newberryi*), southwestern willow flycatcher (*Empidonax traillii extimus*), least Bell's vireo (*Vireo bellii pusillus*), or thread-leaved brodiaea (*Brodiaea filifolia*). Our preliminary conclusions also support a no adverse modification determination for designated critical habitat for the San Diego fairy shrimp and tidewater goby and proposed critical habitat for the thread-leaved brodiaea.

Our draft analyses for the arroyo toad (*Bufo californicus*, "toad"), coastal California gnatcatcher (*Polioptila californica californica*, "gnatcatcher") and its designated and proposed critical habitats, and PPM identify significant project-related impacts to individuals, populations and habitat for these species. Regarding the toad and gnatcatcher, conservation measures identified by the Transportation Corridor Agencies ("TCA") in the April 2004 draft Environmental Impact

Statement/Subsequent Environmental Impact Report ("DEIS") to avoid and minimize impacts to these species will provide the basis for no jeopardy/no adverse modification determinations. However, because of impacts that are not fully offset, we believe that our overall analyses and final no jeopardy/no adverse modification determinations would be further supported by implementation of additional conservation measures. We will discuss our recommendations for additional conservation and other measures in an upcoming consultation meeting.

Regarding PPM, the San Mateo North population is necessary for the survival and recovery of the PPM because it is one of only four populations known for the species. The PPM recovery plan calls for stabilizing and protecting all existing populations and establishing 10 populations within its historic range. Based on our analysis, we have determined that the proposed action as described in the Biological Assessment likely would increase mortality factors at the San Mateo North site during construction and in association with the direct and indirect effects of toll road operation. The proposed action would also reduce the area of suitable habitat available to PPM at San Mateo North. This loss of suitable habitat likely would reduce the ability of the site to support large population fluctuations that are characteristic of this species. Absent the adoption of the measures described below, this loss would effectively "cap" the size of the San Mateo North population during population expansions. Population expansions during favorable conditions likely are essential for sustaining this isolated population through periods of environmental adversity when individuals may forego reproduction and population persistence relies on adult survivorship. Coupled with increased mortality factors likely associated with animals entering the roadway, roadway lighting, predator concentrating effects, and increased fire frequency, the proposed action further increases the vulnerability of the San Mateo North population.

This increased vulnerability can be addressed by the adoption of an adaptive management program for the San Mateo North population and the incorporation of the following minimization and conservation measures into the project:

A. With the approval of and coordination with Marine Corps Base Camp Pendleton (MCBCP), establish an endowment and hire an entity to adaptively manage the PPM population at San Mateo North. The amount of the endowment must be supported through a property analysis record ("PAR") or another similar cost calculation method that is indexed for inflation and incorporates funding for; 1) invasive species control, 2) habitat management and enhancement, 3) predator control, 4) control of public access, 5) PPM population monitoring and augmentation, and 6) contingencies.
B. Construction of a barrier to small mammal movement along the entire western edge of the roadway alignment in the San Mateo North area to prevent PPM from entering the roadway and getting killed.
C. Minimization and shielding of all roadway lighting, including light cast by vehicle head and taillights, from adjoining habitat areas. This measure may require the construction of a block wall or other solid shielding to prevent light from entering adjoining habitat. All

walls constructed adjoining PPM habitat shall be constructed to minimize perching opportunities of owls and other avian predators.

D. Minimizing the potential for fire ignitions associated with toll road construction and usage to travel into adjoining habitat. This measure should minimize the width of any fire break by means of engineering (e.g., block or crib walls adjoining habitat).
E. Development of a fire response plan in coordination with the local fire agencies to minimize the detrimental effects of fire suppression activities in the habitat should a fire occur.

We understand that TCA is willing to implement these additional conservation measures and to work with MCBCP and our agency to assure the long-term conservation of the San Mateo North population of the PPM. Based on this commitment, we have made a preliminary determination that the proposed action will not jeopardize the continued existence of the PPM.

We anticipate further discussions with your agency, TCA and the California Department of Transportation (Caltrans) regarding the issues in this letter prior to providing our final conclusions and a draft biological opinion for your review and comment. If you have any questions regarding this letter, please contact Jill Terp of my staff at (760) 431-9440, extension 221.

Sincerely,

Karen A. Goebel

Karen A. Goebel
Assistant Field Supervisor

cc:
Macie Cleary-Milan, TCA
Sylvia Vega, Caltrans

Environmental Department - Document Control System

Computer Generated Cover Sheet - Wednesday, March 08, 2006 11:12:54 AM

Agency:	☑ *F/E* ☐ *SJH* ☐ *TCS* ☐ *CIP*	***To Entity:***	FD&W
Corridor:	☐ *ETC* ☐ *SJH* ☐ *FTC-N* ☑ *FTC-S*	***To Person:***	Gene E. Fong
Document Date:	9/30/2005	***From Entity:***	USFWS
Received Date:	9/30/2005	***From Person:***	Karen A. Goebel
Document Type:	Letter	***File Location 1:***	FTC-S Cab: A/Agencies/FHWA & USFWS
Project:	FTC-S	***Retention Period:***	
CIP Project No:		***Transmittal No:***	
Section Number:		***Reference ID:***	
PCO Number:		***Unique ID:***	138
Coordinator:	Maria Cleary-Milan		
Contract Num:			

Subject Preliminary Conclusions for the SOCTIIP, AJC-FEC Initial Alignment, Org & San Diego Counties, CA

Keywords: consultation, conference, Endangered Species, Act, Pacific pocket

Keywords: mouse,fairy, shrimp, brodiaea, goby, gnatcatcher, biological opinion

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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA. 95814

RECD OCT 2 4 2005

October 17, 2005

IN REPLY REFER TO
HDA-CA
File # 11-ORA-00 SOCTIP
Document # P53352

Steven John
U.S. Environmental Protection Agency
Southern California Field Office
600 Wilshire Blvd., Suite 1460
Los Angeles, CA 90017

SUBJECT: Request for Concurrence on the Preliminary Least Environmentally Damaging Practicable Alternative (LEDPA) for the South Orange County Infrastructure Improvement Project (SOCTIIP).

Dear Mr. John:

Over the past five years, the Federal Highway Administration (FHWA) has, as part of the collaborative process under the National Environmental Policy Act and Clean Water Act Section 404 Memorandum of Understanding (NEPA/404 MOU), coordinated with the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, U.S. Army Corps Of Engineers, Caltrans, Transportation Corridor Agencies, the Marine Corps, and Camp Pendleton. Based on project analysis and past coordination efforts, the FHWA is formally requesting a preliminary LEDPA determination for the SOCTIIP project. FHWA believes that the A7C-FEC-M Initial (see enclosed map) is the LEDPA. We also enclosed the letter from U.S. Fish and Wildlife Service dated September 30, 2005 regarding their preliminary conclusions on the endangered species for the project to help in this decision process. We would appreciate receipt of your concurrence on the preliminary LEDPA determination on or before 45 days, as stated in the NEPA/404 MOU.

Please contact Tay Dam, Senior Project Development Engineer (213) 321-6360, or Macic Cleary-Milan at (949) 754-3483 if you have any questions.

Sincerely,

/s/ Lisa Cathcart-Randall

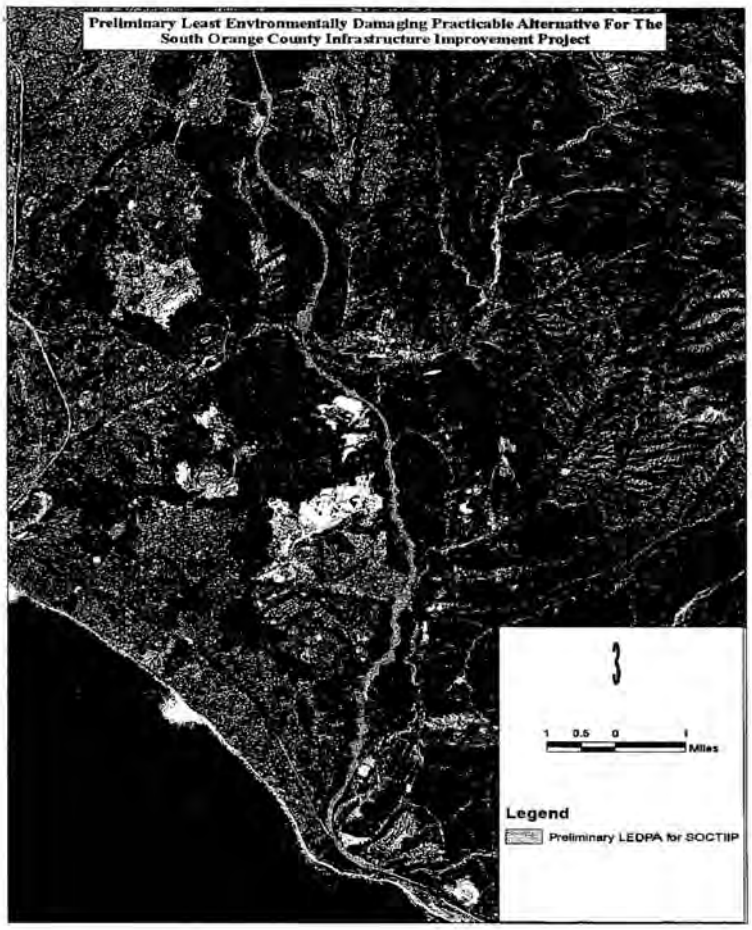
For
Gene K. Fong
Division Administrator

Enclosures

cc: (hard copy w/ enclosures)
Macie Cleary-Milan, TCA
PO Box 53770
Irvine, CA 92619-3770

cc: (email w/ enclosures)
Jay Norvell, Caltrans
Sylvia Vega, Caltrans
Susanne Glasgow, Caltrans
Mary Gray, FHWA
Tay Dam, FHWA
Lisa Cathcart-Randall, FHWA
Larry Vinzant, FHWA

LCathcart-Randall/lmg


Preliminary Least Environmentally Damaging Practicable Alternattve For The South Orange County Infrastructure Improvement Project
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Miles
Legend
Preliminary LEDPA for SOCTIIP

DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
P.O BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

November 1, 2005

REPLY TO
ATTENTION OF:
Office of the Chief
Regulatory Branch

Mr. Gene Fong
Division Administrator
U.S. Department of Transportation
Federal Highway Administration
650 Capitol Mall, Suite 4-100
Sacramento, California 95814

Dear Mr. Fong:

We have reviewed your letter dated October 13, 2005 and received October 17, 2005 requesting our agreement on the South Orange County Transportation Infrastructure Improvement Project ("SOCTIIP"; "Project") alternative most likely to represent the least environmentally damaging practicable alternative ("LEDPA").

The Project's jointly prepared Environmental Impact Statement ("EIS") and Subsequent Environmental Impact Report ("SEIR") evaluated eight build alternatives and two no action alternatives. In our earlier review, the Corps found the Interstate 5 Widening and Arterial Improvement Only alternatives to be impracticable because neither is available to the applicant, (i.e., Transportation Corridor Agencies; "TCA"), for acquisition and implementation. Of the six remaining build alternatives, the A7C-FEC-M alternative appears to be the 'preliminary' LEDPA based on information contained in the draft EIS/SEIR and its appendices/technical studies; Table 1.1 of the draft EIS/SEIR entitled *Evaluation Matrix Summary of Adverse Impacts Before Mitigation*; public comments received on the draft EIS/SEIR (dated 2004) and the Corps' preliminary Public Notice (dated 2004); the Corps' final jurisdictional determination for the SOCTIIP (letter dated September 27, 2005); and the U.S. Fish and Wildlife Service's preliminary conclusions for the A7C-FEC-M alternative (letter dated September 30, 2005).

In accordance with the 1994 California National Environmental Policy Act ("NEPA")/Section 404 of the Clean Water Act ("404") Integrated Process Memorandum of Understanding ("MOU"), we offer our agreement that the A7C-FEC-M is the 'preliminary' LEDPA. Please be advised this determination does not constitute our final Department of Army permit decision. As part of our final regulatory decision-making process a final Corps Public Notice must be published to solicit agency and public comments on the TCA's proposed action as well as to consider all relevant public interest review factors outlined in 33 C.F.R. § 320.4(a)(2) to evaluate whether the A7C-FEC-M is contrary to the public interest.

I am forwarding a copy of this letter to Mr. Steven John, Environmental Protection Agency, 600 Wilshire Blvd., Suite 600, Los Angeles California 900017; Ms. Jill Terp, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92011; California Department of Transportation, Ms. Smita Deshpande, 3337 Michelson Drive, Suite 380, Irvine, California 92612; and Ms. Macie Cleary-Milan, Transportation Corridor Agency, 125 Pacifica, Irvine, California 92618.

If you have any questions, please contact Ms. Susan A. Meyer of my staff at (213) 452-3412. Please refer to this letter and 200000392-SAM in your reply.

Sincerely,

for David J. Castanon
Chief, Regulatory Branch

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Agency:	☑ *F/E* ☐ *SJH* ☐ *TCS* ☐ *CIP*	***To Entity:***	FHWA/DOT
Corridor:	☐ *ETC* ☐ *SJH* ☐ *FTC-N* ☑ *FTC-S*	***To Person:***	Gene Fong
Document Date:	11/1/2005	***From Entity:***	ACOE
Received Date:		***From Person:***	David J. Castenada
Document Type:	Letter	***File Location 1:***	FTC-S Cab: Agencies/Federal/ACOE & FH
Project:	FTC-S	***Retention Period:***	
CIP Project No:		***Transmittal No:***	
Section Number:		***Reference ID:***	
PCO Number:		***Unique ID:***	136
Coordinator:			
Contract Num:			

Subject LEDPA Letter - ACOE

Keywords: SOCTIP, AJC-SEC-M, EIS, SEIR, Matrix, Summary, NEPA, 404,

Keywords: preliminary, Meyer

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

November 8, 2005

Gene K. Fong, Division Administrator
Federal Highway Administration, California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

Subject: Concurrence on the Preliminary Least Environmentally Damaging Practicable Alternative for the South Orange County Infrastructure Improvement Project, Orange County, California

Dear Mr. Fong:

The Environmental Protection Agency (EPA) has reviewed Federal Highway Administration's (FHWA) October 17, 2005 letter requesting concurrence, under the National Environmental Policy Act/Clean Water Act (CWA) Section 404 Integration Process Memorandum of Understanding (NEPA/404 MOU), on the preliminary least environmentally damaging practicable alternative (LEDPA) for the South Orange County Infrastructure Improvement Project (SOCTIIP), Orange County, California. We appreciate the interagency coordination efforts by FHWA, California Department of Transportation, and Transportation Corridor Agency to identify the LEDPA.

EPA concurs that the A7C-FEC-M Initial Alignment is the preliminary LEDPA. Our concurrence is based on: 1) the information contained in the Draft Environmental Impact Statement (EIS) and its technical studies, 2) the preliminary determination by Fish and Wildlife Service, dated September 30, 2005, that the A7C-FEC-M Initial Alignment will not jeopardize the continued existence of listed species, including the Pacific pocket mouse, and 3) the concurrence by the Corps of Engineers, dated November 1, 2005, that alternative A7C-FEC-M is the preliminary LEDPA.

EPA looks forward to working with the SOCTIIP Collaborative on the development of the conceptual mitigation plan for impacts to aquatic resources, to be completed in advance of the Final EIS. This is the next step in the NEPA/404 integration process. EPA will also provide comments on the Final EIS pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act, as well as the Corps of Engineers Final Public Notice for the Clean Water Act Section 404 permit when they are

published for public review. If you have questions, please contact me or Matthew Lakin, the lead reviewer for this project, at (415) 972-3851 or Lakin.Matthew@epa.gov.

Sincerely,

for Duane James, Manager
Environmental Review Office

Cc: Susan Meyer, Army Corps of Engineers, Los Angeles District Office
Jill Terp, Fish and Wildlife Service
Smita Deshpande, California Department of Transportation
Macie Cleary-Milan, Transportation Corridor Agency
Larry Ramsels, Marine Corps Base Camp Pendleton

Environmental Department - Document Control System

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Agency:	☑ *F/E* ☐ *SJH* ☐ *TCS* ☐ *CIP*	***To Entity:***	FHWA, California Division
Corridor:	☐ *ETC* ☐ *SJH* ☐ *FTC-N* ☑ *FTC-S*	***To Person:***	Gene K. Fong
Document Date:	11/8/2005	***From Entity:***	USEPA
Received Date:	11/8/2005	***From Person:***	Duane James
Document Type:	Letter	***File Location 1:***	FTC-S Cab; A/Agencies FHWA & EPA
Project:	FTC-S	***Retention Period:***	
CIP Project No:		***Transmittal No:***	
Section Number:		***Reference ID:***	
PCO Number:		***Unique ID:***	137
Coordinator:	Macie Cleary-Milton		
Contract Num:			

Subject Concurrence on Preliminary LEDPA for SOCTIIP, Orange County, CA.

Keywords: EPA, FHWA, NEPA, 404, MOU, sccams, AJC-FEC-M, Alignment,

Keywords: Pacific pocket mouse, Final EIS, 309, Clean Water Act, permit, Lakin

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802- 4213

In response refer to:
1/SWR/2005/05890:SCG

MAY 23 2007

Gene K. Fong
U. S. Department of Transportation
Federal Highway Administration
California Division
650 Capitol Mall, Suite 4-100
Sacramento, California 95814

Dear Mr. Fong:

NOAA's National Marine Fisheries Service (NMFS) has reviewed the Federal Highway Administration's (FHWA) proposed South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), located in southern Orange County, California. The project consists of creating a 16 mile-long toll road, which will connect Highway 241 with Interstate 5 (I-5) near the cities of Rancho Santa Margarita and San Clemente. The highway connector is designed to alleviate traffic congestion in southern Orange County. The proposed preferred alternative alignment (alignment A7C-FEC-M) will cross San Mateo Creek and San Juan Creek, both of which are within the Distinct Population Segment (DPS) of endangered Southern California Steelhead (*Oncorhynchus mykiss*), and designated critical habitat for this species.

At its southern terminus, the proposed highway will connect with I-5 about 1000 feet upstream of the mouth of San Mateo Creek. A large span bridge with connector lanes will be built directly adjacent to the existing I-5 span bridge to facilitate the connection of the two highways. The bridge will be a cast-in-place pre-stressed box-girder superstructure supported by large deep-pile foundations and bridge piers. Some bridge piers will be located within the San Mateo Creek channel, but will be placed approximately 200 feet apart. As the proposed highway proceeds north it will veer away from San Mateo Creek, and will head north toward San Juan Creek. The proposed highway will have a second span bridge, which would be built over San Juan Creek within Rancho Mission Viejo property, about 6 miles upstream of the ocean. The second bridge will also be a cast-in-place pre-stressed box girder superstructure supported by large deep-pile foundations and bridge piers. Some bridge piers will be within the San Juan Creek channel, but will be distanced approximately 200 feet apart. Additionally, in 15 locations along the proposed highway within the San Mateo and San Juan Creek watersheds, extended detention basins (EDBs) and bioswales will be incorporated into the highway infrastructure. The purpose of the

EDBs will be to contain and detoxify road surface runoff, by facilitating removal of oils, heavy metals, and fine sediments from the runoff prior to it being discharged into any stream. The construction of the bridges and related highway infrastructure is estimated to take 18 to 24 months to complete. The FHWA determined that construction of the SOCTIIP was not likely to adversely affect the Southern California DPS of steelhead or critical habitat for this species, and requested NMFS' concurrence with this determination.

After reviewing the proposed action, the draft environmental impact statement, the biological assessment dated April 14, 2005, additional information provided by letter dated January 5 2007, discussions with FHWA, and a site visit in June of 2005, NMFS concurs with the FHWA's determination for the following reasons.

1. No water diversions will be implemented for the proposed highway and relocation of steelhead will not be necessary. Additionally, the creek channels are expected to be dry for the majority of the construction period. During construction, temporary bridges will be constructed during the dry season so that when flow is present, interference with migrating steelhead is not expected. When construction is complete, the final bridges are not expected to decrease the functional value of steelhead migratory habitat within the San Mateo or San Juan Creek Watersheds because the bridge piers will be spaced 200 feet apart. As a result, even if the final design locates the piers in the channel, NMFS does not expect that the piers will impede steelhead migration.

2. The proposed highway is not expected to reduce water quality within the San Mateo or San Juan Creek watersheds. As part of the Runoff Management Plan for the proposed project, runoff and pollutants from road surfaces will be filtered out within EDBs and bioswales, and untreated runoff will not be discharged into San Juan Creek, San Mateo Creek, or their tributaries. Additionally, untreated runoff from I-5 currently goes directly into lower San Mateo Creek and the estuary, but after project completion, runoff from Interstate 5 will be directed into EDBs and bioswales for the proposed highway, which is expected to eliminate untreated highway runoff into lower San Mateo Creek and the San Mateo Creek estuary.

3. Best management practices will be implemented to minimize impacts during construction of the highway and bridges. These include a Storm Water Pollution Prevention Plan to minimize impacts from onsite runoff during construction, sediment control devices and measures to protect creek bed and banks during and after construction, enclosures for areas where concrete work will take place, restriction of fueling and maintenance of heavy machinery to areas away from the creek channel, and an emergency spill contingency plan.

4. Earthen areas disturbed by construction will be re-vegetated and hydro-seeded to minimize effects to riparian vegetation and to minimize sedimentation from disturbed banks and hillsides.

5. Because the highway will be located away from San Mateo and San Juan Creeks, and because the bridges will be supported by piers spaced sufficiently apart to reduce the risk of impairing flowing water, the project is not expected to affect floodplain development or connectivity in the San Mateo or San Juan Creek watersheds.

This concludes section 7 consultation for this proposed action. Consultation must be reinitiated where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and: (1) if new information becomes available revealing effects of the action on listed species in a manner or to an extent not previously considered, (2) if project plans change, and if the agency action is subsequently modified in a manner that causes an effect to listed species that was not considered, or (3) if a new species or critical habitat is designated that may be affected by this action. Please contact Stan Glowacki at (562) 980-4061 or via email at Stan.Glowacki@noaa.gov if you have any questions concerning this letter, or if you require additional information.

Sincerely,

for Rodney R. McInnis
Regional Administrator

cc: Jae Chung, Corps of Engineers
Mary Larson, CDFG
Jill Terp, USFWS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

February 1, 2008

Gene K. Fong, Division Administrator
Federal Highway Administration (FHWA), California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

Subject: Additional Information Regarding Alternatives Analyzed for South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Orange County, California

Dear Mr. Fong:

On October 4, 2007, the U.S. Environmental Protection Agency (EPA) received a report titled "An Alternative to the Proposed Foothill South Toll Road – *The Refined AIP Alternative*" submitted by Smart Mobility Inc. and Philip William & Associates on behalf of the Endangered Habitats Leagues (EHL) et al. The report addresses the feasibility of a modified AIP alternative and specifically, rebuts many of the engineering design (interchanges) and real estate (displacements) assumptions provided in the Final Subsequent Environmental Impact Report (SEIR).

Upon review of the new information, we corresponded with your staff via email on October 26, 2007 our desire for members of the SOCTIIP Collaborative to further examine the document and requested FHWA to take the technical lead in assessing and responding to the new information. Our agency has an interest in knowing how this new information will be viewed by FHWA and/or whether it could substantively impact the alternatives analysis to an extent where this AIP-R alternative is fully analyzed under National Environmental Policy Act (NEPA).

Your email response to our request indicated that FHWA would respond to the Smart Mobility Report after receiving the amended version from EHL. On January 24, 2008 EPA received the revised version of the Smart Mobility Report along with peer review of the report completed by Bergmann Associates that stated a refined AIP alternative should be presented in the SEIR.

The purpose of this letter is to reiterate our concerns regarding the new information and encourage FHWA to convene a meeting of the Collaborative to address how this new information will be incorporated into the Final Environmental Impact Statement (EIS). We are looking for FHWA to take the technical lead in assessing and responding to this information and would like to better understand how this will occur.

We note that our letter dated November 8, 2005 (Concurrence on the Preliminary Least Environmentally Damaging Practicable Alternative) as well our comments dated March 19, 2007 on excerpts of the Administrative Draft Final EIS were completed without consideration of this new information. We expect that the Final EIS will fully address and incorporate this information as relevant to a full alternatives analysis.

We look forward to continued coordination on this project. Please contact Susan Sturges (415-947-4188 or sturges.susan@epa.gov) or Eric Raffini (415-972-3544 or raffini.eric@epa.gov), the lead reviewers of this project, to schedule a time to meet. Also, when the Final EIS is released for public review, please send three hard copies and two electronic copies to the address above (mail code: CED-2).

Sincerely,

Connell Dunning

FOR Nova Blazej, Manager
Environmental Review Office

cc: Sylvia Vega, California Department of Transportation, District 12
Larry Rannals, Camp Pendleton
Tay Dam, Federal Highway Administration, Los Angeles
Susan Meyer, U.S. Army Corps of Engineers
Karen Goebel, U.S. Fish and Wildlife Service, Carlsbad Office
Paul Bopp, Transportation Corridors Agency

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE DIRECTOR
1120 N STREET
P. O. BOX 942873
SACRAMENTO, CA 94273-0001
PHONE (916) 654-5266
FAX (916) 654-6608
TTY 711

Flex your power!
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May 27, 2008

The Honorable Carlos M. Gutierrez
Secretary of U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Gutierrez:

The California Department of Transportation (Caltrans) wishes to convey our support of the Foothill/Eastern Transportation Corridor Agencies (TCA) administrative appeal of a decision by the California Coastal Commission (CCC) regarding a toll road project on State Route 241. Specifically, Caltrans asks that you override the CCC's objection to TCA's request for Consistency Certification for the Foothill Transportation Corridor – South (FTC-S).

Caltrans has worked for over nine years as part of an innovative federal-state agency collaborative process. The Federal Highway Administration (FHWA), U.S. Army Corps of Engineers (ACOE), U.S. Environmental Protection Agency (EPA), United States Fish and Wildlife Service (FWS), Caltrans, and the TCA as lead agency for the project, formed a partnership (Collaborative) which has agreed on purpose and need, considered many possible alternatives, refined the alternatives to 24 for detailed evaluation, established criteria to use for identification of the Least Environmentally Damaging Practicable Alternative (LEDPA), and worked to select a preferred alignment to be included in the Final EIS. The ACOE and the EPA identified the preferred selected alignment to be the preliminary LEDPA. FWS has recently issued the Endangered Species Act Biological Opinion for the preferred alignment, which determines compliance with the Federal Endangered Species Act. The TCA has certified an environmental impact report (EIR) for the Project and approved the locally preferred alignment. The federal environmental impact statement (EIS) is still under review pending federal permits and consistency determination.

FTC-S is the remaining 16-mile segment of Orange County's planned 67-mile toll road system. Caltrans anticipates growing freeway and arterial congestion on Interstate 5 (I-5) in southern Orange County as a result of projected growth. By 2020 there will be 577,000 more residents in Orange County. Additionally, Orange County estimates 98,000 new jobs and 47,000 new homes will be added in the FTC-S area by 2025. Traffic volumes at the Orange County/San Diego county line are projected to increase by 60 percent by 2025. The FTC-S will provide improvements to the transportation infrastructure that will help alleviate future

traffic congestion and accommodate the need for mobility, access, and goods movement on I-5 and the local arterial network.

Currently identified local, State, and federal funding will not provide all the infrastructure improvements south Orange County will need to avoid gridlock and ensure mobility in the future. The $569 billion ($67.6 billion in Orange County) in available local, State, and federal revenues identified in the Southern California Association of Governments Draft 2008 Regional Transportation Plan has been committed to specific projects. Widening the I-5 to address traffic demand without the FTC-S would cost an estimated additional $2.5 billion, for which there is no identified funding source.

FTC-S will provide important environmental benefits to the people of California. First, it will improve mobility on a burdened infrastructure and thus improve access to and from coastal communities, recreational resources and the many coastal attractions in Orange and San Diego Counties. Second, it will provide important air quality benefits. The South Coast Air Quality Management District has formally recognized the air quality benefits of the project by designating it as a Transportation Control Measure in the regions Air Quality Management Plan. Third, the FTC-S alignment has been designed to avoid and minimize impacts on wildlife habitat and wetlands. Fourth, the project includes a state-of-the-art system to collect and treat storm water runoff, including runoff from a segment of I-5 that currently goes untreated.

In addition to the traditional environmental mitigation required for a project of this magnitude, the TCA has proposed to contribute $100 million to State Parks for additional camping and other important improvements not only at San Onofre State Beach, but also at San Clemente State Park and at Crystal Cove State Park.

The CCC states that reasonable alternatives exist. The TCA's environmental document addresses the reasons why those alternatives were not selected. Caltrans has written three responses documenting our assessment of the Smart Mobility Inc. (SMI) alternative (see attachments). Ultimately, the alternative presented in the SMI Report does not meet Department standards, ignores the FHWA designated 13 controlling criteria for selection of design standards of primary importance for highway safety, and in our view does not meet applicable engineering standards of care. Therefore, Caltrans cannot support the SMI proposed design refinements or conclusions.

The FTC-S can be built without State and federal funding in a manner that will enhance and foster the use of California's great Pacific Coast and protect coastal resources. Caltrans is hopeful that CCC balancing provisions, in relation to coastal zone and coastal access, can be applied to support the extensive work done by the Collaborative and/or find this project is consistent with the objectives of the Coastal Zone Management Act. The project will reduce congestion, increase economic activity, and improve the quality of life for residents and users. Completion of the FTC-S is a critical element of the Orange County Long Range Transportation Plan, and is consistent with the Governor's vision for California's future.

Thank you for your consideration of Caltrans' support of the TCA appeal.

Sincerely,

WILL KEMPTON
Director

Attachments

c: Dale E. Bonner, Secretary, Business, Transportation and Housing Agency
Regina Evans, Deputy Cabinet Secretary, Office of Governor Arnold Schwarzenegger
Eric L. Swedlund, Deputy Director, Office of Governor Arnold Schwarzenegger, Washington D.C.
Thomas Street, NOAA Office of General Counsel for Ocean Services
Gene Fong, Administrator, Federal Highway Administration, California Division
Tom Margro, Transportation Corridor Agencies

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET NW
WASHINGTON, D.C. 20314-1000

MAY 28 2008

REPLY TO
ATTENTION OF:
Civil Works Directorate - Operations

Joel La Bissonniere
Assistant General Counsel
for Ocean Services
National Oceanic and Atmospheric Administration
Washington D.C. 20230

Dear Mr. La Bissonniere:

I am responding to your May 1, 2008 letter to LTG Robert Van Antwerp, Commander of the U.S. Army Corps of Engineers (Corps) in which you requested comments from the Corps concerning the Foothill/Eastern Transportation Corridor Agency (TCA) appeal of the California Coastal Commission's objection to the construction of TCA's proposed extension of California State Route 241 in Orange County, California. This letter represents my agency's official response to your Federal Register notice of March 17, 2008.

TCA's proposed project would entail the discharge of dredged or fill material into waters of the United States. Pursuant to Section 404 of the Clean Water Act (CWA), Department of the Army authorization (through a Corps Section 404 permit) is required for such discharges. Our Los Angeles District office has been engaged for many years with the Federal Highway Administration (FHWA), Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS) and others in an effort to develop an environmental impact statement (EIS) to evaluate various alternatives for this project. Pursuant to the National Environmental Policy Act (NEPA), FHWA is the lead federal agency responsible for preparing this EIS.

The draft EIS was circulated for public review in 2004. It evaluated eight "build" alternatives, all of which meet the overall project purpose to "provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement, and future traffic demands on the I-5 freeway and arterial network in the study area." Based on the best information available at the time, the Los Angeles District determined in 2005 that six of the eight build alternatives (as toll roads) were available to TCA and thus "practicable," for our CWA Section 404 evaluation purposes.

Also in 2005 (and pursuant to the 1994 State of California Memorandum of Understanding between FHWA, California Department of Transportation, EPA, FWS, National Marine Fisheries Service, and the Corps on integrating the NEPA and 404 processes for transportation projects), the Los Angeles District preliminarily identified alternative A7C-FEC-M ("green" alignment) as the least environmentally damaging practicable alternative (LEDPA). As of the date of this letter, this preliminary determination has not changed. Federal regulations governing

our regulatory program prohibit granting of Section 404 authorizations unless the Corps determines that the proposed action constitutes the LEDPA and that the proposed alternative is not contrary to the public interest. A finalized EIS that satisfies the Corps' statutory requirements is necessary before our agency can complete these determinations and render a permit decision. The Los Angeles District Commander will ultimately be the Corps decision maker for TCA's permit application.

Two of the eight build alternatives were found not to be available to TCA because they were not toll road alternatives. Because they were not available to the applicant (TCA), they were not considered to be practicable under the definition of that term in our CWA Section 404(b)(1) regulations. These non-toll road alternatives could meet the overall project purpose, and to ensure NEPA compliance, these alternatives were carried through for analysis in the draft EIS.

The interagency effort to develop the environmental review documents for this proposed project is known as the "Collaborative". The Collaborative is the forum that has been used for many years to implement the procedural provisions of the 1994 NEPA/404 Integration MOU which has so far lead to the publication of the draft EIS and preliminary identification by the Corps and EPA of the LEDPA. The Collaborative is now actively working with FHWA to move the federal environmental review process forward; however substantial work remains with respect to both the NEPA and the Section 404 permit application processes, including an evaluation of information received subsequent to the release of the draft EIS. Release of the Corps' standard Public Notice (PN) soliciting public and agency comment on the proposal is expected to take place concurrent with the publication of FHWA's Federal Register Notice of Availability of the final EIS. Any substantive comments received on the PN and final EIS would be given full consideration in helping us to determine compliance with the CWA regulations and in understanding the scope of potentially significant public interest factors – both evaluated in our Record of Decision (ROD). Once the ROD is complete, the Corps can issue a permit decision.

In our regulatory role in reviewing applications for permits to discharge dredged and fill material into waters of the United States, my agency is neither a project proponent nor opponent. We are committed to fair and balanced permit decisions which acknowledge the legitimate needs of permit applicants as well as the public's interest in protecting the aquatic ecosystems and other environmental resources. I appreciate the opportunity to provide these official U.S. Army Corps of Engineers agency comments to your March 17, 2008 Federal Register notice. If you have any questions please call Jennifer Moyer, Acting Chief of our Regulatory Program at (202) 761-4599.

Sincerely,

Steven L. Stockton, P.E.
Director of Civil Works

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, California 92011

In Reply Refer To:
FWS-OR/MCBCP-08B0352-08TA0525

MAY 28 2008

Thomas Street, Attorney-Advisor
Office of the General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1305 East-West Highway, SSMC4, Suite 6111
Silver Spring, Maryland 20910

JUN 02 2008

Subject: State Route 241 Extension, Foothill Transportation Corridor – South, in Orange and San Diego Counties, California

Dear Mr. Street:

This correspondence is in response to your letter dated May 1, 2008, requesting our comments regarding the Transportation Corridor Agencies' (TCA) appeal of the California Coastal Commission's (CCC) ruling on February 6, 2008, that the proposed extension of State Route 241, the Foothill Transportation Corridor – South (toll road), in Orange and San Diego counties, California, is inconsistent with the Coastal Zone Management Act.

The primary mission of the U.S. Fish and Wildlife Service (Service) is to "work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people." Specifically, the Service administers the Endangered Species Act of 1973 (Act), as amended, and provides support to other Federal agencies in accordance with the provisions of the Fish and Wildlife Coordination Act.

We have also worked as a member of the interagency "Collaborative" group comprised of the Federal Highway Administration (FHWA), Environmental Protection Agency (EPA), Caltrans, the Department of the Navy – Marine Corps Base Camp Pendleton, Corps of Engineers (Corps), TCA, and the Service. Members of the collaborative have met since the mid-1990's to evaluate various project alternatives with respect to their ability to meet the purpose and need, environmental impacts, and feasibility. We have appreciated the opportunity to participate in this process, although at times we have not been an active participant due to workload constraints.

Our intent in providing comments is to clarify our role in evaluating the proposed project pursuant to the Act and as a member of the Collaborative. We are neither a supporter nor an opponent of the proposed project. We offer the following comments based on our review of the CCC's Principal Brief dated April 11, 2008, and TCA's Principal Brief dated March 18, 2008, regarding the CCC's ruling.

CCC's Principal Brief, dated April 11, 2008, stated that the Service "made only a preliminary determination regarding the toll road; it has yet to issue a final opinion" (p. 5). However, the Service completed formal consultation on the proposed project on April 30, 2008, concluding that the project was not likely to jeopardize the continued existence of federally listed species, including thread-leaved brodiaea (*Brodiaea filifolia*), tidewater goby (*Eucyclogobius newberryi*), arroyo toad (*Bufo californicus*), coastal California gnatcatcher (*Polioptila californica californica*, "gnatcatcher"), least Bell's vireo (*Vireo bellii pusillus*), and Pacific pocket mouse (*Perognathus longimembris pacificus*).

TCA's Principal Brief, dated March 18, 2008, stated that "the project as proposed by TCA reflects the unanimous recommendation of the federal transportation and environmental agencies with jurisdiction over the Project (Federal Highway Administration ("FHWA"), U.S. Environmental Protection Agency ("EPA"), U.S. Army Corps of Engineers ("ACOE"), and the U.S. Fish and Wildlife Service ("USFWS")). These federal agencies evaluated a wide range of project alternatives under the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA") and the Endangered Species Act ("ESA"), and concluded that the project proposed by TCA is the Least Environmentally Damaging Practicable Alternative ("LEDPA")" (p. 2). On page 6, TCA's brief stated that "after comparing all other alternatives addressed by the Draft EIS/SEIR, the Collaborative unanimously determined that the Project described in the Consistency Certification is the LEDPA [Least Environmentally Damaging Preferred Alternative]." However, the Service did not determine that the project is the LEDPA as defined under NEPA. The determination of the LEDPA is not a Service responsibility.

Thank you for the opportunity to comment on the proposed project. If you have questions regarding this letter, please contact me at (760) 431-9440, extension 211.

Sincerely,

Jim A. Bartel
Field Supervisor

cc:
Thomas H. Magness, Corps
Gene Fong, FHWA
Peter Douglas, CCC
Ed Pert, CDFG
Valarie McFall, TCA
Wayne Nastri, EPA
Cindy Quon, Caltrans
Lupe Armas, USMC

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OCT 1 2008

South Pacific Division
- Regional Integration Team

Joel La Bissonniere
Assistant General Counsel
for Ocean Services
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

Dear Mr. La Bissonniere:

I am responding to your letter of September 16, 2008, requesting additional comments regarding the Foothill/Eastern Transportation Corridor Agency (TCA) appeal of the California Coastal Commission's objection to the construction of TCA's proposed extension of California State Route 241 in Orange County, California. You requested any additional information or analysis that has been developed since my letter of May 28, 2008, that would, on substantive grounds and with respect to the criteria described in your letter, affect your examination of the alternative that the State of California asserts is consistent with the coastal zone management program.

The basis of our comments is our statutory authority under Section 404 of the Clean Water Act, and the National Environmental Policy Act (NEPA) requirements that flow from our action. I want to reiterate from our previous letter that substantial work remains with respect to both the NEPA and the Section 404 permit application processes. Since our last letter, the evaluation of information received subsequent to the release of the Federal Highway Administration's (FHWA) Draft Environmental Impact Statement (DEIS) continues. Further, since my letter of May 28, 2008, we have received additional information from both TCA and other organizations regarding the project. However, we have not yet received FHWA's reevaluation of their DEIS. A reevaluation is required in order to fully evaluate and take into consideration information received by FHWA since the publication of its DEIS four years ago. Therefore, at this time it is not possible to draw any conclusions from our review over the scope of the alternatives that will be considered (i.e., "available" to TCA), or which alternative may be selected as the final Least Environmentally Damaging Practicable Alternative.

In our regulatory role in reviewing applications for permits to discharge dredged and fill material into waters of the United States, my agency is neither a project proponent nor opponent. We are committed to fair and balanced permit decisions which acknowledge the legitimate needs of permit applicants, as well as the public's interest in protecting the aquatic ecosystems and other environmental resources. The Los Angeles District Commander and his team have been in regular dialogue with the project applicant (TCA), local stakeholders and environmental groups

and federal partners that make up the collaborative. These discussions have been mutually beneficial and bave moved the process forward.

I appreciate the opportunity to provide these comments. If you have any questions please call Linda Morrison, Acting Chief of our Regulatory Program at (202) 761-8560.

Sincerely,

Steven L. Stockton, P.E.
Director of Civil Works

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

October 7, 2008

Mr. Thomas Street
Attorney-Advisor
Office of General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
1305 East-West Highway, Suite 6111
Silver Spring, Maryland 20910

Subject: Additional Comments on the Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agencies for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Southern Orange County and Northern San Diego County, California

Dear Mr. Street:

This letter responds to the September 16, 2008 letter from your office requesting additional comments on the Federal Consistency Appeal, under the Coastal Zone Management Act (CZMA), by Foothill/Eastern Transportation Corridor Agencies (TCA) regarding the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP). In particular, you requested additional comments regarding the new information we referenced in our May 28, 2008 comment letter.

The U.S. Environmental Protection Agency's (EPA) involvement in the project is pursuant to our authorities under the National Environmental Policy Act (NEPA), Section 309 of the Clean Air Act, and Section 404 of the Clean Water Act (CWA). The development of the environmental impact statement (EIS) for this project has followed the NEPA and CWA Section 404 Integration Process for Federal Aid Surface Transportation Projects in California Memorandum of Understanding (NEPA/404 MOU).

To prevent further misunderstanding concerning EPA's position on SOCTIIP, please note that we have not made any final determinations on the SOCTIIP. Our review of the proposed project continues, pending receipt of additional information from the Federal Highway Administration (FHWA). We continue to evaluate the project alternatives in light of changing circumstances and new information that is brought to our attention.

Through the NEPA/404 process and as a member of the SOCTIIP Collaborative, EPA participated in defining the project purpose and need, determining the alternatives for analysis, and reviewing technical reports required under NEPA and the CWA. In November 2005, we gave our preliminary concurrence on the A7C-HEC-M alternative as the Least Environmentally Damaging Practicable Alternative (LEDPA). That preliminary concurrence was based on information available at that time and does not constitute an endorsement or final determination on a preferred project alternative.

Since the Draft EIS was circulated more than four years ago, new information and programmatic authorities have become available that may affect the practicability under both CWA and NEPA of project alternatives that were previously determined to be impracticable. Based on our review of the new information and authorities, EPA believes that additional analysis of alternatives that improve existing infrastructure is warranted. In particular, the following issues should be carefully examined by the TCA, FHWA, and reviewing agencies:

- New federal and state tolling authorities and initiatives may influence the availability of alternatives for SOCTIIP that improve existing infrastructure.
- Context sensitive design and Value Engineering Analysis approaches may enable reductions in the number of takings and other impacts associated with alternatives in urban areas.
- The feasibility and traffic congestion benefits of building High Occupancy Toll (HOT) lanes or converting High Occupancy Vehicle (HOV) to HOT lanes should be evaluated on I-5 in Southern Orange County.
- Given the overlap between the SOCTIIP alternatives and improvements identified in the South Orange County Major Investment Study (SOCMIS), the alternatives analysis should be revised to consider the relevant projects and their impacts.

We expand on these issues in our detailed comments (Attached).

In close coordination with the U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (FWS), we raised new information and circumstances to FHWA to consider in its reevaluation of the project's Draft EIS, as required under 23 CFR 771.129. In April 2008, FHWA's Office of Project Development and Environmental Review in Washington, DC offered to help answer our questions and provide a second opinion on the findings of Smart Mobility Inc., which report significantly fewer residential impacts are associated with an alternative that improves existing infrastructure. To date, we have not received a response to our questions from FHWA's Washington office, nor have we received FHWA's NEPA reevaluation. EPA believes there remain a number of unresolved questions regarding the feasibility of several alternatives that improve existing infrastructure.

Thank you for considering the above comments during the appeal process. If you have any questions regarding these comments, please call David Smith at 415-972-3464 or Kathy Goforth at 415-972-3521, or refer your staff to Eric Raffini, at 415-972-3544 or Susan Sturges at 415-947-4188.

Sincerely,

Alexis Strauss, Director
Water Division

Enrique Manzanilla, Director
Communities and Ecosystems
Division

Attachment

CC: Gene Fong, Federal Highway Administration
Nancy Bobb, Federal Highway Administration
Christine Johnson, Federal Highway Administration
Will Kempton, California Department of Transportation
Sylvia Vega, California Department of Transportation
Thomas Margro, Transportation Corridor Agencies
Colonel Thomas Magness, U.S. Army Corps of Engineers
David Castanon, U.S. Army Corps of Engineers
Jim Bartel, U.S. Fish and Wildlife Service
Colonel James B. Seaton III, Marine Corps Base Camp Pendleton
Larry Rannals, Marine Corps Base Camp Pendleton
Edmund Pert, California Department of Fish and Game, South Coast Region
John Robertus, California Regional Water Quality Control Board, San Diego Region
Mark Delaplaine, California Coastal Commission

Detailed EPA Comments
Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agencies for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP)

I. Smart Mobility Inc. Reports

Since our preliminary concurrence on the proposed least environmentally damaging practicable alternative (LEDPA) in 2005, outside organizations have submitted several technical reports and studies regarding alternatives to the proposed project. Specifically, on behalf of Endangered Habitats League et al., the transportation consulting firm Smart Mobility Inc. (SMI) issued several reports on the feasibility of the alternatives that improve existing infrastructure, including refinements to the I-5 Widening Alternative and the Arterial Improvements Plus High Occupancy Vehicle (HOV) and Spot Mixed-Flow Lanes on I-5 Alternative (referred to as the AIP Alternative). These include technical reports dated July 2005, January 2008 and May 2008. In the reports, SMI claims that by using context-sensitive design techniques in tightly constrained urban areas, the number of residential and commercial takings associated with alternatives that improve existing infrastructure could be significantly reduced.

The I-5 Widening Alternative was one of the eight alternatives studied and carried forward in the Draft Environmental Impact Statement (Draft EIS) because, according to traffic modeling results, it provided the greatest traffic relief and resulted in minimal environmental impacts. However, the large number of takings and displacements estimated by the Transportation Corridor Agencies (TCA) to be associated with that alternative resulted in costs that were several times those of the other alternatives. EPA did not consider this alternative as the preliminary LEDPA under Section 404 based in part on these large estimated impacts on residential communities.

Because the SMI reports brought forward several pieces of new, pertinent information, and TCA and SMI estimates of takings associated with the I-5 Widening alternative were far apart, EPA asked California Division Federal Highway Administration (FHWA) to take the technical lead in evaluating this issue. In close coordination with the U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (FWS), we submitted a list of outstanding questions and issues to FHWA to consider in its reevaluation of the project's Draft EIS, as required under 23 CFR 771.129.

In response to our requests, we received additional information from the California Department of Transportation (Caltrans), TCA, and California Division FHWA that countered several SMI findings. Transportation experts from SMI later provided rebuttals to these transportation agency responses. Given the conflicting analysis from transportation experts, EPA concluded it may be appropriate for an independent third party to review the SMI recommendations. In April 2008, FHWA's Office of Project Development and Environmental Review in Washington, DC offered to help answer our questions and provide a second opinion on the refined-AIP alternative identified in the SMI Report. To date, we have not received a response to our questions from FHWA's Washington office, nor have we received FHWA's

NEPA reevaluation. EPA believes there remain a number of unresolved questions regarding the feasibility of several alternatives that improve existing infrastructure.

II. Tolling Initiatives and the Evaluation of Alternatives

As stated in the Draft EIS, the purpose of the project is to *provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement and future traffic demand on I-5.* The Draft EIS further summarized the various needs of the project. Together, the project's purpose and need provides the primary basis for selecting reasonable and practicable alternatives for consideration, analyzing those alternatives in depth, and selecting the preferred alternative.

Both NEPA and Section 404 require analysis of a range of alternatives that satisfy both the purpose and need. However, the analysis requirements of NEPA and Section 404 are slightly different. A Section 404 permit can only be issued for the LEDPA, as defined by EPA's 404(b)(1) Guidelines (Guidelines) (40 CFR 230), and, therefore, requires a more detailed analysis of the aquatic impacts of each alternative than typically is required under NEPA.

The Guidelines define a "practicable alternative" as one which is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. The presence or absence of funding for a particular alternative does not determine its practicability.

In August 2004, the SOCTIIP Collaborative discussed the eight alternatives carried forward in the Draft EIS in terms of their "practicability" under Section 404 and NEPA. Based on the information available at that time, EPA and the Corps determined that the I-5 Widening and the Arterial Improvements Only (AIO) alternatives were impracticable under Section 404 because the applicant did not have the legislative authority to obtain (buy), utilize (e.g. rent), expand or manage non-toll public roads.

Over the last four years, several new provisions have been enacted into federal law that may affect the practicability of the alternatives involving I-5. In particular, new and innovative federal programs promote tolling by both public and private entities on both new and existing interstate highways for the purposes of reducing congestion. The Safe, Accounting, Flexible, Efficient Transportation Eqnity Act: A Legacy for Users (SAFETEA-LU) Section 1604(b), enacted in 2005, offers States and public authorities, or public or private entities designated by States, broader authority to use tolling on a pilot or demonstration basis. SAFETEA-LU authorized three new federal tolling programs including the Value Pricing Pilot Program, the Interstate System Construction Toll Pilot Program and the Express Lanes Demonstration Program (ELD). The ELD program permits tolling on selected facilities to manage high levels of congestion, reduce emissions in a non-attainment (e.g. South Coast) or maintenance area pursuant to the Clean Air Act Amendments, or finance added interstate lanes for the purpose of reducing congestion.

The Secretary of Transportation is authorized to carry out 15 ELD projects through 2009 to allow States, public authorities, or public or private entities designated by States to collect a toll from motor vehicles at an eligible toll facility for any highway, bridge, or tunnel, including on the interstate. According to FHWA staff who manage the ELD program, opportunities currently exist to conduct an ELD project in California. Therefore, SAFETEA-LU now appears to provide TCA the ability, either acting on its own or in partnership with the Orange County Transportation Authority (OCTA) and/or Caltrans, to implement one of the tolling alternatives involving I-5 that were previously deemed impracticable.

Over the past several years, there has been increased recognition of the benefit of managed highway toll lanes, also know as High Occupancy Toll or "HOT" lanes. With their announcement of the ELD program in February 2008, and by giving states additional flexibility to utilize electronic tolling, the U.S. Department of Transportation has made the use of congestion pricing and HOT lanes a national priority.

Managed HOT or Express Toll lanes are already being used to reduce traffic congestion at several locations throughout Southern California, including on State Route 91 in Los Angeles County and along Interstate 15 in San Diego County. On State Route 91, HOT lanes can maintain free flowing travel speeds (60 to 65 mph) during peak travel hours while carrying up to twice the volume of congested general-purpose lanes.[1] A large-scale congestion-reduction pricing demonstration project has been approved for the San Bernardino Freeway in Los Angeles County. Additionally, both Orange County and San Diego County are considering utilizing HOT lanes on I-5 as part of their long-term transportation planning efforts. Finally, a recent report by the nonprofit research organization Rand Inc., identified congestion pricing as one of the most effective ways to reduce traffic congestion in the Los Angeles area.[2]

Tolling of existing and new transportation infrastructure is also gaining support at the state level. The California Legislature has approved the creation of a new state-level agency - the California Transportation Financing Authority (CTFA) - to issue toll road bonds and authorize local authorities to convert existing HOV lanes into toll projects without further legislative approval. If the CTFA is established, a wide variety of local and regional agencies, as well as the State transportation department, would be eligible to sponsor projects that would expand the use of tolls in California, create a method to finance projects, and ease traffic congestion.

III. Southern Orange County Major Investment Study (SOCMIS)

Another piece of information that has come forward since our preliminary concurrence on the LEDPA is the Southern Orange County Major Investment Study (SOCMIS). The SOCMIS is an effort by the OCTA to examine the transportation needs of south Orange County over the next 25 years. The SOCMIS identifies alternatives for addressing transportation

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[1] Obenberger, Jon, "Managed Lanes," Public Roads, Vol. 68, No. 3, November– December 2004, pp. 48–55. Available online at http://www.tfhrc.gov/pubrds/04nov/08.htm

[2] Moving Los Angeles : Short-Term Policy Options For Improving Transportation/ Paul Sorensen ... [et al.]. 2008. Rand Corporation. Available online at http://www.rand.org/pubs/monographs/2008/RAND_MG748.pdf

demands and other problems in southern Orange County. Earlier this year, OCTA published a draft locally preferred strategy (LPS) which highlights a number of transportation improvements for the region. The draft LPS identifies numerous projects that overlap with alternatives studied under SOCTIIP. For example, the draft LPS proposes to increase capacity of I-5 by: 1) adding one General Purpose lane in each direction on I-5 in the following locations: Avenida Pico to Ortega Highway, Avery Parkway to Alicia Parkway, and in the vicinity of SR-133 to the SR-55 ramps; and 2) adding one HOV carpool lane in each direction on I-5 from the San Diego County Line to Pacific Coast Highway. The draft LPS proposes intersection improvements at many of the same intersections identified in the SOCTIIP I-5 Widening and AIO Alternatives. In effect, if these improvements identified in the draft LPS were implemented, the combined result would look very similar to SOCTIIP's I-5 and AIO alternatives. Therefore we believe it is important that the interagency process further examine the feasibility of these alternatives in light of SOCMIS.

IV. Value Engineering Analysis

Finally, the Final EIS for the I-5 Corridor Improvement Project in Southern Los Angeles and Northern Orange County (August 2007) provides a Value Engineering Analysis that should be considered with regard to whether or not a similar analysis of some of the SOCTIIP alternatives might alter previous estimations of residential takings. In the I-5 Corridor Improvement Project, the project sponsor Caltrans proposes to improve I-5 between State Route 91 and Interstate 605, a length of approximately 9 miles, by widening to provide a minimum of 10 lanes across the entire route. During the development of the project, Caltrans completed Value Engineering Analyses for alternatives of 10 and 12 lanes. According to Caltrans, a Value Engineering Analysis is a function oriented, systematic team approach, used to analyze and refine a product, facility design, system, or service. The Value Engineering Analysis completed for the 10-lane alternative reduced the estimated residential takings needed by 50% - from 208 to 104. For SOCTIIP, Value Engineering Analysis may enable reductions in the number of takings and other impacts associated with alternatives that improve existing infrastructure.

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

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Flex your power!
Be energy efficient!

October 23, 2008

The Honorable Carlos M. Gutierrez
Secretary of U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Gutierrez:

The California Department of Transportation (Caltrans) submitted a letter to you on May 27, 2008 in support for the Foothill/Eastern Transportation Corridor Agencies (TCA) administrative appeal of a decision by the California Coastal Commission regarding the completion of the State Route 241 toll road project.

On September 22, 2008, I testified at the Foothill/Eastern Transportation Corridor Agency Federal Consistency Appeal public hearing in Del Mar, California. In my testimony, I stated that the State Route 241 toll road can be built without state and federal funding in a manner that will enhance and foster the use of California's great Pacific coast while protecting coastal resources. The project will improve mobility on an over burdened infrastructure, reduce congestion, increase vital economic activity, and improve the quality of life for residents and users.

I am requesting you consider the information in the attached October 21, 2008 letter sent by Caltrans staff to the TCA. The letter describes Caltrans involvement with the South Orange County Transportation Infrastructure Improvement Project Collaborative group and discusses in more detail our views on the availability and reasonableness of the alternatives for the completion of State Route 241.

Thank you for your consideration of Caltrans support of the TCA appeal.

Sincerely,

WILL KEMPTON
Director

Enclosure

c: Dale E. Bonner, Secretary, Business, Transportation and Housing Agency
Regina Evans, Deputy Cabinet Secretary, Office of Governor Arnold Schwarzenegger
Eric L. Swedlund, Deputy Director, Office of Governor Arnold Schwarzenegger, Washington D.C.
Thomas Street, NOAA Office of General Counsel for Ocean Services
Gene Fong, Administrator, Federal Highway Administration, California Division
Tom Margro, Transportation Corridor Agencies

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

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Flex your power!
Be energy efficient!

October 21, 2008

Mr. Sam Elters
Chief Engineer
Transportation Corridor Agencies
125 Pacifica, Suite 100
Irvine CA 92618-3304

Dear Mr. Elters

The California Department of Transportation (Caltrans) is submitting this letter to describe our involvement with the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Collaborative group, and to discuss our views on the availability and reasonableness of the alternatives to the completion of State Route 241.

The Transportation Corridor Agency (TCA) initiated coordination to implement the 1994 Memorandum of Understanding for the National Environmental Policy Act (NEPA) and Clean Water Act Section 404 Integration Process for projects in Arizona, California, and Nevada for this project. Caltrans and the other signatories of the NEPA/404 MOU and TCA participated in a collaborative process to review the project. Federal Highway Administration (FHWA) is the lead federal agency under NEPA. The U.S. Marine Corps also participated relative to any issues on Camp Pendleton.

The signatory agencies reviewed this project and essentially performed a form of value analysis to reach consensus under the NEPA/404 MOU regulatory decision-making process guidelines. The agencies agreed on purpose and need; criteria for alternative selection (that all the alternatives would meet local and Caltrans highway design standards for equal comparison purposes relative to both the build and natural environments); and developed a range of alternatives including Interstate 5 (I-5) with HOT lanes, various mixed-flow lane configurations, elevated lanes and local street improvements, along with toll road and no action alternatives. Throughout development of the alternatives the collaborative group evaluated, refined, and screened alternatives and gained concurrence prior to moving on to the next steps under the guidelines of the MOU.

All of the project alignment alternatives were evaluated by Caltrans and FHWA in the course of the extensive evaluation of numerous project alternatives in the National Environmental Policy Act and the California Environmental Quality Act evaluation of the Project. The federal/state environmental analysis also evaluated an alternative that included improvements to arterials combined with selected improvements to mixed flow lanes on Interstate-5 (the "AIP" Alternative). The AIP alternative was dropped from further study prior to the release of the Draft Environmental Impact Statement (EIS)/Subsequent Environmental Impact Report (SEIR).

Arterial Improvements Plus – Refined (AIP-R)

The AIP-R alternative is a modification of the AIP alternative. The AIP-R alternative includes a number of design and other modifications that some believe would significantly reduce the very large community and other environmental impacts of the AIP alternative. The AIP-R was developed by Smart Mobility, Inc., (SMI) of Norwich Vermont and was originally presented in a September 2007 report. The AIP-R has since been modified multiple times by SMI in follow-up reports. Caltrans has reviewed the original SMI report and its numerous revisions and in each instance concluded that the AIP-R alternative does not meet Caltrans standards, and in our view does not meet applicable engineering standards of care.

One of the primary design concerns about the AIP-R is the recommendation for the use of Single Point Interchanges (SPI) or tight diamond interchanges as a means to reduce property impacts. Caltrans has documented in our January 2, 2008 letter to FHWA our extensive reasoning why the SPI interchange configurations are not best suited to accommodate the traffic demand along I-5.

However, in the latest SMI report, SMI has continued to suggest the use of a SPI at Avenida Pico and I-5 interchange. The City of San Clemente studied various alternatives for this interchange, and had dropped the SPI interchange from further consideration. Caltrans was not a signatory as would be typical for any freeway interchange study. As the owner/operator of I-5, Caltrans has serious concerns about the application of an SPI at this location. These concerns include pedestrian safety as this interchange is near a school; safety concerning the geometry of the interchange layout itself; construction related issues; and a concern about the unbalanced traffic demand and the operational efficiency for both the local and freeway mainline. Further, Avenida Pico provides a primary access route to the beach in San Clemente. This interchange proposal is not reasonable and it appears to pose a disadvantage to the uses and resources of the state's coastal zone.

The SMI reports have presented condensed interchange designs that (to a layman) give the appearance that they will not impact as much right of way and yet they imply that these interchanges have the same operational benefits as the ones studied in the AIP alternative. Also, in prior reports, it's been suggested that design exceptions where minimum design standards are not achieved could or should be acquired to avoid impacts to the surrounding build environment. Both tight interchanges and impacts to minimum design standards affects the operational efficiency of interchanges, arterials and freeway mainline and we do not believe the AIP and the AIP-R are operationally equivalent.

The I-5 corridor's existing traffic volumes create substantial backup on many ramps along I-5 in south Orange County. Offramp backup encroaching into the mainline creates very unsafe situations. Caltrans and Orange County Long Range Transportation Plan (LRTP) are planning for improvements along I-5. However, these plans have assumed the baseline of the toll road as being in-place and alleviating some of the traffic demand in south Orange County. If the toll road were not a part of that plan, then there will be substantially more impacts to the I-5 corridor absent the toll road.

Further, SMI does not address constructability issues related to the AIP-R alternative. Many of the interchanges would have to be fully reconstructed thus creating tremendous construction related impacts including construction staging issues that impact a very large construction envelope due to vertical profile issues. The SMI report does not address these right of way impacts nor does it address the right of way impacts it will take to keep the traffic flowing during construction. For the reasons listed above, we believe this alternative should not be considered available as it is precluded by a technical barrier.

Finally, no funding has been programmed for this alternative in any regional or local transportation plan. The AIP-R is not a toll road and the TCA does not have the authority or the ability to finance and construct this alternative. Caltrans has previously indicated in an August 4, 2008 letter to FHWA that the lack of funding is an appropriate reason for alternative rejection because there is no reasonable or foreseeable prospect of funding for the AIP-R alternative. Therefore, this alternative could be precluded due to a lack of financial resources.

The most recent SMI report recommends High Occupancy Toll (HOT) lanes as a means to finance the AIP-R alternative. HOT lanes were evaluated under the SOCTIP collaborative and recently evaluated as part of the South Orange County Major Investment Study (SOCMIS) that is being conducted by the Orange County Transportation Authority (OCTA). As noted in our August 4, 2008 letter to FHWA, we noted that the "Locally Preferred Strategy (LPS) adopted by OCTA's SOCMIS Policy Advisory Committee & Highways Committee excluded the utilization of HOT lanes from consideration. We understand that one of the primary reasons the HOT lane concept was dropped from further consideration was the additional right of way and associated property takes and community impacts that would be required for construction of HOT lanes. Many local professionals (municipal, regional planning and transportation agencies) and public stakeholders participated in this extensive study over the last several years. Due to the lack of local support, we believe that HOT lanes should not be considered a reasonable or available alternative.

I-5 Widening Alternative (I-5)

The U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency determined that the I-5 widening and the AIO alternatives to be unavailable to the applicant (TCA) and therefore not practicable. The reason they are not available to the applicant is that the TCA does not posses the legislative authority to obtain (e.g., buy) utilize (e.g., rent), expand or manage non-toll public roads.

Caltrans Director Will Kempton gave testimony at the Coastal Commission hearing, stating that there is no identified funding source or funds programmed for this I-5 widening alternative. And although you might possibly shave off some impacts, substantial impacts remain by anyone's measure. The cost of this alternative is $2.5 billion in 2002 dollars, which the state does not have. Additionally, Director Kempton spoke at the Secretary of Commerce hearing, and stated that along with FHWA, the Department is setting clear goals to establish system redundancy. The region surrounding I-5 is subject to considerable risks, should any occurrence prevent I-5 from functioning properly. Just recently, on October 14th, Interstate 5 freeway south was completely closed at San Onofre State Beach exit for a brush fire, in San Onofre. While not a requirement, the SR-241 toll road connection to I-5 would provide a redundant alternate route that is currently lacking in south Orange County.

There is no foreseeable or reasonable prospect of funding the widening of I-5. Therefore, we believe this is an appropriate reason for alternative rejection because the resources to fund the I-5 widening are simply not available.

Central Corridor Alternative (CC)

During the conceptual phase of the CC alignment, TCA worked with Caltrans and FHWA on several configurations of the interchange of SR-241 with Interstate-5 at Avenida Pico. The issues with this

interchange involve the adjacent frontage roads; weaving; the proximity of I-5 interchanges south of Pico; and the vertical profile on I-5. FHWA and Caltrans determined the interchange of SR-241 with I-5 at this location would not comply with state and federal highway design standards and was not acceptable. It was determined that additional efforts to redesign the interchange to address FHWA's and Caltrans concerns were not warranted because a redesign would only lead to significantly more property takes than the proposed design and thus would entail very severe and unacceptable community impacts. As such, we believe the CC alternative should not be considered an available alternative because it is precluded by technical barrier.

Arterial Improvements Only (AIO)

Of all the alternatives evaluated during the SOCTIIP process the AIO performed the worst in regards to improving traffic on the I-5, which is the primary purpose of the project. Consideration should also be given to the fact that when travelling south, Avenida La Pata does not extend and connect to I-5, but terminates at Avenida Pico in San Clemente. All the traffic that comes from Avenida La Pata to the intersection with Avenida Pico negatively impacts the level of service at this intersection and also the Avenida Pico/I-5 interchange. The AIO increases the volume at the La Pata/Pico intersection and the Pico/I-5 interchange to greater than 120% of capacity. This is a substantial increase over the No Action Alternative.

With little benefit to I-5 and the negative impact of causing severe traffic congestion on one of the primary access routes to the beach in San Clemente, the AIO alternative is not a reasonable alternative.

Central Corridor – Avenida La Pata Variation (CC-ALPV) and Alignment 7 Corridor – Avenida La Pata Variation (A7C-ALPV)

These two toll road alternatives do not have connections with I-5 and have a southern terminus located approximately 2.3 miles from the I-5 and 2.5 miles from the coastal zone. Similar to the AIO these "short alternatives" provide only limited traffic relief to I-5. If either the CC-ALPV or the A7C-ALPV were to be constructed they would provide less than half of the congestion relief of the proposed project and would not provide a regional alternative to I-5. For the limited amount of relief to I-5 these alternatives generate, a substantial amount of community displacements would occur in San Clemente. As such the CC-ALPV or the A7C-ALPV do not appear to be reasonable alternatives.

Conclusions

As local transportation experts and owner/operators of all California state highways, we were pleased to participate in the collaborative process for this project. We believe the process was a systematic and thorough process and the project alignment adopted by TCA is the preferred alternative.

Sincerely,

Lisa Ramsey, P.E.
Office Chief/Corridor Project Manager

U.S. Department of Transportation
Federal Highway Administration

Office of the Administrator
October 24, 2008

1200 New Jersey Avenue, SE.
Washington, DC 20590

In Reply Refer To:
HCC-30

Vice-Admiral Conrad C. Lautenbacher, Jr., USN, Retired
Under Secretary of Commerce for Oceans and Atmosphere and Administrator
National Oceanic and Atmospheric Administration
1491 Constitution Avenue, NW
Washington, DC 20230

Dear Admiral Lautenbacher:

In response to a September 16 request from your agency, the Federal Highway Administration (FHWA) submitted additional comments pertaining to the consistency appeal by the Foothill/Eastern Transportation Corridor Agency regarding the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP, also known as Foothill-South). Our October 7 letter noted FHWA was completing work on a technical review of the alternative known as the AIP ("Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5") and certain proposed revisions to the AIP known as the "Smart Mobility" alternative or AIP-R ("Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5 – Refined").

The FHWA has now completed this technical review. Because FHWA completed the review prior to the October 24 closure of the consistency appeal record, and in light of the particular interest expressed by your agency in any additional information FHWA could provide on alternatives, I felt it appropriate to forward this review to you. If you have any questions or require additional information, please do not hesitate to contact Carol Braegelmann of our Office of Project Development and Environmental Review at (202) 366-1701, or Brett Gainer of our Office of the Chief Counsel at (916) 498-5891.

Sincerely,

Thomas J. Madison, Jr.
Administrator

cc:
Mr. Thomas Street
Attorney-Advisor, NOAA

FHWA Design Review of the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5 (AIP) Alternative and SMI Recommendations

As part of an independent Federal Highway Administration (FHWA) review of the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), the Office of Infrastructure has reviewed the design of the "Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5" (AIP) alternative to address questions that have been raised by the U.S. Environmental Protection Agency (EPA).

The SOCTIIP National Environmental Policy Act (NEPA) review is being conducted by the FHWA, the Transportation Corridor Agencies (TCA) and the California Department of Transportation (Caltrans) with participation by the SOCTIIP Collaborative in deliberations and reviews. In the project development process TCA and Caltrans followed in developing the SOCTIIP, they evaluated the performance and potential impacts for a range of possible alternatives. The AIP alternative, along with the other project alternatives, underwent a detailed analysis to assess and quantify the project's performance, expected impacts, and estimated total project cost for each alternative. This assessment provided the basis to compare and determine which alternatives were considered reasonable and feasible to advance further in this process, ultimately leading to the selection of a locally preferred alternative by TCA.[1] Based on the estimated total project cost, projected performance, and other impacts in comparison to other alternatives, in our technical design review we determined that it was reasonable and appropriate for TCA and Caltrans to eliminate the AIP alternative from further evaluation.

The scope of the AIP alternative included the addition of one HOV lane in each direction, one general purpose lane in each direction, auxiliary lanes, adjustments in the I-5 alignment, modifications to interchanges, and limited improvements to the adjoining surface street to accommodate these interchange modifications. The initial design of these improvements is consistent with Caltrans' adopted design standards. These proposed improvements were also designed to accommodate other improvements which would impact this corridor that are included within the Six-year Transportation Improvement Program (TIP) of the Southern California Association of Governments (SCAG consists of six counties and 187 cities). The modeling analysis that was conducted to assess and evaluate the AIP alternative utilized SCAG's regional transportation models that include the projects in the 20-year long range plan.

Smart Mobility, Inc., (SMI) submitted comments and reports after the formal public comment period associated with the NEPA Draft Environmental Impact Statement (EIS) for this project, questioning the design of the AIP alternative along with the TCA and Caltrans decision to dismiss the AIP alternative from further consideration without additional refinement to reduce expected adverse impacts. SMI is advocating revisions to the scope and design of the AIP alternative, which SMI refers to in their reports as AIP-R, short for "Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5 – Refined (AIP-R)". These recommendations propose improvements similar in scope to the AIP alternative, including one HOV lane, one general purpose lane, auxiliary lanes, and new freeway interchanges. These recommendations

[1] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), 2-58.

included reducing the scope of various AIP improvements, reducing design standards, and adding improvements outside of the proposed SOCTIIP and plans of local communities. They assert these proposed modifications would result in substantive changes in the cost, performance, and impacts associated with their recommendations, and that these changes would allow a revised AIP alternative to be further considered in the NEPA review and potentially considered the preferred alternative for the project.

The Office of Infrastructure design review relied on existing reports previously prepared in support of the Draft EIS and the SMI recommendations. This review evaluated the geometric design, traffic analysis, estimated cost, project impacts, proposed improvements, and overall assessment of both the AIP alternative and SMI alternative recommendations. The objective of this review was to assess the feasibility and implications of the SMI alternative recommendations to determine their reasonableness for more detailed consideration. This design review assessed the:

- Reasonableness of the SMI recommendations (AIP-R),
- Reasonableness of the design and analysis conducted on the AIP alternative, and
- Potential for the proposed SMI recommendations to substantially change the magnitude of the AIP alternative impacts (e.g., total project cost, safety, traffic flow) to the point where it could be considered a viable alternative.

Assessment of the SMI (AIP-R Alternative) Recommendations

We have determined in our technical design review that the SMI recommendations to change the design or scope of the AIP alternative improvements are not reasonable and feasible. This finding is based on the expected influence these recommendations would have on the total project cost, performance (e.g., safety and traffic operations), and other impacts (e.g., right-of-way, drainage, and environment).

The SMI report recommends changes in the geometric design and type of improvements to be made with the AIP alternative without providing an adequate rationale or any supporting analysis or evaluation to assess their impacts and estimated costs. While SMI asserts its recommendations will not adversely impact travel and result in substantially lower total project costs and impacts, there is no reasonable rationale or technical basis provided upon which these recommendations are founded. We have determined in our technical review that the SMI recommendations would result in an alternative with a higher total project cost, diminished traffic capacity and flow, and greater adverse impacts than was suggested by the SMI reports.

This technical assessment considered the potential implications of the key SMI design recommendations for the AIP alternative which could positively or negatively impact the safety, traffic flow, environment, total project cost, and key factors and issues. This assessment identified that many of the SMI recommendations would not be reasonable and/or feasible due to their expected adverse impacts on travel performance within the I-5 corridor, the environment, and total project cost; or they would provide only small overall improvements. Based on this assessment we have determined the SMI recommendations do not justify altering the AIP alternative, nor should they affect the decision to dismiss the AIP alternative from further consideration in the development of the SOCTIIP.

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Examples of the SMI recommendations we consider to be unreasonable and/or infeasible involve the geometric design of I-5, the connecting interchanges, and portions of the connecting surface street network. These recommendations also involve detailed design issues appropriately considered in later stages of the project development when advanced preliminary or final design is conducted on the preferred alternative selected for the project. The technical review and assessment of these SMI recommendations (e.g., reducing the number of lanes on arterial streets, selecting different types of interchanges, using retaining walls, shifting the I-5 alignment) are provided below.

Assessment of the AIP Alternative

We determined in our technical design review that the process, methodology, level of design, and issues that TCA and Caltrans considered in developing, evaluating, and making a decision on the AIP alternative were appropriate. The key factors in TCA's and Caltrans' decisions to eliminate the AIP alternative were the substantial impacts to the right-of-way, safety and traffic operations, environment, and total project cost.[2] The number and size of the right-of-way impacts significantly influenced this cost and associated community impacts, with an estimated cost associated with acquiring or impacting approximately 1200 right-of-way parcels in excess of $1,000,000,000.[3]

The level of effort and detail that went into developing the proposed improvements and geometric design of the AIP alternative was appropriate for the evaluation and comparison of the alternatives in NEPA. The data compiled, analysis conducted, evaluation performed, and costs estimated were also commensurate with this phase in the project development process. Sufficient information was available and used by TCA and Caltrans in support of making an informed, context-sensitive decision regarding the overall reasonableness and feasibility of the AIP alternative. We determined, based on a review of the information that was developed by TCA and Caltrans, that their decision to eliminate the AIP alternative from more detailed evaluation in the development of the SOCTIIP was reasonable and well-founded.

The level of analysis and design conducted was appropriate to assess and compare the feasibility, performance, and impacts of the AIP and all other SOCTIIP alternatives. Additionally, there was sufficient information available from the level of design completed for TCA and Caltrans to make decisions on alternatives to further evaluate in the NEPA and project development process.

Design Review of the AIP Alternative and SMI Recommendations (AIP-R)

In our review, we determined that TCA and Caltrans followed a context sensitive process in developing the SOCTIIP. Context sensitive solutions (CSS) involves the concept and principles associated with reaching out to, identifying, and integrating the concerns and issues of interest for a variety of different stakeholders who may be impacted by a transportation

[2] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), page 2-84.
[3] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page ix; and TCA, *SOCTIIP Draft Relocation Impacts Technical Report, Final, December 2003.*

project.[4] This involvement and consideration of these issues and concerns should occur throughout the process of developing and designing a project. In our design review, we found that the interests and concerns of stakeholders were appropriately identified and considered in the decision-making that occurred throughout the development of the SOCTIIP.

Design exceptions are one tool for implementing design flexibility and CSS. When conditions warrant, design exceptions may be appropriate for project designs not conforming to the minimum criteria as set forth in the standards, policies, and standard specifications.[5] The potential to pursue design exceptions is evaluated based on their expected benefits or impacts to the environment, traffic, safety, and other considerations specific to each project.

Design exceptions may be considered throughout the process of developing and designing a project. The conditions specific to each project will determine the need for design exceptions and when it may be appropriate to consider design exceptions in the project development process. Key determinants in deciding when it may be appropriate to consider design exceptions are the level of analysis that has been conducted, overall impacts of the project, influence each design exception may have on these impacts, project's performance, and cost.

Agencies do not typically consider design exceptions in the initial phases of planning or designing a project when multiple alternatives are being considered which vary in scope and potential impacts. Agencies develop the design of the alternatives to obtain an estimate of the expected impacts and benefits in support of making an informed decision to select a preferred alternative based on their relative merits. Design exceptions typically do not reduce the impacts significantly enough to influence the comparison and decisions about the viability of project alternatives. It is not reasonable and feasible for agencies to fully design, analyze, and evaluate the impacts of design exceptions until a preferred alternative has been selected.

We also determined that it was reasonable and appropriate for TCA and Caltrans not to include design exceptions in the initial alternatives evaluated and compared to make decisions among SOCTIIP alternatives. This is especially true given the significant impacts that were identified for the I-5 corridor alternatives along with the constraints which exist (e.g., severe terrain, existing development, drainage). We also found that the SMI recommendations proposing design exceptions are more appropriate to consider in later stages in the project development process when a full consideration of their implications on the preferred alternative would be analyzed and evaluated. Additionally, while we found these design exceptions may lead to somewhat reduced impacts, collectively they would not substantively reduce or change the overall total project cost, impacts, or performance to where the AIP alternative should be evaluated further.

[4] FHWA, CSS Web site, http://www.fhwa.dot.gov/context/index.cfm.
[5] FHWA, Federal Aid Policy Guide Non-regulatory Supplement (http://www.fhwa.dot.gov/legsregs/directives/fapg/0625sup.htm), 23 CFR 625.

Technical Design Review

During our technical design review, we assessed the geometric design of the AIP alternative and proposed SMI recommendations to the adopted standards[6] of both the FHWA and Caltrans. We also reviewed the supporting documentation associated with the analysis, evaluation, and assessment of the AIP alternative that was conducted for the Draft EIS and Final Subsequent Environmental Impact Report. In addition, we reviewed the SMI reports, recommendations, and correspondence between SMI and the SOCTIIP Collaborative regarding the AIP alternative and SMI's recommendations.

Since the primary factors for eliminating the AIP alternative from further evaluation were the significant right-of-way impacts and their associated costs and community impacts, our review focused on the following design elements that have the greatest potential to influence the amount of right-of-way and that may adversely impact travel or environment within the I-5 corridor:

- Number of lanes
- Width of lanes
- Roadside slopes
- Types of interchanges
- Alignment
- Storm water detention basins

Number of Lanes

The number of lanes needed on I-5 and local streets in the study area for the AIP alternative was determined from the projected travel demand and the expected performance of the transportation network. As stated in the environmental document, Level-of-Service (LOS) "E...is the adopted performance standard for freeway/tollway mainline segments and ramps. LOS D...is the performance standard for most intersections in the study area."[7] The traffic analysis showed that the AIP alternative failed to meet the established traffic operations threshold against which all alternatives were being evaluated.[8]

TCA and Caltrans utilized regional transportation models to forecast and evaluate the impacts of the design-year traffic demand on the performance of the alternatives. Projects are required to be designed for the traffic demand that is projected to occur 20 years in the future.[9] The design year utilized for the SOCTIIP is 2025. Reducing the number of lanes on any roadway will either decrease the overall performance within the study area or increase the number of lanes needed on another roadway. As a result, reducing the number of lanes on any of the roadways included in the study area for the AIP alternative will diminish the safety and flow of traffic, thereby limiting the degree to which the alternative satisfies the purpose and need for the project.

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[6] 23 CFR 625.4 and http://www.dot.ca.gov/hq/oppd/hdm/hdmtoc.htm.
[7] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalsefr.htm), p. 1-11.
[8] TCA. *SOCTIIP Traffic and Circulation Technical Report, December 2003*. 5-21.
[9] 23 CFR 450.216, 23 CFR 450.220, and American Association of State Highway Transportation Officials (AASHTO), *A Policy on Design Standards Interstate System, January 2005*, p. 1.

As an example, SMI recommended reducing the number of lanes on El Camino Real from 4 to 3 lanes, with one lane in each direction separated by a center auxiliary lane. This SMI recommendation would reduce the right-of-way required for El Camino Real, providing additional space to accommodate the I-5 widening, thereby reducing the amount of additional right-of-way that may be required along I-5.

El Camino Real is at a four lane roadway carrying an average of 17,000 vehicles per day, which is currently operating at a LOS A.[10] The SOCTIIP alternatives, including the AIP alternative, did not identify any need to expand the number of lanes on El Camino Real based on a projected LOS A operation in the design year. While this roadway is expected to operate at LOS A in the design year, other key factors influenced why it would not be reasonable and appropriate to reduce the number of traffic lanes from four to three on El Camino Real in all of the SOCTIIP alternatives.

El Camino Real has been designated as a secondary arterial in Orange County's Master Plan of Arterial Highways (MPAH).[11] Orange County plans secondary arterials to serve as collectors, "distributing traffic between local streets and Principal, Major and Primary Arterials."[12] The designation or classification of El Camino Real as a secondary arterial has even more significance given that it is the only north-south arterial serving the community between Avenida Pico and Cristianitos Road.[13] The Orange County design standards require that roadways classified as a secondary arterials have four traffic lanes.[14]

With I-5 projected to operate at LOS D and F in the design year,[15] when severely congested travel conditions are encountered on I-5, travelers will more frequently divert off of I-5 and use El Camino Real. These conditions will increase the frequency of non-recurring incidents (i.e., vehicle break-down, accidents, adverse weather conditions) that will disrupt and cause severe delays to I-5 travelers throughout the typical day or week. Based on this review, we agree with the decision that El Camino Real should remain a four lane roadway in the SOCTIIP.

Lane Widths

The width of lanes for the AIP alternative meets FHWA and Caltrans adopted roadway design standards. The standard for lane width on the Interstate is 3.6 meters (or 12 feet).[16] SMI proposed a reduced lane width of 3.3-meters (or 11 feet) which would result in a savings of 3.6 meters (12 feet) in total based on the 12-lanes proposed on I-5 for the AIP alternative. This same standard for lane width was applied to all the alternatives initially considered in the NEPA process, ensuring a balanced assessment and comparison of their impacts.

The use of 3.3 versus 3.6 meter lanes on I-5 is considered to be minor and would not substantially reduce the overall width of the right-of-way that would need to be acquired for the AIP alternative. Additionally, this reduction in the width of right-of-way is not expected to

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[10] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. F-156 to F-163.
[11] Orange County, "Response to Smart Mobility Report, The Refined AIP Alternative", January 2008, p. 21.
[12] Orange County, "Highway Design Manual", (http://www.ocroad.com/docs/OCHDM.pdf), June 2005, p. 100-3.
[13] Orange County, "Response to Smart Mobility Report, The Refined AIP Alternative", January 2008, p. 21.
[14] Orange County, "Highway Design Manual", (http://www.ocroad.com/docs/OCHDM.pdf), June 2005, p. 100-3.
[15] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-111 to D-114.
[16] AASHTO, *A Policy on Design Standards Interstate System, January 2005*, p. 3.

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reduce the number of complete parcels that would need to be acquired. The next section contains the details of how these right-of-way needs were estimated.

We determined in our review that the use of a 3.6 meter lane width on I-5 allowed for a balanced assessment and comparison of the expected impacts for all of the SOCTIIP alternatives, allowing TCA and Caltrans to make an informed decision to eliminate alternatives from further study that were determined not to be reasonable and feasible. The consideration of narrower lanes is an appropriate design exception to evaluate and consider in the advanced preliminary or final design of a preferred alternative once selected. This design exception would allow for any benefits that may be realized with reducing the right-of-way to be considered along with any adverse impacts it could have on the safety and flow of traffic along I-5. However, we determined that any net benefits realized by this reduction in right-of-way width would not be of sufficient magnitude to substantially change the potential impacts of the AIP alternative.

Roadside Slopes

The width of the roadside slopes along the I-5 corridor varies greatly based on topography, soil conditions, and retaining walls. The right-of-way impacts identified for the AIP alternative were based on the width needed to transition from the I-5 roadway to the surrounding terrain. This transition in grade can be done with a wider and flatter slope, a narrower and steeper slope, or with the installation of a retaining wall. Steeper roadside slopes are inherently less stable than flatter slopes. Depending on the soil conditions, steep slopes may require special design considerations; require soil reinforcements; or be determined not to be feasible from a design, construction or maintenance standpoint. Retaining walls have structural supports that extend into the soil behind the face of the wall and require additional drainage considerations.

The construction of retaining walls is more costly than modifying the grade of a roadway or its roadside side slopes. For example, a simple 3.0-meter-tall stabilized earth retaining wall would cost on the order of $1,870 per linear meter of wall. [17] A rough, order of magnitude, estimate of the cost to construct a 3.0 meter retaining wall along both sides of the corridor would be approximately $100 million. If the design of the 3.0-meter wall required pile foundations and tiebacks, the cost would increase to approximately $250 million. [18] These estimated costs are exclusive of the any costs that may be needed to acquire right-of-way or easements, special drainage needs, and access that may be needed to construct and maintain these walls.

It is important to note that the cost to construct taller retaining walls would not be an incremental increase above the estimated cost to construct walls 3.0 meters in height. The average cost per meter construct higher retaining walls is expected to increase substantially as the height increases. If retaining walls that may be needed along the I-5 corridor were significantly higher than 3.0 meters, the cost to install these walls may be cost prohibitive, or could be determined to be not feasible to construct. Even with retaining walls, the reduction in right-of-way impacts would be limited by the width needed for the structure or base of each retaining wall that may be installed.

[17] Values calculated from data in CalTrans, "Memo to Designers", 1989; and California's escalation rate for capitol improvement projects, http://staffnet.fhwa.dot.gov/hep/staffepp/fematrix/fecalif.htm.

[18] Values calculated from data in CalTrans, "Memo to Designers", 1989; and California's escalation rate for capitol improvement projects, http://staffnet.fhwa.dot.gov/hep/staffepp/fematrix/fecalif.htm.

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TCA and Caltrans based the estimated right-of-way needed for the AIP alternative on the use of unstabilized roadside slopes. Based on our technical review of the 1200 residential and commercial parcels of land identified as needing to be acquired for the AIP alternative,[19] the installation of retaining walls may be reasonable and feasible to avoid the need to acquire 10-20 percent of these parcels. This estimate was based on our review of locations where TCA and Caltrans had identified impacts to property parcels. We assessed whether these impacted property parcels could potentially be avoided by using retaining walls as mitigation for side slopes. Even with retaining walls, many locations would not be avoided. In some locations, the parcels would be impacted by the easement needed to construct the retaining walls. In other locations, other design elements of the AIP alternative, such as configuration of a reconstructed interchange, is the cause for the impacts to the parcel.

TCA developed a methodology for estimating how much of an impacted parcel would need to be acquired or if the entire parcel would need to be acquired. The following criteria were used to determine if an entire parcel needed to be acquired:

1.) "the parcel is entirely within the limits of disturbance,
2.) the parcel is over 90% within the limits of disturbance,
3.) the parcel is a single family residence and any portion falls within the limits of disturbance,
4.) the parcel is developed non-residential and any portion of the building falls within the limits of disturbance,
5.) the parcel is developed non–residential and more than 25% of the site parking falls within the limits of disturbance, or
6.) access to the parcel is cut off."[20]

TCA and Caltrans applied these same criteria consistently to estimate the number of parcels and total right-of-way that would need for each SOCTIIP alternative, enabling a comparison of their impacts. Their criteria reasonably assumed a partial taking of a seemingly small percentage of right-of-way from a parcel would significantly impact the value of the remaining property, making such partial takings impractical on smaller parcels. Additionally, they also reasonably assumed that to avoid the complete taking of a single-family residence, the entire parcel would need to be outside the proposed new right-of-way limits for each alternative.

A detailed analysis and design that is appropriately conducted in the advanced preliminary and final design of a preferred alternative would determine if it would be cost effective to use retaining walls to reduce the number and impact of these right-of-way takings. This analysis and evaluation would allow the issues and factors for every parcel to be considered. The detailed engineering and design would consider locations for walls based on geological and cost analyses, consultation with the property owners, drainage. and other issues.

Our review determined that the methodology used to estimate the quantity of right-way needed for the AIP alternative was appropriate. Additionally, SMI's recommendation to use retaining walls to reduce the number of parcels needed to be acquired would not be feasible. Our review also determined the magnitude of using retaining walls to mitigate the right-of-way impacts would not be sufficient to substantially change the overall impacts of the AIP alternative.

[19] TCA, *SOCTIIP Draft Relocation Impacts Technical Report, Final, December 2003*, 1-20 and 1-21.
[20] TCA, *SOCTIIP Draft Relocation Impacts Technical Report, Final, December 2003*, 1-19.

Types of Interchanges

Given the high traffic volumes projected for I-5, existing development, terrain, and the intersecting local streets, partial cloverleaf A (ParClo-A) interchanges would be an appropriate choice along this corridor. Diagrams depicting the configuration of the freeway interchanges referenced in this review are attached to this document. ParClo-A interchanges would be able to accommodate more vehicles and provide better performance (e.g., increased travel speeds, reduced travel time, reduced delays, and improved safety) on the local streets and on I-5 than other interchange types.[21] Additionally, this interchange type allows for safer accommodation of pedestrians and bicyclists. Using other interchange types would further degrade the operation of the AIP alternative, which fails to meet the established SOCTIIP performance threshold. Specific interchange modifications suggested by SMI are discussed below.

Avenida Pico

At the Avenida Pico interchange, SMI recommended a single-point urban interchange (SPUI) to reduce the impacts and asserted, without supporting analysis, that it will provide sufficient capacity for the design year traffic.[22] SPUI's do not, in general, have as much traffic capacity as the ParClo-A interchanges, have higher construction costs, and make it difficult to provide access for pedestrians through the interchange. Construction costs are higher for SPUI's because of the need for a wider and longer bridge to provide space for single intersections. The capacity of a SPUI is affected by the size of the intersection, the proximity of adjacent intersections and driveways, and the balance of left-turn to through movements.[23] Providing guidance to motorists maneuvering through the intersection can be problematic due to the long elliptical path of the left-turn movement and the size of the intersection.[24]

The existing I-5 interchange with Avenida Pico is a diamond interchange with the I-5 ramps terminating at closely-spaced intersections and five through-lanes on Avenida Pico. Under current conditions, the northbound on-ramp and southbound off-ramp are operating at LOS F. The northbound off-ramp and southbound on-ramp are operating at LOS A and LOS B. The intersection for the southbound ramps is operating at LOS E and the intersection for the northbound ramp is operating at LOS B. The freeway has eight lanes in this area and is operating at LOS C and D during peak hours.[25]

The no-action alternative at this interchange would maintain the same configuration with the addition of auxiliary lanes to improve operations for the northbound on-ramp and the southbound off-ramp. However, the traffic projection and analysis conducted for the no-action alternative also include other committed and funded transportation improvement projects that will "address some of the...projected traffic demand in south

[21] Institute of Transportation Engineers, *Freeway and Interchange Geometric Design Handbook*, 2005, 210; and AASHTO, *A Policy on Design Standards Interstate System, January 2005*, pp. 776-804.

[22] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, p. 21.
[23] CalTrans, "Single Point Interchange Planning, Design and Operations Guidelines", June 2001, pp. 2-3.
[24] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, p 783.
[25] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-6, D-7, E-5, F-37, and F-41.

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Orange County."[26] Even with these improvements, analysis of the 2025 traffic demand on the local street network indicates that the northbound on-ramp and the southbound off-ramp would be operating at LOS F and D. Additionally, the southbound on-ramp and the freeway through-lanes would be operating at LOS F. The northbound off-ramp would be operating at LOS A. The intersection for the southbound ramps with Avenida Pico would be operating at LOS A and the intersection for the northbound ramp would be operating at LOS B.[27]

The ParClo-A interchange proposed in the AIP alternative would add loop ramps to eliminate the left-turn for vehicles entering the freeway for both the eastbound-to-northbound and westbound-to-southbound movements. The AIP alternative would also add to the freeway auxiliary lanes for all of the ramps where they join the freeway and add high-occupancy vehicle lanes (two lanes northbound and one lane southbound). With these improvements, the freeway lanes would be operating at LOS D and F. The addition of the loop-ramps would improve operations on all of the intersections and interchange ramps into the range of LOS A-C, with the exception of the southbound on-ramp loop, which would be operating at LOS E.[28]

The SPUI would not provide the same improvements in the flow of traffic on the ramps, ramp intersections with Avenida Pico, or I-5. The heavy demand for the westbound-to-southbound movement is evident from the LOS E for the southbound on-ramp loop in the AIP alternative and the LOS F for the intersection of Avenida Pico with the southbound on-ramp for the no-action alternative. Eliminating the loop ramps would result in heavy left-turn demand at one intersection, would diminish the flow of traffic due to the longer green-time required to clear these left-turn movements and accommodate the through traffic on Avenida Pico.

Since the southbound on-ramp loop of the AIP alternative would be operating at the established performance threshold, the absence of that loop in the SPUI alternative would result in an alternative that does not meet the established SOCTIIP performance threshold. The high left-turn demand and unbalanced movements of traffic demand through the interchange would further compound the ineffectiveness of a SPUI at this location. Finally, the commercial and school properties near the interchange would indicate pedestrian traffic, which is poorly accommodated in a SPUI. Our review determined that the SPUI at Avenida Pico would result in an alternative that does not meet the purpose and need for the project.

Crown Valley Parkway

The existing interchange at Crown Valley Parkway is a partial cloverleaf with a single loop for the eastbound-to-northbound on-ramp for traffic entering I-5. Under current conditions, the freeway lanes are operation at LOS D and E. The southbound on-ramp and the westbound-to-northbound on-ramp are operating at LOS B and C. The northbound loop on-ramp and the northbound off-ramp are operating at LOS D. The

[26] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), p. 1-10.
[27] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-10, D-11, E-10, F-37, and F-47.
[28] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-113, D-114, E-121, F-37, and F-162.

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southbound off-ramp is operating at LOS F. The intersections of the ramps with the Crown Valley Parkway are operating at LOS B for the northbound ramps and LOS D for the southbound ramps.[29]

For the no-action alternative, the freeway would be operating at LOS D through F in the design year. The southbound on-ramp would be operating at LOS C. The northbound loop on-ramp would be operating at LOS D. The northbound off-ramp would be operating at LOS E. The northbound-to-westbound on-ramp and the southbound off-ramp would be operating at LOS F. Both of the ramp intersections would be operating at LOS F.[30]

The AIP alternative would add a westbound-to-southbound loop ramp from Crown Valley Parkway to I-5, removing the left-turn movement from the southbound on-ramp intersection and making this a ParClo-A interchange. The loop ramp removes the necessity for a left-turn movement at the intersection and allows that movement to be made from the right side of Crown Valley Parkway, eliminating the need for a left-turn phase at the signal and improving operations of that intersection. The southbound on-ramp and the new southbound on-ramp loop would be operating at LOS A, and the intersection would be operating at LOS D. However, southbound off-ramp would be operating at LOS F and the southbound ramp intersection would be operating at LOS D.[31] The southbound off-ramp would fail to meet the project's performance threshold. Omitting the southbound loop-ramp from the alternative would further degrade operations of this intersection and ramp.

Instead of adding a southbound loop on-ramp, SMI proposed adding a fly-over southbound off-ramp. This fly-over would cross under Crown Valley Parkway, cross over I-5, and then require a 180 degree curve to connect with the northbound off-ramp at the intersection with Crown Valley Parkway.[32] This proposal eliminates the southbound-to-eastbound left-turn movement from the southbound off-ramp intersection and relocates it to the northbound off-ramp intersection as a right-turn movement. A detailed operational analysis would be needed to determine if this would improve the operations of the southbound intersection sufficiently without degrading operations of the northbound intersection.

While this concept is possible from an operational standpoint, the alignment provided by SMI ignores several geometric constraints that would negatively affect the operations, safety, and cost to construct this ramp. For the fly-over ramp to have sufficient vertical clearance as it crosses under Crown Valley Parkway and over I-5, it would require a longitudinal grade of approximately 10 percent followed immediately by a 180 degree curve. This non-standard design would affect the speed differential between trucks and passenger cars, decrease sight distance, and severely impact the safety and operation of trucks that would complete this movement.[33]

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[29] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-6, D-7, E-4, F-35, and F-41.
[30] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-10, D-11, E-9, F-35, and F-47.
[31] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-113, D-114, E-120, F-35, and F-162.
[32] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page 19.
[33] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, pp. 279-283, 828-829

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The distance between the southbound-to-westbound off-ramp and the fly-over southbound off-ramp would be less than a third of the 300-meter minimum design standard required for the spacing for ramps on freeways. This spacing provides room for motorists to comprehend the sign messages, make a decision, and make a safe maneuver while crossing the path of other traffic.[34] Finally, with the fly-over ramp and the northbound off-ramp joined at one intersection, drivers maneuvering from the northbound off-ramp to the right turn lanes at the intersection would have poor sight distance and insufficient distance to make this maneuver.

For the interchange configuration proposed by SMI to be safe and to operate well, the ramps would need to be redesigned to provide sufficient length for grade changes, sight distance, and lane change maneuvers. Changing the design in this way would significantly increase the right-of-way needs and construction costs beyond what was estimated by SMI. Our review determined that SMI's recommendations are not reasonable and feasible based on this non-standard design of the ramps. Additionally, this design would adversely impact the safety and traffic of the ramp, resulting in an overall impacts that are expected to be greater than what was estimated for this interchange in the AIP alternative.

El Camino Real

El Camino Real is a north-south secondary arterial running nearly parallel to I-5, ultimately intersecting at a severely skewed angle. The existing interchange is a diamond; however, the ramps are offset, creating four discrete intersections. Approximately 600 meters south of the diamond interchange, there is a partial interchange serving northbound I-5 only with an additional on-ramp and off-ramp. The ramps and intersections at this interchange are operating at LOS A, and the freeway is operating at LOS C and D.[35]

The no-action alternative would result in a LOS of E and F on the freeway in the design year. The ramps and ramp intersections would be operating at LOS A and B.[36] El Camino Real is projected to operate at a LOS A in the design year.

The AIP alternative would modify the southbound off-ramp to eliminate the short weaving section between this ramp and the on-ramp at the next interchange to the north. Weaving sections are locations where motorists entering the freeway must cross paths with motorists exiting the freeway. Short weaving sections result in turbulence in traffic flow and negatively impact safety and operations. The AIP alternative would correct this by extending the off-ramp to the north using a structure where it crosses over the on-ramp.

Even with this improvement substantially improving the safety and operation of the freeway, it would be operating at LOS F at this location.[37] Other improvements proposed at this interchange in the AIP alternative include: realigning the southbound

[34] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, pp. 843-844.
[35] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-6, D-7, E-5, F-37, and F-41.
[36] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-10, D-11, E-10, F-37, and F-48.
[37] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-114.

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ramps to tie into a single intersection with Avenida Valencia; closing the northbound ramps which are 600 meters south of the interchange; and realigning the northbound ramps, adding a loop for the southbound El Camino Real to northbound I-5 maneuver.

SMI recommended that the southbound ramps to El Camino Real remain in their existing configuration. They recommended the closing of the northbound ramps at the interchange and the preservation of the northbound ramps that are 600 meters to the south, creating two partial interchanges that would function together.[38] These recommendations do not provide any safety or operational improvement for the southbound lanes of the freeway that would be operating below the performance threshold for the project. Additionally, they do not address any potential safety issues related to sight-distance at the skewed intersections, deceleration length for ramps as they approach intersections, and curves on the ramps that may not be appropriate for the vehicle speeds. Partial interchanges are discouraged and only considered in extreme situations since drivers expect to find all movements at one interchange. [39]

Since the ramps and intersections would be operating at LOS A and B and the northbound freeway lanes would be operating at LOS D in the AIP alternative,[40] there may be an opportunity to evaluate minor modifications to the design of the ramps and the intersection of the ramps with El Camino Real. If these modifications were determined to be feasible in the advanced preliminary engineering, they may only have the potential to slightly reduce the number of parcels need to be acquired by 25 to 75, without adversely impacting the safety and flow of traffic, reductions which would not be significant when compared to the parcels needed for the AIP alternative. A detailed analysis of the viability and potential of these modifications would be appropriately conducted in the advanced preliminary or final design of a preferred alternative. Therefore, the AIP alternative provides a reasonable estimate of the impacts of the improvements at this interchange.

Our review determined that the SMI recommendation to maintain the existing configuration of the southbound ramps at the El Camino Real interchange would further degrade the safety and traffic operations for the southbound lanes of I-5. We also determined that some of SMI's recommendations associated with the northbound exit ramps at the El Camino Real interchange may be reasonable. However, these modifications would have no influence on the overall estimate of the right-of-way needed to be acquired, other impacts or the cost to construct the AIP alternative. Additionally, our review determined these SMI recommendations would not affect the TCA and Caltrans decision to eliminate the AIP alternative from further consideration.

[38] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page 22.
[39] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, pages 770.
[40] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. E-121, F-37, and F-162.

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La Paz Road

This interchange and section of I-5 was designed and built in the 1960s[41] using design standards that are now out of date and no longer utilized. These facilities were also designed to accommodate a significantly lower volume of traffic. As a result, the ramps have sharper curves and limited sight distance, which may affect the safety and operation of motorists traveling on these facilities.

The La Paz Road interchange in its current configuration is a ParClo-A. The freeway is operating at LOS F under current conditions. The ramps are operating at LOS A with the exception of the southbound off-ramp, which is operating at LOS D. The intersection for southbound ramps with La Paz Road is operating at LOS D, and the intersection for the northbound ramps is operating at LOS C.

With the no-action alternative, the freeway would be operation at LOS F more frequently and for longer periods of the day. The on-ramps would be operating at LOS A and the off-ramps would be operating at LOS B and C. The operations of both interchange intersections with La Paz Road would be LOS E.

The AIP alternative maintains the current configuration of the interchanges with improvements to the ramp alignment, removing sub-standard curves. The freeway lanes would be operating at LOS E with the addition of an HOV lane in each direction. The on-ramps would be operating at LOS A, and the off-ramps would be operating at LOS C. The ramp intersections with La Paz Road would be operating at LOS C and D.

SMI recommended keeping the existing alignment of the ramps rather than improving them to current design standards, asserting that "the existing configuration has not resulted in safety or operations problems."[42] Since the on- and off-ramps and their intersections with La Paz Road have some available capacity, there may be an opportunity to evaluate minor design modifications. If these modifications were determined to be feasible in the advanced preliminary engineering, they may only have the potential to slightly reduce the number of parcels need to be acquired by 15 to 25, without adversely impacting the safety and flow of traffic, reductions which would not be significant when compared to the parcels needed for the AIP alternative. A detailed analysis of the viability and potential of these modifications would be appropriately conducted in the advanced preliminary or final design of a preferred alternative. Therefore, the AIP alternative provides a reasonable estimate of the impacts of the improvements at this interchange.

Our review determined that the SMI recommendation to maintain the existing configuration of the off-ramps at the La Paz interchange would not have significantly affected estimated right-of-way impacts and construction costs of the AIP alternative. We also determined that these modifications, if included in the AIP alternative, would not have affected the comparison of the SOCTIIP alternatives, or TCA and Caltrans decisions to eliminate the AIP alternative from further consideration.

[41] FHWA, "Quarterly Report on the Federal-Aid Highway Program", 1969, on file with Richard Wiengroff.
[42] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page 18.

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In summary, the SMI recommendations to modify the proposed AIP alternative interchange improvements would not meet the performance thresholds for the SOCTIIP, would have greater right-of-way impacts than stated by SMI, or would have little significance to the overall estimate of impacts of the AIP alternative. We have determined that the SMI recommendations, if implemented, would not have affected the comparison of alternatives and the decision to eliminate the AIP alternative from further evaluation.

Alignment

SMI suggested the AIP alternative could be improved by shifting the alignment to avoid right-of-way impacts along one side of the corridor. Shifting the corridor may minimize the impacts to one side; however, the shift may instead lead to an increase in the severity and number of properties affected on the other side. Other factors further offset the benefits of this suggestion. Shifting the alignment would make it much more difficult to utilize existing I-5 and local street infrastructure, thus increasing design and construction costs.

The density and location of the developments and location of open space along both sides of the corridor would render a wholesale shift of the alignment to one side ineffective in reducing the overall impacts of the AIP alternative. The transition to shift the I-5 alignment 10 meters would need to begin 500 to 2000 meters in advance of the area to be avoided. The length need for the alignment shift would depend on the alignment, speed, and constraints along the roadway (e.g., existing structures, location of development, environmental constraints, and topography). Thus, shifting the alignment to one side at one location would increase the impacts to the other side.

Based on our review of these factors, we have determined that TCA and Caltrans did develop a reasonable and feasible alignment for the AIP alternative. This alignment shifts off of the original centerline at several locations along the corridor to reduce the number of parcels and amount of right-of-way that would be impacted. The location and density of development, location of open space, environmental constraints, and traffic demands would limit the feasibility of any additional alignment shifts beyond those included in the AIP alternative.

Storm Water Detention Basins

TCA and Caltrans developed a preliminary storm water management plan for each of the SOCTIIP alternatives. The plan developed specifically for the AIP alternative estimated sizes and identified initial locations for the storm water detention basins determined necessary to capture the run-off expected to occur within the I-5 right-of-way and intersecting local roadways. We have determined, based on a review of this preliminary storm water management plan, it provided TCA and Caltrans with the information to identify and assess the impacts associated with the proposed configuration and location of these drainage facilities. [43]

SMI recommended that these basins be relocated or adjusted to better utilize the space available within and adjacent to the I-5 right-of-way, thereby minimizing the impacts and right-of-way that may be required. For example, at the Avenida Pico and Ortega Parkway

[43] TCA, "SOCTIIP Runoff Management Plan", December 2003, page 1-3.

interchanges with I-5. SMI recommended the interchanges be realigned to accommodate and minimize the impact the proposed detention basins would have at this location. [44]

Based on our review of this recommendation, we have determined that TCA and Caltrans' proposed design of these interchanges and initial consideration of the detention basins was reasonable and feasible. The location and configuration of the basins did not affect the design of the interchange. Instead, the design of the interchanges affected the size and location of basins. [45] Additionally, we determined the alternate locations SMI identified for these detention basins were not reasonable and feasible due to the steep topography and associated impacts that would occur with constructing and maintaining these basins in these locations.

If the AIP alternative had been carried forward in the SOCTIIP, the additional, more detailed analysis and consideration of the impacts of these detention basins in the advanced preliminary or final design stages of the project would refine further their configuration and location. This additional analysis at a later stage in the project development process is where it would be appropriate to fully consider the full impacts of the cost, environmental, right-of-way, constructability, and maintenance issues that should be considered in arriving at the optimum configuration and location of the needed drainage facilities and basins.

We have determined in our review the SMI proposed refinements would not have led to any substantial changes in the overall impacts or cost to construct the required drainage facilities and basins or the right-of-way that would need to be acquired. Additionally, we determined that any net benefits that may be realized from any additional analysis or change in the location of the subject drainage basins would not be of sufficient magnitude to affect the TCA and Caltrans decision to eliminate the AIP alternative from further evaluation.

Conclusion

Based on an evaluation of the total project cost, performance, and impacts, TCA and Caltrans decided to eliminate the AIP alternative from further consideration. The independent FHWA technical design review that was performed determined that the SMI recommendations to change the design or scope of the AIP alternative improvements are not reasonable and feasible. This finding is based on the expected influence these recommendations would have on the total project cost, performance (e.g., safety, and traffic flow), and other impacts (e.g., right-of-way, drainage, and environment). While SMI asserts its recommendations will not adversely impact travel and result in substantially lower project costs and impacts, there is no reasonable rationale or technical basis provided upon which these recommendations are founded.

Our review of SMI's recommendations to modify the AIP alternative determined that they would not result in an alternative that meets the performance thresholds established for the SOCTIIP. We further determined that only a limited number of SMI recommendations may be reasonable and feasible to implement after further study and analysis which would appropriately be conducted in the later stages of the advanced preliminary or final design of a

[44] , "An Alternative to the Proposed Foothill South Toll Road", January 2008, pags 20-21.
[45] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, pags 20-21, and TCA, "SOCTIIP Runoff Management Plan", December 2003, Figures I-5-1 through 1-5-23.

project. Additionally, these potential modifications would not have sufficiently affected the impacts quantified for the AIP alternative to where they could change the comparison between SOCTIIP alternatives.

We have determined based on our review that the SMI recommendations would result in an alternative with a higher total project cost, diminished traffic levels of capacity and traffic flow, and greater adverse impacts than was suggested in the SMI reports. Based on this assessment we have determined the SMI recommendations do not justify altering the AIP alternative, nor should they affect the TCA and Caltrans decision to eliminate it from further consideration in the development of the SOCTIIP. The SMI recommendations also involved detailed design issues that are appropriately considered in later stages of the project development when advanced preliminary or final design is conducted on the preferred alternative selected for the SOCTIIP.

We have determined in our review that TCA and Caltrans followed a context sensitive process to appropriately develop and make an informed decision regarding the feasibility of the AIP and other SOCTIIP alternatives. A sufficient level of design was conducted, and information was analyzed, evaluated and used by TCA and Caltrans in support of making informed, context-sensitive decisions regarding the feasibility of the AIP alternative. Our review did not identify the need to conduct any additional study and analysis of the AIP alternative and the recommendations made by SMI. We determined, based on a review of the information that was developed by TCA and Caltrans, that their decision to eliminate the AIP alternative from more detailed evaluation in the development of the SOCTIIP was reasonable and well-founded.

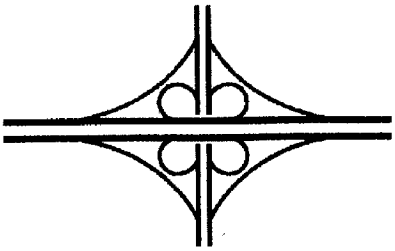
This technical design review was completed by the following individuals on October 24, 2008:

Brooke Struve, P.E., P.M.P.
Design Program Manager

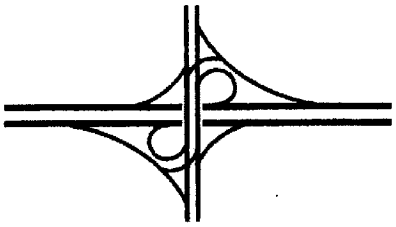
Jon Obenberger, Ph.D., P.E.
Preconstruction Team Leader

Office of Program Administration
Office of Infrastructure
FHWA

Attachment: Interchange Configurations



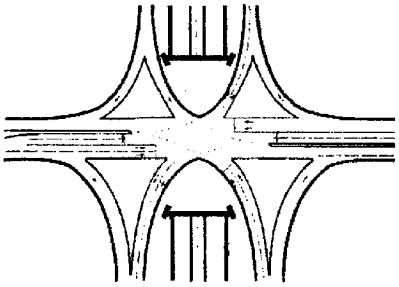
Full Cloverleaf



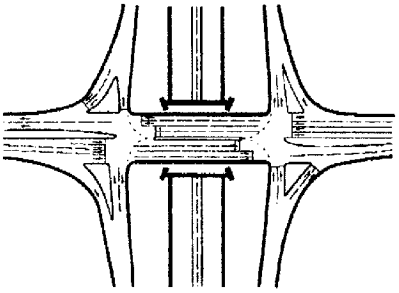
Partial Cloverleaf Type A (Parclo A)

Source: Joel P. Leisch/PBS&J (ITE Freeway and Interchange Geometric Design Handbook)

Attachment: Interchange Configurations



Single Point Urban Diamond (SPUI)



Tight Urban Diamond

Source: Joel P. Leisch, Thomas Urbanik II, and James P. Oxley. "A Comparison of Two Diamond Interchange Forms in Urban Areas." ITE Journal (May 1989)

Letter from Organizations Opposed to the Legislation

American Rivers * Audubon * Center for Biological Diversity * Defenders of Wildlife * Earthjustice * EcoFlight * Environmental Protection Information Center * Food & Water Watch * Idaho Conservation League * Klamath Forest Alliance * League of Conservation Voters * Natural Resources Defense Council * Nevada Wilderness Project * Oceana * Powder River Basin Resource Council * San Juan Citizens Alliance * Sierra Club * Sky Island Alliance * Southern Environmental Law Center * Southern Utah Wilderness Alliance * The Wilderness Society * Western Environmental Law Center * Western Resource Advocates * WildEarth Guardians * Wilderness Workshop

April 25, 2012

Dear Representative:

On behalf of our millions of members and supporters, the undersigned organizations are writing to urge you to oppose H.R. 4377, the Responsibly and Professionally Invigorating Development Act of 2012 ("RAPID Act). Instead of improving the permitting process, the RAPID Act will severely undermine the National Environmental Policy Act (NEPA) and, consequently, the quality and integrity of federal agency decisions.

The National Environmental Policy Act plays a critical role in ensuring that projects are carried out in a transparent, collaborative, and responsible manner. NEPA simply requires federal agencies to assess the environmental impacts of proposals, solicit the input of all affected stakeholders, and disclose their findings publicly *before* undertaking projects that may significantly affect the environment. Critically, NEPA recognizes that the public – which includes industry, citizens, local and state governments, and business owners – can make important contributions by providing unique expertise. Also crucial for informed government decisions, NEPA mandates the consideration of alternative ways of achieving a proposed action, thus ensuring decision-makers and developers are fully informed before proceeding with a project.

Based on some of the following provisions, the proposed reforms in the RAPID Act will significantly undermine this bedrock environmental law:

- Place Arbitrary Limitation of Environmental Review – Section 2(d) mandates reliance on NEPA documents no matter how flawed they may be and how inaccurate the information is before the agency; this completely ignores situations where there are new developments or information which make the document seriously inadequate and require the preparation of supplemental material.
- Severely Limit Consideration of Alternatives – Section 2(g) would diminish the alternatives analysis, the "heart of the NEPA process," by restricting the range of alternatives considered.
- Create a Presumption of Project Approval – provisions such as 2(i)(4) create a presumption that projects will be approved regardless of the impacts on the health, economy, and environment of communities – thus completely undermining NEPA's goal of informed decisionmaking and the agency's role of acting in the public interest.
- Create Conflicts of Interests – Provision such as those in Section 2 that blur the distinct roles of private entities and agencies in agency decisions as well as those that permit project sponsors to

help pay for the preparation, oversight, and approval of an environmental documents create inherent conflicts of interest.

- Limit Public Participation – unnecessarily reduces the public comment period from 45 to 30 days.
- Lead to Unanticipated Delays – unclear statutory language and severe restrictions on judicial review will force stakeholders into court preemptively simply to preserve their right to judicial review.

The provisions in the RAPID Act will only serve to increase delay and confusion around the environmental process. We believe compromising the quality of environmental review and limiting the role of the public is the wrong approach. A far more sensible approach that would improve the efficiency of the process is to urge agencies to use the existing, but underused, flexibilities that exist within NEPA, and were subsequently detailed last month by the Council on Environmental Quality (CEQ). This guidance released by CEQ, "Improving the Process for Preparing Efficient and Timely Environmental Reviews Under NEPA," provides additional measures that can be implemented to ensure that an environmental review process can be conducted in a timely and efficient manner.

Far from being broken, the National Environmental Policy Act has proven its worth as an invaluable tool to ensure that the public, developers, and agencies have an agreed upon template that consistently and fairly assesses proposals that may impact federal resources. The RAPID Act contradicts and jeopardizes decades of experience gained from enacting this critical environmental law. Further, it tips the balance away from informed decisions, jeopardizing the public's right to participate in how public resources will be managed. Please oppose this unnecessary and overreaching piece of legislation.

Sincerely,

Jim Bradley
Senior Director of Government Relations
American Rivers

Brian A Rutledge
VP Rocky Mountain Region
Audubon –Rocky Mountain Region

Mike Daulton
VP of Government Relations
Audubon – Washington DC

Bill Snape
Senior Counsel
Center for Biological Diversity

Mary Elizabeth Beetham
Director of Legislative Affairs
Defenders of Wildlife

Marty Hayden
V.P. of Policy and Legislation
Earthjustice

Bruce Gordon
President
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Andrew Orahoske
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Lara Rozzell
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Bobby McEnaney
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Jeneane Harter
Executive Director
Nevada Wilderness Project

Corry Westbrook
Federal Policy Director
Oceana

Jill Morrison
Powder River Basin Resource Council

Dan Randolph
Executive Director
San Juan Citizens Alliance

Jesse Prentice-Dunn
Washington Representative – Green Transportation
Sierra Club

Melanie Emerson
Executive Director
Sky Island Alliance

Navis A. Bermudez
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Stephen Bloch
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Susan Jane M. Brown
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Karin P. Sheldon
President
Western Resource Advocates

Mark Salvo
Wildlife Program Director
WildEarth Guardians

Sloan Shoemaker
Executive Director
Wilderness Workshop

Response to Post-Hearing Questions from William L. Kovacs, Senior Vice President, Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce

Answers to Questions for the Record
Subcommittee on Courts, Commercial and Administrative Law
following the legislative hearing for the
"Responsibly and Professionally Invigorating Development (RAPID) Act of 2012"
held on
April 25, 2012

Questions for Mr. Kovacs from Mr. Cohen

1. **You largely blame the so-called NIMBY activists for stalling or killing outright a "broad range of energy projects."**

   Would you oppose the building of a nuclear spent fuel site in your backyard if it would result in jobs?

   Personally, I support the continued operation of nuclear power plants as part of the "all of the above" approach to the country's energy needs. Safely disposing of spent nuclear fuel is an important aspect of responsibly operating nuclear plants. We all want spent nuclear fuel to be disposed of safely and securely. To this end, the Federal Government spent over 20 years and $7 billion analyzing and studying all of the land in the U.S. to identify the best possible sites for the disposal of nuclear waste. The Federal Government determined that a suitable site should be located within solid rock, far away from population centers, with an arid climate, great depth to the water table, and little potential for earthquake or volcanic damage. The Federal Government identified several candidate sites and we should defer to their expertise. Judged on that basis, my backyard would certainly not fit the bill for a nuclear spent fuel site.

   Would you mind having the Keystone Pipeline run through your property?

   While I obviously don't live near the proposed routes of the Keystone Pipeline, I take this question to ask whether I would object to living near an oil or natural gas pipeline. In reality, I have a large natural gas pipeline less than 1/10 of a mile from my house, which helps to deliver energy to my home. According to Department of Transportation's Pipeline and Hazardous Materials Safety Administration, over 2,300,000 miles of pipeline operated in 2003, carrying and distributing oil and natural gas. The fuels in these pipelines keep homes warm in winter, cool in summer, and keep our businesses operating. For that reason, I am happy to have the pipeline close by. Also, like everyone else who uses natural gas, I have a small pipeline delivering gas from the big pipeline to my house. Houses are in close proximity to large pipelines in many parts of the country and these pipelines operate safely.

   Would you mind having a coal-fired energy plant in your community?

   I was born and lived in Scranton, Pennsylvania until age 6 where the primary energy resource was coal. In fact, the primary source of heating our house was a coal furnace.

We had a coal bin where we stored the coal. We had to shovel the coal into buckets and walk it to the coal furnace on a daily basis. Also, our stove used coal that was loaded into the top of the stove. From what I can remember my family was very happy to have heat in the winter and a stove to cook our food. Coal also allowed my family to start a new life in the United States. My grandfather came to the U.S. during World War I and he became a coal miner in Scranton. As a miner he made enough money to start and support a family, buy a house and eventually send my father to college. So you see from my background I never feared or hated coal as some do today. I always looked at the tremendous benefits coal provided my family and our society. It provides affordable electricity to almost half of the United States, it allowed the expansion of the nation, and it still provides immense prosperity to millions of humans.

I certainly would welcome the reliable, low-cost energy that coal-fired plants have delivered for many decades across the country. Modern coal-fired plants use better technology like fluidized-bed combustion, supercritical boilers, coal gasification, and sulfur dioxide scrubbers that make them far more efficient and cleaner than previous plants. Although the Federal Government is exerting great pressure for plants to switch from coal to natural gas, the transition cannot take place until additional pipeline infrastructure is built and expanded to bring service to local areas not currently served by natural gas. To make this fuel switch happen we will need even **more** pipelines built near more houses in the U.S. And yet, pipeline projects are currently stalled or killed outright by the lengthy permitting process just like other energy projects.

2. **Would you support increasing funding for agencies so that they have the resources to conduct such reviews more quickly, including the ability to respond to public comments more rapidly?**

If I could be certain that increasing agency funding would directly translate into faster project reviews and more expeditious permitting, I could support increased agency funding. In practice, it is nearly impossible to assure that higher levels of agency funding are dedicated to improved environmental reviews and streamlined permitting. The temptation for agencies to divert funds to other pet programs is simply too great. For this reason, in the 1990 Clean Air Act Title V operating permit program, Congress specified that Title V permit applicants pay fees that are adequate to completely fund Title V permit processing activities and agency personnel. Only by creating a dedicated funding source paid for by permit applicants did Congress ensure that Title V permits would be reviewed and processed in a competent, timely fashion. While this approach might work for the environmental review process, simply increasing agency budgets is no guarantee that reviews and permits will be processed more efficiently. The other approach, which is taken in the RAPID Act, is to set hard deadlines for action by the agencies – with consequences if the agencies fail to meet the deadlines. We believe that the "hard deadline" approach is the most effective and the 2005 SAFETEA-LU amendments addressed in my testimony prove the correctness of the assertion.

Moreover, over the past three decades federal agency budgets have been increased significantly while the length of time taken for environmental reviews and permitting

decisions has continued to grow. For example, aggregated budget authority for federal agencies increased from about $200 billion in 1976 to $2 trillion in 2010, while delays by agencies completing environmental impact statements increased by 37 days per year. In some instances the delays have been as long as 18 years, according to the deWitt study cited in my testimony. Simply giving additional resources to agencies doesn't seem to do anything to address the project delay problem.

Post-Hearing Questions submitted to Gus Bauman, Esq., Beveridge & Diamond, P.C., and Related E-mail Correspondence

Questions for the Record
Subcommittee on Courts, Commercial and Administrative Law
following the legislative hearing for the
"Responsibly And Professionally Invigorating Development (RAPID) Act of 2012"
held on
April 25, 2012

Questions for Mr. Bauman from Mr. Cohen

1. The bill would allow project sponsors to make a "voluntary contribution" to the lead agency. Do you share Ms. Bear's concerns that this provision, at a minimum, would raise conflict of interest concerns? If so, why?

2. The bill defines "project" to mean anything requiring a federal permit or license (§(b)(11)), and says that is applies to every project "for which a federal agency is making a decision under an environmental law" (§(o)). Does this mean that this bill would require EPA to follow this law for its CERCLA, Clean Air Act, and Clean Water Act actions, even though federal law currently does not require any NEPA review for those actions?

3. It appears that participating agencies must either commit to the process before the scope of the project is known (§(h)(1)(E)) or be barred from the process. How does that promote agency efficiency?

4. Can a NEPA review be delayed because of:
   - Changes in the project planning and design process?
   - Changes in local or state funding priorities?
   - Construction complexities?
   - Local controversy or community opposition to a project?
   - Compliance with myriad local, state, tribal and other federal laws?

Lewis, Ashley (Judiciary)

From: Gus B. Bauman[redacted]
Sent: Thursday, May 17, 2012 11:14 AM
To: Lewis, Ashley (Judiciary)
Subject: RE: 4.25.12 CCAL Hearing Transcript

Ashley, I doubt I'll be replying to them given my schedule. Thanks. Gus

Gus B. Bauman

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From: Lewis, Ashley (Judiciary) [redacted]
Sent: Thursday, May 17, 2012 11:10 AM
To: Gus B. Bauman
Subject: RE: 4.25.12 CCAL Hearing Transcript

Yes thank you Mr. Bauman. I received all of your edits, but not the completed questions. Any idea when I could expect those? Best,

Ashley

Response to Post-Hearing Questions from Dinah Bear, Esq., former General Counsel, Council on Environmental Quality

Questions for the Record
Subcommittee on Courts, Commercial and Administrative Law
following the legislative hearing for the
"Responsibly And Professionally Invigorating Development (RAPID) Act of 2012"
held on
April 25, 2012

Questions for Ms. Bear from Mr. Cohen

1. Do agencies have adequate resources in terms of funding and personnel to timely perform environmental reviews required under NEPA?

   No, generally speaking, I do not believe that agencies have adequate resources to perform timely environmental reviews required under NEPA. While I lack – and more importantly, Congress lacks – a systematic survey that is responsive to this question, beginning in 1981 and ever since that time, regardless of which administration has been in office, I have watched a serious erosion of capability to implement NEPA from within the agencies. In some cases, headquarters offices have been eliminated (for example, in the Department of Agriculture); in other instances, positions in the field have been eliminated (for example, the U.S. Fish and Wildlife Service). Simultaneously, training for staff in NEPA has also been reduced.

   Could the lack of adequate resources explain why EIS completion time has purportedly increased in recent years?

   I believe it is a significant reason for increase in EIS completion time. There are at least two results of the lack of adequate resources in agencies that result in delay. First, staff who were not hired for purposes of implementing NEPA and who are not trained but find themselves responsible for implementation, may unintentionally make bad decisions that result in delays. Second, the increased use of consultants to implement the entire process inevitably leads to expanded time frames, beginning with the procurement process for the consultant and continuing need for agency review of drafts, etc. There is also the issue of whether the agency has adequate staff to oversee the contractors. I have personally dealt with situations in which agency representatives acknowledged that they lacked trained staff to substantively oversee the work[1]. As I said during the hearing, all of the EISs I have seen done under twelve months have been done within the agency with adequate resources were allocated for the production

2. Mr. Kovacs argues that the average time for all federal entities to prepare an EIS is 3.4 years.

   Is it fair to lump a Yucca Mountain EIS with a hunting determination?

[1] Indeed, the scope of this problem is broader than NEPA compliance. Earlier in this decade, a Chairman of the Nuclear Regulatory Commission (NRC), upon the occasion of his retirement speech, noted that he was proud that the NRC was one of the few agencies left with the capability to technically oversee their contracts.

I do not think that it is fair to lump all EISs together. It is important to recall that besides agency resources, an important element of the NEPA process is public involvement, and that varies dramatically depending upon the proposal. I have seen EISs where the widespread interest resulted in over 80,000 letters to the agency and other cases where there was little public interest and the agency received under five letters on the draft EIS. Given that the agency has to respond to all substantive comments, obviously, the number of comments affects the timeline. Additionally, a highly controversial proposal is usually accompanied by a high level of involvement from other government entities, be it Congressional committees, County Commissioners, City Councils, etc.

3. Mr. Kovacs appears to decry judicial review of NEPA actions.

   What are the ramifications of restricting judicial review of such actions?

   In my view, were judicial review to be eliminated or restricted to the point that it was seldom accessible, compliance with NEPA would erode significantly. It is often only the existence of enforceable legal requirements that allow agencies that are frequently under considerable pressure to approve actions to "look before they leap" into hasty decisionmaking. Further, in an era of ever-decreasing federal resources, only resources for those requirements that are enforceable are likely to be funded at all (whether by Congress or private applicants).

   Interestingly, Mr. Kovacs spoke favorably of the Regulatory Flexibility Act (RFA), which he pointed out is not enforced through litigation. A quick literature search regarding suggests that there is much criticism of the effectiveness of the RFA from the perspective of business and industry, some similar to complaints about NEPA.[2]

4. Mr. Kovacs states that H.R. 4377 is modeled after section 6002 of SAFETEA-LU and CEQ's March 2012 Guidance, suggesting that there should, therefore, be broad-based support for H.R. 4377.

   What is your response?

   There are sections of H.R. 4377 that are modeled after section 6002 of SAFETEA-LU. However, SAFETEA-LU was written specifically for proposed highway projects that trigger NEPA requirements. There are approximately 85 federal agencies that comply with NEPA for hundreds of programs that come under separate statutory authorities, many of which have very specific mandates and procedural frameworks that vary

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[2] For example, *see*, See, Michael R. (2006). "Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—and Current Proposals to Invigorative the Act". *Fordham Urb. L.J.* (33): 1199. The author was formerly an attorney in the Small Business Administration who oversaw implementation of the RFA and wrote the article while he was employed by the American Petroleum Institute (although writing in his own capacity). Interestingly, one of the reasons he identifies for agencies' failure to comply with the Act is lack of adequate staff and adequate training.

considerably from the highway situation. Section 6002 of SAFETEA-LU was not intended to be and is not an appropriate "one size fits all" fix for all statutory frameworks. The Congressional authors of SAFETEA-LU had no reason to consider, for example, the statutory framework for decisionmaking by the Nuclear Regulatory Commission for the licensing of nuclear power plants, the procurement processes of the military services, or the process for administrative appeals of grazing permits in the Bureau of Land Management when they drafted section 6002.

5. Are you familiar with the project that Mr. Margro has described? If so, what are your thoughts about the problems he identified?

I have not personally been involved with this particular project. Reading Mr. Margo's testimony, I noted with some dismay that the EIS under NEPA and the Environmental Impact Report (EIR) required under CEQA were done separately rather than concurrently as directed in the CEQ regulations. I do not know why that occurred, but in my experience, implementing the federal and state processes separately instead of doing them concurrently always expands the time line. I am aware that it is highly controversial project in southern California and local opposition to a project typically produces delays. A wide variety of parties, from surfers to the United States Navy and Marine Corps, have expressed objections to the project. See, for example, http://www.ocregister.com/articles/corps-240682-camp-toll.html.

6. Do agencies typically make decisions and take action soon after completion of the NEPA process?

Frequently agencies will make decisions and take action shortly after completion of the NEPA, but by no means will that always occur. A number of developments falling outside of the NEPA process can delay or prevent an agency from making a decision, or even after the decision is made, delay its implementation. For example, in one case, the U.S. Supreme Court upheld an agency's compliance with NEPA in 2004 but the action just began to be implemented in 2011 (*Department of Transportation v. Public Citizen* 541 U.S. 752). In that case, political opposition to the entry of Mexican trucks into the U.S. delayed implementation of the "NEPA approved" decision for over eight years. In other situations I'm familiar with, financial, budget or market considerations caused delays of a decade or more.

7. Please explain some of the discrepancies between the bill and CEQ regulations.

First, it is important to note that the purposes of H.R. 4377 reach far beyond the National Environmental Policy Act (NEPA). NEPA does not authorize, require or result in the issuance of permits; rather, the NEPA process may apply to an agency's decision as to whether to grant a permit under another law. Importantly, NEPA does not dictate when or what decision an agency should make. H.R. 4377 seeks to regulate the process of agency decisionmaking through dictating timelines for any decision that falls under the

purview of the bill, thus affecting potentially dozens of other authorizing laws. That said, here are some of the discrepancies between H.R. 4377 and CEQ regulations implementing NEPA; please note that this is not an exhaustive list:

Definitions:

The definition for an "Environmental Assessment" repeats the first part of the CEQ definition verbatim, but omits 40 CFR 1508.9(b) that sets out the required contents of an EA.

The first part of the definition for a "Finding of No Significant Impact" is verbatim from CEQ regulations (40 C.F.R. § 1508.13), but omits provision stating that the finding need not repeat any of the discussion in the EA but rather may incorporate it by reference.

The definition of "project" is new for purposes of this bill. It defines a subset of activities that fall under NEPA, specifically "construction activities undertaken with Federal funds or that require approval by a permit or regulatory decision issued by a Federal agency." Many other proposed federal actions are subject to NEPA under the CEQ regulations, for example, plans, programs, management actions and regulations.

The definition of "Record of Decision" in H.R. 4377 is seriously inconsistent with the CEQ definition in that it omits requirement to identify the environmentally preferable alternative, the requirement to discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions and any essential considerations of national policy which were balanced by the agency in making its decision and how those considerations entered into its decision. It also omits the requirement to include a monitoring and enforcement program for any mitigation that is included in the decision.

Role of Project Sponsor

(1) Preparation of environmental documents: H.R. 4377 authorizes the project sponsor, whether a private or public entity, to prepare any NEPA document so long as the lead agency furnishes oversight in its preparation and independently evaluates the document and the document is approved and adopted by the lead agency. Currently, all applicants can prepare EAs, but not EISs. State agencies can prepare EISs and state, local and tribal agencies can prepare NEPA analyses appropriate to their role as either joint or cooperating agencies. However, the CEQ regulations bar a private applicant from preparing an EIS.

(2) The bill provides new authority for federal agencies to accept voluntary contributions of funds from a project sponsor, to be used either for the NEPA process or for making a decision under other environmental laws. This is not provided for in the CEQ regulations.

Adoption and Use of Documents

(1) Documents Prepared Under NEPA: H.R. 4377 limits agencies to "not more than 1 EIS and 1 EA for a project. This is inconsistent with CEQ regulations, which provide that agencies should prepare whatever analyses are needed to meet the requirements of NEPA. It also appears to be potentially inconsistent with the CEQ regulations on programmatic EISs and tiering, 40 C.F.R. § 1508.28.

Comment Periods

In the narrowed circumstances in which an agency may supplement an EIS under H.R. 4377, the lead agency "may" solicit comments from agencies and the public for not more than 30 days beginning on the date of publication of the supplement. CEQ regulations require an agency to provide for a 45 day public review and comment period, although there is also a provision in the CEQ regulations that allows CEQ to approve alternative procedures for supplemental EISs if circumstances warrant a deviation from the normal process[3].

Under H.R. 4733, each participating agency is to limit its comments on a project to areas within the authority and expertise of the agency and identify statutory authority for their comments. The lead agency "shall not act upon, respond to or include in any document that are outside of the authority and expertise of the commenting participating agency". This is inconsistent with the CEQ regulations, which allow all agencies, whether local, tribal, state or federal, to comment on any substantive issue relevant to the NEPA analysis, just as all members of the public are able to do so.

Range of Alternatives

Under the bill, cooperating agencies would only 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. The CEQ regulations limit the requirement to analyze alternatives to "reasonable alternatives" that meet the purpose and goal of the lead agency. However, "reasonable alternatives" are not limited to the needs of a particular developer, but rather to the purpose and need at issue in regards to agencies' decisionmaking.

Deadlines

In H.R. 4733, for projects requiring an EIS, the agency must make a decision on the proposed project within 2 years after the earlier of either the project initiation request or a NOI to prepare an EIS is published in the Federal Register. If an agency has prepared an EA it must issue either a FONSI or Notice of Intent to prepare an EIS within 1 year of project request or participating agency invitations (whichever is earlier). Extensions may

[3] 40 C.F.R. § 1502.9(c) (4).

only be extended if a different deadline is established by agreement of the lead agency, project sponsor and all participating agencies or is extended by the lead agency for good cause. It may not be extended by more than 1 year for an EIS or 180 days for an EA.

"Notwithstanding any other provision of law, in any case in which a decision under any other Federal law", is required to be made, if a federal agency is required to approve or make a determination or finding regarding a project prior to the ROD or FONSI, the bill requires an agency to make that decision no more than 90 days after the lead agency publishes an NOI of the FEIS or issuance of other final environmental documents or no later than such other date that is otherwise required by law, whichever event occurs first."

Other decisions: With regard to any determination, approval or finding of a federal agency not required to be made prior to ROD or FONSI, each federal agency must make decision not later than 180 days after the lead agency issues the ROD or FONSI unless a different deadline is established by agreement of everyone or extended for good cause, provided that such extension doesn't extend beyond 1 year after ROD or FONSI.

The CEQ regulations do not require an agency to make the underlying decision about a project within any particular timeframe. All deadlines in the CEQ regulations pertain to the NEPA process, not other environmental statutes or non-environmental statutes that govern decisionmaking. There are many factors outside of the NEPA process that mandate or influence decisionmaking in a particular manner. These provisions would shift the NEPA process from a framework of analysis and information sharing that leaves federal agencies free to use their own professional judgment, under the policy direction of the President, to a framework for forcing particular results.

I would also note that these provisions appear to confuse decisionmaking on the underlying project with NEPA documentation. While a Record of Decision under NEPA reflects the actual project decision, a FONSI is an environmental document that simply reflects the agency's decision that the proposed action does not require an EIS. A FONSI by itself is not a decisionmaking document on the proposed project.

It is impossible to accurately pinpoint every ambiguity about and conflict with compliance with other federal statutes, but it is inevitable that a great deal of litigation in federal courts would be brought to interpret the meaning of these provisions and their relationship to the rest of the public laws in the United States.

Environmental Review Comments

For comments by agencies and the public on a draft EIS, there will be a 60 day comment period after publication of the NOI unless a different deadline is establishment by agreement of the lead agency, project sponsor and all participating agencies or the

deadline is extended by the lead agency for good cause. CEQ regulations only require a 45 day comment period on a draft EIS.

Failure to Act

If any federal agency fails to approve or disapprove the project or make a required finding or determination within the applicable deadlines described above, H.R. 4377 requires an agency to issue any required permit or make any required finding or determination. Nothing in the CEQ regulations require an agency to make a decision prior to full compliance with NEPA. As explained above, the CEQ regulations do not regulate any process other than the NEPA process.

Judicial Review

Any approval, determination, finding or issuance of a permit under the "Failure to Act" provision is deemed to be final agency action and may not be reversed by any agency. A court "may not set aside such agency action by reason of that agency action having occurred under this paragraph." This provision is inconsistent with the entire body of NEPA case law and law and regulation under other environmental statutes since current law does not allow, let alone mandate, the issuance of permits prior to compliance with all applicable laws.

8. What are the principal causes of delay in the NEPA review process? In my view, the 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.

9. The definition of methodologies (§ (g) (3) (A)) eliminates the reference in the CEQ regulatory definition (§1502.24) that the decisions have "professional integrity" and "scientific integrity." Why would there be a need for such a change?

In my view, there is no justification for such a change.

10. Under the bill's "voluntary contributions" provision, would this permit the Koch Brothers to pay millions of dollars to a lead agency responsible for approving a project that Koch is sponsoring?

Yes.

What are the ramifications of this provision?

This country has always prided itself on be able to avoid the type of rampant corruption and graft that occurs in many other societies. Indeed, much of the world has customarily looked with envy and awe at a government system that does not inherently involve bribery when dealing with a government official, whether at the level of a traffic ticket, approval for construction of a new building, or procurement of a weapons system. There have, of course, been exceptions, but those are not examples that Americans look upon with pride – rather, expect prosecutions for this type of behavior.

Two reasons why the United States has long been able to avoid corruption on a systematic basis are the rule of law and the fact that government agencies and their employees have been funded to perform inherently governmental functions. I fear that allowing the direct payment of funds to agencies for project approval would indeed provision would make legal the sale of government decisions. And even if an agency had no legitimate reason to be concerned about a proposed project, if this provision became law and the applicant gave funds to the decisionmaking agency, the public could have no assurances that the agency had acted objectively in assessing it.

11. What is so problematic about the bill's limitation on the number of EISs and EAs that may be prepared?

There are two types of problems with this provision: interpretation of the provision as it is drafted and its substantive restrictions. First, it is simply not clear how it would be interpreted, although it is quite predictable that litigation would ensue to figure that out. For example, does it mean that federal courts would be precluded from ordering additional analysis, leaving them with only an order to halt going forward with the project as a remedy? While this seems counter to the underlying intent of the bill, read literally, that is a possible interpretation. What about actions that are currently addressed through a series of tiered analyses: for example, exploration for oil and gas resources, followed by production. Would an agency and a company have to engage in the NEPA process for all stages of oil and gas development in one document, even before knowing what resources might be commercially feasible? And what if a project proponent changes a project in a way that affects environmental impacts but it remains fundamentally the same project.

The second problem with the section is the elimination of an agency's option to prepare an additional EA or supplemental EIS when it determines that the initial analyses was flawed in some way or for some other reason further the purposes of NEPA per the CEQ NEPA regulations.[4] Inevitably, agencies considering the preparation of additional NEPA analyses experience both internal and external pressure not to do so. But there are

[4] 40 C.F.R. § 1502.9(c).

situations where a further analysis makes sense and is required. The provision as drafted imposes an artificial constraint on analyses and the dissemination of information that would be useful to the decisionmaker and to the public.

12. Do agencies typically comment on matters not within their expertise?

No, generally they do not. Indeed, many agencies are hard pressed to devote resources to addressing those issues that are within their expertise.

13. If there are any other points that you would like to raise, including any responses to your fellow witnesses' testimony, that you did not have a chance to raise during the hearing, please do so here.

First, overlooked in much of the discussion at the hearing is the fact that the NEPA process can and does lead to better decisions . . . . not in every instance, but enough times that it has been shown to add real value for the citizens of this country. NEPA forces agencies to listen to citizen concerns, address information that it would not otherwise consider, and identify better ways to achieve a goal. Not every decision should be made hastily and most decisions are improved by information and participation by a wide range of affected agencies and people. I have personally heard testament to NEPA's positive influence on decisionmaking from agency decisionmakers who were skeptical about the usefulness of the NEPA process when they entered into government service. I have seen agencies adopt alternatives that were different than what was originally proposed because they recognized that the alternative was a better idea. And I have seen environmental damage be avoided or mitigated because of the process.

Further, NEPA is the vehicle through which all citizens from all walks of life, including water users, ranchers, farmers, small business owners, mayors, neighborhood associations and more have an opportunity to influence federal decisionmaking. The NEPA process is not the exclusive domain of either the U.S. Chamber of Commerce or the Sierra Club. Indeed, some of the most effective engagement I have seen in the NEPA process has been by private citizens who frankly had never heard of NEPA until a federal agency proposed to do something that would seriously affect the quality of their lives, including their livelihood. And those citizens benefit when the entire panoply of local, tribal, state and federal agencies are fully engaged in the NEPA process, utilizing their expertise for the benefit of the public.

Second, much of H.R. 4377 seems premised that all or most delay in environmental review processes and decisionmaking lack justification and that most of the delay is derived from agencies with environmental responsibilities holding up the process to meet the requirements of environmental laws. To the contrary, many times a proposed action from one agency affects a wide range of agencies and stakeholders that have legitimate concerns. The NEPA process provides a framework for addressing those concerns. For

example, several types of projects, including highways, commercial airports, residential developments, and energy projects may encroach into the vicinity of military installations, operational ranges and training areas creating resource uses (land, air, water, frequency spectrum) that are incompatible with current and future military training and general mission activities.

For instance, recently, through the NEPA process the USMC has been able to engage the BLM on adverse impacts on airspace over the U.S. Marine's Chocolate Mountain Aerial Gunnery Range in California. The West Chocolate Mountains Renewable Energy Evaluation Area Draft Environmental Impact Statement and Draft Amendment to the California Desert Conservation Area (CDCA) Plan evaluates six alternatives authorizing testing for and development of solar and wind energy development facilities on approximately 17,900 acres of Bureau of Land Management managed surface lands; and leasing approximately 20,962 acres of federal mineral estate for geothermal energy. testing and development. The West Chocolate REEA DEIS is available here: www.blm.gov/ca/st/en/fo/elcentro/nepa/wcm.html

The DEIS (p 3-189) states: "Through the public scoping process, the Marine Corps noted that the height of structures and power lines near the CMAGR may become an impact to low-level flight training. Siting of structures may also affect ground accessibility. Lighting was noted as having the potential to interfere with pilots using night-vision technology. Other interferences with military technology include the potential for wind turbine blades to scatter radar waves and the potential for alternative energy sites to produce radiofrequency energy, which may affect radar instruments and communications systems. There is also a concern that Off Highway Vehicle users may unintentionally encroach into the CMAGR if HV access is restricted near alternative energy sites."

Both military readiness and the production of energy are important to the country's future. The NEPA process and associated environmental review provides the procedural framework and systematic review that allows the decisionmaker(s) to ultimately weigh and balance the impacts of these projects and reach an appropriate decision that reflects the agencies' best judgment and America's values.

Response to Post-Hearing Questions from Thomas Margro, CEO, Transportation Corridor Agencies

Questions for the Record
from
Rep. Howard Coble, Chairman
of the
Subcommittee on Courts, Commercial and Administrative Law
following the legislative hearing for the
"Responsibly And Professionally Invigorating Development (RAPID) Act of 2012"
held on
April 25, 2012

For Mr. Margro:

1. If H.R. 4377 had been the law when you were planning the 241 toll road, how would that have affected your project and where do you think the project would be today?

   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. Despite the fact that we entered into a Memorandum of Understanding (MOU) with the Federal Highway Administration (FHWA), Army Corps of Engineers (Corps), Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (USFWS) to improve interagency coordination and streamline the environmental review process, it took 10 years and $20 million for the collaborative to prepare a draft Environmental Impact Statement (EIS) and agree to a preliminary Least Environmentally Damaging Practicable Alternative (LEDPA) under the Clean Water Act.

   Despite the coalescence of the federal agencies around the preliminary LEDPA, the Corps and EPA subsequently withdrew their support after "Smart Mobility, Inc." (SMI), a Vermont-based engineering firm with no California Department of Transportation (Caltrans) highway experience and not licensed in the state of California, was hired by project opponents and suggested that another alternative be studied. FHWA and Caltrans subsequently discredited SMI's report as being flawed, having safety issues, and not being feasible; however, the timing was such that it tainted the process and caused the project to lose support with the California Coastal Commission.

   Had H.R. 4377 been in effect, EPA and the Corps would not have been able to insist that FHWA review the SMI report on yet another alignment (after years of review of 24 different alignments) since the agencies had already agreed on a preliminary LEDPA, no new facts had emerged, and road engineering is clearly not within EPA or the Corps' expertise. In fact, FHWA issued a letter dated October 24, 2008 stating, "We have determined in our technical design review that the SMI recommendations…are not reasonable and feasible."

   H.R. 4377 also sets forth a process and timeline for initiation of NEPA, designation of participating agencies, review of alternatives, preparation of an EIS and issuance of a Record of Decision (ROD) that would have helped advance the project forward.

2. A witness at the hearing objected to the provision in H.R. 4377 limiting participating agencies to comments on issues within their expertise, stating that agencies typically focus on areas within their expertise. Can you provide more detail on the experience you had with this issue in connection with the 241 toll road?

   See answer to number 1 above.

3. California has a stringent environmental review law – the California Environmental Quality Act. H.R. 4377 would allow project sponsors in states with laws as stringent as NEPA to satisfy NEPA by complying with state law. In your experience, does CEQA provide for a robust consideration of environmental impacts that is equivalent to NEPA?

   CEQA 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. Currently public entities interested in undertaking projects with environmental impacts must prepare a negative declaration or a more complex and detailed environmental impact report (EIR) under CEQA, and a separate EIS or environmental assessment (EA) under NEPA. This duplication of process often adds significant time and cost to a project without providing any additional environmental protections.

   The Subsequent EIR (SEIR) for the 241 Toll Road analyzed several environmental factors that could have been potentially affected by one of the ten project alternatives analyzed for CEQA purposes. This analysis resulted in the preparation of more than 20 separate technical reports that analyzed each alternative's potential impacts on air quality, biology, traffic, water quality, etc., and identified mitigation measures where necessary to reduce the level of impacts. It took more than six years to complete and certify the SEIR for the project.

4. One witness raised concerns about project sponsors hiring consultants to help prepare the NEPA documents. In your experience, would this delay the review process or create an irreconcilable conflict of interest?

   It would not be feasible or cost effective for lead agencies or project sponsors to have enough in-house staff to prepare all of the environmental documents under their purview efficiently. Consultants offer a wider array of experience preparing environmental documents for a broad range of projects and expertise in the various environmental and resource impact areas that must be studied under NEPA. Rather than delay the process, consultants have an incentive to provide objective and efficent environmental reviews since they will want a positive recommendation for future business.

   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. First, CEQ's conflict of interest regulation would remain in place to ensure that any consultant

hired does not have a financial interest in the outcome of the NEPA review. Indeed, under current law, state transportation agencies hire consultants to prepare NEPA documents for federally-funded projects, and these consultants execute disclosures to assure that no conflicts of interest exist. Second, the federal agency oversees and must approve the preparation of the NEPA document, which ensures that the NEPA study is fair, unbiased and meets the requirements of all applicable laws.

5. A concern was raised at the hearing about imposing restrictions on the ability of resource agencies to request additional studies, analyses and other information. What is your experience with resource agencies in the environmental review process and do you think the provisions in H.R. 4377 are necessary?

   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. As discussed above, after the agencies had identified the preliminary LEDPA, EPA and the Corps pushed for FHWA to analyze the SMI report even though it was based on a design proposal that was very similar to an alternative evaluated and ultimately rejected during the lengthy period when alternatives were being considered.

6. One witness suggested that delays in the NEPA process are overblown since most projects are eligible for categorical exclusions that are processed very quickly. What is your reaction to this assertion?

   While I do not doubt that a large number of projects are eligible for categorical exclusions, larger infrastructure projects (such as new road, bridge or rail transit construction projects) almost always require the preparation of an EIS or EA. These are the projects that create the most jobs and provide the most benefits in terms of congestion relief and mobility improvements. These are also the projects that result in the most significant delays and demonstrate the need for NEPA reform. We simply have to figure out a way to evaluate new construction projects efficiently so that we can expedite construction while ensuring that environmental protections are in place. H.R. 4377 accomplishes these goals.

Questions for Mr. Margro from Mr. Cohen:

1. You identify certain "reforms in the bill" that you support. Do you support all of the bill's provisions?

   I do support all of the reforms in the bill. My reason for identifying specific reforms in my written testimony is that some of the reforms in the bill either are already applicable to transportation projects or are focused on projects being undertaken by the private sector.

2. Ms. Bear notes that H.R. 4377 could actually result in slowing down the approval process in several respects. For example, it would authorize more "cooks in the kitchen" by allowing additional entities to qualify as participating agencies. It also introduces new terms or modified terms that will need to be interpreted by the court.

   What is your response?

   I do not agree with Ms. Bear's characterization. First, H.R. 4377 does not authorize more "cooks in the kitchen." Rather, it establishes a process for interested parties to choose to be involved in the review process, but limits the scope of their review to issues within their expertise. Moreover, it assures that all agencies that should be involved are brought in at the front end of the process, so the lead agency can identify, study and address all appropriate issues and resolve disputes when it is preparing the NEPA document, rather than being "surprised" by new issues later in the process. This approach has proven successful for the NEPA review of transportation projects under current transportation law, known as the Safe Accountable Flexible Efficient Transportation Equity Act a Legacy for Users (SAFETEA-LU).

   H.R. 4377 also sets forth clear deadlines and procedures for alternatives analysis, environmental document preparation, environmental decisions and judicial review. Most of the terms included in the bill are borrowed from SAFETEA-LU, but in any event are clearly written and, in my opinion, should not require interpretation by the courts.

3. Do federal agencies that you work with have sufficient resources to timely process environmental review requests?

   I do not have personal knowledge of the resources available to the federal agencies with which we work; however, I believe that H.R. 4377 would require federal agencies to be more efficient in evaluating projects, which would result in reviews being undertaken more expeditiously and at a lower cost, without compromising environmental protections.

4. Did your project encounter very strong public opposition based on its potential impact to local beaches, state parks and recreation areas, and land that was sacred to Native Americans?

   The 241 Toll Road, like many new road and transit construction projects around the country, has both support and opposition. The business community, organized labor, local elected officials, the communities most impacted by traffic gridlock, the Federal Highway Administration and the former governor of California all supported the project through the environmental review process and before the California Coastal Commission. In fact, USFWS issued a Biological Opinion with a No Jeopardy determination, which verifies that the project poses no concern to any federally-listed threatened or endangered species. This determination was less than three months after the California Coastal Commission hearing.

While our project has had some vocal opposition, their concerns should have and will continue to be addressed through the NEPA process and the other applicable laws and regulations. If H.R. 4377 had been in effect, we would not have spent 10 years in the environmental review process, but would have had timelines for addressing issues – with project opponents having the opportunity to participate in the review process and challenge findings they do not believe are legally justified.

When this project was undergoing the environmental review process more than a decade ago, environmental groups including the Surfrider Foundation raised concerns about the 241's potential impacts on surfing resources at a popular surf spot known as Trestles, which is located ½-mile from the existing Interstate 5. TCA hired an independent, respected and qualified coastal expert, Dr. David Skelly, of Geosoils, Inc., to analyze whether the project would negatively impact Trestles. Dr. Skelly's analysis concluded there would be no impact to the surf break at Trestles. Dr. Skelly provided additional/subsequent analysis in 2004 that also concluded there would be no impact to surfing resources. A few years later, three independent peer reviews of Skelly's analysis were conducted by respected and qualified experts in their fields who all concluded there would be no detrimental effects to the surfing at Trestles.

Regarding potential impacts to lands sacred to Native Americans, TCA has positive, long-standing relationships with Native Americans and issues related to the 241 project regarding Native American lands were addressed in the EIS.

5. Are you aware that more than 96% of federally funded highway projects are approved under NEPA pursuant to the least intensive, shortest and quickest analysis, i.e., categorical exclusions?

While I cannot confirm the percentage of projects that are approved pursuant to a categorical exclusion, categorical exclusions are categories of actions that have been determined not to have a significant effect on the human environment either individually or cumulatively and therefore do not require preparation of an EIS or an EA. The Federal Highway Administration limits projects eligible for a categorical exclusion to those that involve plans and technical studies; utility installations along or across a transportation facility; bicycle and pedestrian lanes; installation of noise barriers; landscaping; installation of signs; emergency repairs; acquisition of scenic easements; improvements to rest areas; ridesharing activities; bus and rail car rehabilitation; purchase of maintenance equipment with no significant off site impacts; resurfacing highways; bridge rehabilitation and construction of new truck weigh stations.

The types of projects that create jobs, result in the most significant delays during NEPA, and have the greatest benefit for congestion relief require either an EA or EIS. Thus, the fact that a high percentage of federally funded highway projects are approved under categorical exclusions is not relevant to the need for the types of reforms and streamlining included in H.R. 4377.

6. Are you aware that only 0.3% of Federal Highway Administration projects require a full environmental impact statement?

I cannot confirm the percentage of projects requiring a full EIS nor is it a relevant number. The fact that a project requires an EIS does not justify an unwieldy review process that adds significant cost and delays. While I certainly agree that an EIS should carefully review the project purpose and need, alternatives and environmental mitigation so that the lead agency has sufficient information to issue a ROD, H.R. 4377 includes reforms that would expedite the NEPA process without weakening the analysis of environmental impacts and proposed mitigation. Moreover, the reforms in H.R. 4377 also would apply to EAs. While EAs typically do not take as long to prepare as a full EIS, EAs suffer from the same types of inefficiencies that cause unnecessary delays and costs, and thus projects requiring EAs would also benefit from H.R. 4377.

7. How do you respond to the fact that the principal causes of project delays are incomplete funding packages, local opposition, low local priority, or compliance with other laws and requirements considered during the NEPA process, not NEPA itself?

I do not know that to be a true statement. My own experience working in the transportation industry for over 40 years is that NEPA delays are not uncommon and result in significant added costs and lost opportunities for job creation, mobility improvements and economic development. I also want to point out that one of the benefits of H.R. 4377 is that it reduces delays in the permitting and approval processes of the other laws that apply to the development of infrastructure projects, such as the Clean Water Act and the Endangered Species Act. H.R. 4377 accomplishes this by involving such agencies as the Corps and the USFWS early in the NEPA process, requiring that these agencies utilize the NEPA document prepared for the project, and place a time limit on when such other permits and approvals must be issued or denied and confine their participation to areas that are within their own area of authority and expertise.