

**STATEMENT OF
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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.