



# Statement of the U.S. Chamber of Commerce

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ON: GREEN JOBS AND RED TAPE: ASSESSING  
FEDERAL EFFORTS TO ENCOURAGE  
EMPLOYMENT

TO: HOUSE COMMITTEE ON SCIENCE, SPACE AND  
TECHNOLOGY, SUBCOMMITTEE ON  
INVESTIGATIONS AND OVERSIGHT

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

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

**BEFORE THE COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY  
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT  
OF THE U.S. HOUSE OF REPRESENTATIVES**

**“Green Jobs and Red Tape: Assessing Federal Efforts to Encourage Employment”**

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

**April 13, 2011**

Good morning, Chairman Broun, Ranking Member Edwards, and members of the Subcommittee on Investigations and Oversight. 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. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today.

You have asked me to come before the Committee today to provide an overview of the barriers, burdens, and impediments to the development of private sector energy projects, including the creation of green jobs. In addition, you have asked me to address any underutilized federal programs or projects that could spur green jobs growth without new authority.

The phrase “green job” has become a politically-charged term over the past few years, and has developed its fair share of followers and critics. My goal today is to be neither. Rather, I am here today to talk about ways we can help create a substantial number of jobs by deploying new, clean energy technologies and promoting energy efficiency. And creating jobs is essential: the Chamber estimates we will need to create 20 million jobs over the next decade—all jobs, including green jobs—to replace those lost in the current recession and to meet the needs of America’s growing workforce.

My testimony will focus on how Congress, without the use of any federal funds, can create tens of thousands of clean energy and energy efficiency jobs. First, Congress should take steps to streamline the calcified regulatory process for permitting new private sector energy projects that is preventing construction and keeping millions of potential jobs on the sidelines. Second, Congress can maximize the Energy Savings Performance Contracts program, an energy efficient retrofit program for Federal buildings that requires virtually no upfront taxpayer cost, but that suffers from drastic underutilization. Better utilization of this program will reduce the federal government’s energy needs while creating jobs and saving taxpayers money.

## **I. CHANGES TO THE SITING AND PERMITTING PROCESS FOR NEW ENERGY PROJECTS COULD YIELD TRILLIONS OF DOLLARS IN GDP AND MILLIONS OF JOBS ANNUALLY**

If our great nation is going to begin creating jobs at a faster rate, we must get back in the business of building things. We also 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 impede or stop any energy project.

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

For years, the Chamber knew of anecdotal evidence that projects were being delayed or stopped throughout the nation, but there was no study that systematically examined the circumstances of such challenged projects. This lack of information allowed groups that typically oppose new energy projects to tell their elected officials that clean energy was wonderful but that the local project was just not the right project for the neighborhood. Unfortunately, without a national study, our own elected leaders had no appreciation for the number of projects being stopped or substantially delayed. To address this information shortfall, Chamber staff implemented *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. The purpose of the *Project No Project* initiative is to enable the Chamber 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 the 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 nobody 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.

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.

A few examples will help illustrate the problem. In California, the Green Path North was a proposed \$500 million, 85-mile-long “green” power transmission line that would have brought renewable electricity from inland California to Los Angeles. The Los Angeles Department of Water and Power (LADWP) proposed the project to help

meet its renewable electricity mandate, which must be 35 percent by 2020. In 2009, LADWP projected that 14 percent of its electricity came from renewable sources. A wide range of national and local environmental activist groups, including the Sierra Club, Center for Biological Diversity, and the Redlands Conservancy fiercely opposed the project, because it would have crossed wilderness preserves and scenic ridgelines. The opposition groups forced seven route and capacity revisions for the proposed transmission line. In addition, Senator Dianne Feinstein introduced legislation to protect California desert lands from renewable projects, which would have made it very difficult, if not impossible, to construct the Green Path North transmission line. On March 10, 2010, LADWP officially abandoned the Green Path North project, citing enormous costs and fierce opposition from environmental groups.

In Pennsylvania, Penn-Mar Ethanol attempted to construct an ethanol producing plant in Conoy Township in 2004. Neighboring Hellam Township sent a letter to the Conoy Township Board of Supervisors objecting to the ethanol plant. Hellam Township's objections included environmental risks to the surrounding area and the "risk of causing the beautiful area surrounding the Susquehanna River to become an undesirable site." In February 2005, Penn-Mar announced plans to cancel the project at the planned location and relocate the project to Franklin County, Pennsylvania, where Penn-Mar signed a \$2.24 million sales agreement to buy a 55-acre tract. Almost immediately, a group calling itself "Citizens for a Quality Environment" sought to block the project *at the new location*. The group mounted local opposition and filed a lawsuit grounded in local zoning laws. An injunction was granted against the proposed plant, and in November 2005, Judge Richard J. Walsh issued an order stating that Penn-Mar Ethanol's plant was not a permitted use. The proposed plant's investors could not work out the details by the sales agreement's expiration date, and ultimately the deal fell through. Investors publicly blamed Citizens for a Quality Environment for the death of this project.

A third example comes from a challenge to biomass power generation in Wisconsin—one that occurred after the *Project No Project* inventory was completed, but one that clearly illustrates the difficulty of building any type of energy facility, even a technology that environmental groups claim to support. In 2008, We Energies settled a Clean Water Act lawsuit with Sierra Club and Clean Wisconsin over plans to build the Elm Road Generating Station, a coal-fired power plant. The settlement required, among other things, that We Energies build a 50-megawatt biomass power plant to help satisfy the state's renewable energy mandate. However, little more than two years later, the environmental groups have changed position and are now challenging the biomass plant's permit, alleging that it does not adequately account for the biomass facility's greenhouse gas emissions. Just a few days ago, the Wisconsin Department of Natural Resources issued a final permit for the facility, but one more state approval remains. Regardless of the outcome, lawsuits will almost surely follow. We Energies is working to construct the plant by 2013 to qualify for tax credits, and any further delay could severely hinder that goal.

As these examples demonstrate, NIMBYism is a complex, technology-neutral problem. No single “checklist” exists for the NIMBY plaintiff, although in every case the opponent uses the same general strategy: if at first you don’t succeed, try again. And again. And keep trying as long as the law will allow in the hopes that eventually the developer will walk away. Even the environmentally-conscious Vermont Journal of Environmental Law argued in 2003 that that most environmental NIMBY plaintiffs are usually less concerned with environmental protection than they are with maintaining a standard of living.<sup>1</sup> The article encourages attorneys to counsel their clients away from the protracted environmental NIMBY litigation strategy—which generally benefits nobody—and toward alternative approaches, such as environmental mediation or a multi-party structured negotiation process.<sup>2</sup>

## **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. 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.<sup>3</sup> The values they arrive at include not only of 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

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<sup>1</sup> Colin Carrol, “NIMBY Suits: The Crutch of the Unskilled Environmental Advocate,” *Vermont Journal of Environmental Law*, Oct. 10, 2003, available at <http://www.vjel.org/editorials/ED10038.html>.

<sup>2</sup> *Id.*

<sup>3</sup> “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.

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. Moreover, these facilities, once constructed, continue to generate jobs once 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?**

<b>Projects Approved</b>	<b>Total GDP (\$B in PDV)</b>	<b>Employment Earnings (\$B in PDV)</b>	<b>Annual Jobs (in Thousands)</b>
<b>Only Largest Project in Each State</b>			
Investment Effect	\$449	\$144	572
1-year Operations	\$50	\$12	272
<b>Only Nuclear Projects</b>			
Investment Effect	\$411	\$132	468
1-year Operations	\$44	\$11	267
<b>Only Renewable Projects</b>			
Investment Effect	\$151	\$49	447
1-year Operations	\$17	\$4	78
<b>Only Transmission Projects</b>			
Investment Effect	\$64	\$213	106
1-year Operations	\$1.4	\$0.3	7
<b>All 351 Projects</b>			
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 we must build something; right now we are building very little.

**C. What Is Needed: Permit Streamlining**

Unfortunately, despite the potentially significant economic and employment stimulus that could result from building these new energy facilities, the outlook for many of these projects is murky. Serious regulatory inefficiencies and permitting delays persist and NIMBY activists are winning more often than they are losing. All of this is leading to serious marketplace uncertainties, which can drive investors to opt not to finance new major construction projects or pull out of previous financial commitments.

The Chamber therefore recommends that Congress enact legislation to streamline the siting and permitting process for new energy projects. While considering options, lawmakers may want to model legislation off one or more effective and workable streamlining provisions already in place: SAFETEA-LU Section 6002, National Environmental Policy Act (NEPA) streamlining language in the American Recovery and Reinvestment Act, or the Federal Communications Commission’s “shot-clock.”



i. SAFETEA-LU Section 6002

Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) accelerates the environmental review process for federal highway projects. Section 6002 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; rather, it designates a lead agency (in SAFETEA-LU's case, DOT) and requires early participation among the lead agency and other participating agencies. 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.

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 only real motive is to exploit the law to delay projects, 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<sup>4</sup> highway project.

ii. NEPA Streamlining in the Stimulus

During debate on the 2009 economic stimulus bill, the American Recovery and Reinvestment Act ("Recovery Act"), the Chamber called attention to the fact that the 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.

This amendment has made all the difference in getting Recovery Act projects underway. According to a February 2011 report to Congress by the White House Council on Environmental Quality, over 180,000 of the 272,000 Recovery Act projects covered by NEPA received the most expeditious form of compliance treatment possible—a categorical exemption—and work was able to begin and jobs were created.<sup>5</sup>

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<sup>4</sup> <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.

<sup>5</sup> The Eighth 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\\_feb2011.html](http://ceq.hss.doe.gov/ceq_reports/reports_congress_feb2011.html).

Moreover, only 830 projects received an environmental impact statement, the longest available process under NEPA.<sup>6</sup> These circumstances confirm a recognition among some policymakers that the permitting process is harming our ability to grow our economy so we can compete with the world.

The Chamber is not asking that anyone's rights be denied; rather we are suggesting that those opposing a project must exercise their rights in a defined period of time after a decision is made, and that all claims be immediately addressed. The developer of a project should at least be afforded a decision to begin construction in one or two or even three years, not ten or fifteen.

### iii. FCC Shot-Clock

Even cellular telephone towers are challenged by NIMBYs. At one point it was estimated that the construction of approximately 700 cell towers were being challenged. Without the new cell towers, the expansion of broadband was limited. To address this issue, the Federal Communications Commission (FCC) issued new regulations in November 2009 to speed up the siting and permitting of cellular telephone towers and antennas. Under the new rules, state and local governments have a 90-day deadline to process applications for co-located facilities where two or more providers share a tower, and 150 days to process applications for new towers. However, if the government authority has not acted on the application within the requisite time period, the applicant may file a claim in court. There is not enough data yet to judge the effectiveness of the rule, which is currently being challenged by several municipalities.

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The economic and job impact projections of the *Project No Project* study show that millions of jobs, and hundreds of billions of dollars in potential economic value, continue to sit on the shelf. This is not good for the nation's well-being. Widespread failure to move energy projects forward in a timely manner works against our ability to address two of our nation's most significant concerns: promoting substantial job creation and stimulating economic growth. The longer it takes to get the shovels into the ground and projects underway, the more expensive these projects become (owing to rising labor and materials costs as well as other factors) and correspondingly, the less confidence investors will have for successful project outcomes; a condition that will only limit the future competitiveness of the country.

Slowly but surely, the issue of permit streamlining is gaining acceptance across party lines. On March 3, 2011, Minnesota Governor Mark Dayton, a Democrat, signed a Republican-backed bill that streamlines the environmental permitting process. The new law sets goals that state agencies should issue or deny all environmental permits within 150 days of submission. In signing the bill into law, Gov. Dayton cited a shared desire to

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<sup>6</sup> *Id.*

streamline and improve the permitting process to help responsible businesses locate or expand in Minnesota and create new jobs for our citizens.”<sup>7</sup>

The consensus that was reached in Minnesota can and should be brought to the national stage. Congress should carefully consider how all of these federal permitting obstacles and uncertainties and time delays can be addressed so as to speed up the processing, consideration, approval decisions, and development of many of the job-creating projects whose progress has so far been denied. Failure to find a path forward that will allow projects to be built in a reasonable timeframe should not be acceptable. If we fail to take on this challenge, we could find ourselves faced with: an endless litany of project failures; loss of investor confidence; fewer jobs created than we have the potential to create; and an inability to provide this nation with the energy it needs.

## **II. THE FEDERAL GOVERNMENT CAN CREATE JOBS, SAVE TAXPAYER DOLLARS, AND CONSERVE ENERGY BY MAXIMIZING THE ENERGY SAVINGS PERFORMANCE CONTRACTS PROGRAM**

The 112<sup>th</sup> Congress has brought with it a changed political climate. Fiscal restraint is paramount, and this concern has proponents of energy efficiency measures—the Chamber included—scrambling to develop policy options that strike the proper balance between spending and results. President Obama announced a “Better Buildings Initiative” earlier this year, a set of incentives and other programs designed to spur the private sector to invest in energy efficiency in commercial buildings. These are admirable goals. However, the Chamber is disappointed that the President’s plan lacks any discussion of Energy Savings Performance Contracts (ESPCs), a severely underutilized \$80 billion program that uses private sector money to achieve energy savings in Federal buildings while creating jobs. It is puzzling that the nation’s largest energy user—the Federal government—cannot find ways to use this program more effectively. At a time when there is a critical need for reduced government spending, ensuring the availability of mechanisms to save energy in Federal buildings at no upfront cost to the government is good policy.

### **A. The ESPC partnership and its evolution**

According to the U.S. Department of Energy (DOE), an ESPC is “[a] contract for a term of up to 25 years under which an Energy Services Company (ESCO) designs, acquires, installs, and finances energy and/or water conservation measures for an existing Federally-owned building and is repaid by the agency from the resulting energy, water, and related cost savings.”<sup>8</sup> ESPCs are a statutorily-established program of public-private

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<sup>7</sup> <http://www.scribd.com/doc/49974415/20110303161040406>.

<sup>8</sup> “Energy Savings Performance Contracts (ESPCs): A Different Kind of Animal,” Kimberly J. Graber, Office of Chief Counsel, U.S. Department of Energy, Feb. 19, 2010; *available at* <http://www.eli.org/pdf/events/02.18.10dc/Graber.pdf>.

partnerships between federal agencies and ESCOs that put the best that the private sector has to offer to work in improving Federal energy performance.<sup>9</sup>

Under the ESPC program, ESCOs install new energy efficient equipment at Federal facilities at no upfront cost to the government; Federal agencies pay off this investment over time with the funds saved on utility costs, and the private sector contractors guarantee the savings.<sup>10</sup> Energy savings can be realized through improvements in building components such as energy efficient lighting, building management control systems, and, heating, ventilating, and air-conditioning systems.<sup>11</sup>

By law, the government never pays more than it would have paid for utilities if it had not entered into the ESPC.<sup>12</sup> In addition to improving efficiency and saving taxpayer dollars, ESPC retrofits can stave-off years of deferred maintenance at federal facilities, while upgrading mission-related infrastructure.<sup>13</sup> This is a much better alternative to business as usual—the continued use of inefficient older equipment that wastes energy and requires higher maintenance and repair expenditures, forfeiting potential energy and cost savings. You may have even seen ESPCs at work while roaming the halls of the House office buildings; in 2010, the Architect of the Capitol awarded an ESPC for facility infrastructure upgrades in the Rayburn, Longworth, Cannon, and Ford House Office Buildings, and the House Page Dormitory.

Originally, Federal agencies could enter into an ESPC directly with an ESCO via a stand-alone contract. However, that wasn't happening.<sup>14</sup> To remedy this problem, DOE competed and awarded “Super” ESPC contracts in the late 1990s. Super ESPCs are competitively awarded contracts to qualified contractors that provide for an indefinite quantity of supplies or services during a fixed period of time. By changing the program in this manner, agencies can implement Super ESPC projects in far less time than it takes to develop stand-alone ESPC projects. General terms and conditions are established in the overarching contracts, and agencies implement projects by awarding delivery orders to the Super ESPC ESCOs.

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<sup>9</sup> Statutory authority for the ESPC program can be found at 42 U.S.C. §§ 8287-8287d; implementing regulations are codified at 10 C.F.R. Part 436, Subpart B.

<sup>10</sup> An ESCO conducts a comprehensive energy audit for the Federal facility and identifies improvements to save energy. In consultation with a Federal agency, the ESCO designs and constructs a project that meets the agency's needs and arranges the necessary financing. The ESCO guarantees that the improvements will generate energy cost savings sufficient to pay for the project over the term of the contract. ESCOs are paid over time through savings realized, with federal agencies paying off equipment investments through savings realized on utility costs from the efficiency improvements that are made—the Federal agency repays the ESCO for its capital investment over a period of years from the savings generated. Payments over the life of an ESPC, some extending for as long as 25 years, are based on projected energy use and estimated energy savings agreed to by the Government. After the contract ends, all additional cost savings accrue to the agency. *See* Graber, note 7 *supra*.

<sup>11</sup> *See* [http://www1.eere.energy.gov/femp/pdfs/espc\\_intro.pdf](http://www1.eere.energy.gov/femp/pdfs/espc_intro.pdf).

<sup>12</sup> *See* Graber, note 8 *supra*.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

In December 2008, DOE recompleted the Super ESPCs in a full and open competition, resulting in the selection of sixteen new ESCOs that were determined to be qualified to perform energy savings and renewable energy services on a world-wide basis for ten years.<sup>15</sup> A combined ceiling of \$80 billion was set for the contracts for use toward energy efficiency, renewable energy and water conservation projects at federally-owned buildings and facilities.<sup>16</sup> These changes refined the program and made it better. The designation of Super ESPCs, which are administered by the U.S. Department of Energy (DOE) Federal Energy Management Program (FEMP), streamlined the ESPC award process considerably.<sup>17</sup>

The ESPC program is a “win-win” for the private sector and the Federal government, and should be a key component in helping the Federal government meet its energy efficiency and renewable energy goals. Yet despite the readiness of the ESCOs to enter into ESPCs, Federal agencies seem inherently unable to do so on a broad basis. As a result, only a small percentage of the \$80 billion ceiling has even been met. Failure to grasp the full potential of ESPCs is costing jobs, money and energy.

## **B. Underutilization of the ESPC Program**

As of March 2010, DOE records showed that more than 550 ESPC projects worth \$3.6 billion were awarded to 25 Federal agencies and organizations in 49 states and the District of Columbia.<sup>18</sup> However, these numbers could and should be much higher. Between FY2003 and FY2008, the Federal government invested about \$622 million annually in energy efficiency, but of this amount, only 38% was through ESPCs.<sup>19</sup> In FY2009, total investment in ESPCs was roughly \$386 million, with additional awards accounting for about another \$354 million to the end of the calendar year.<sup>20</sup> Most recently, under the recompleted Super ESPC program, which has been in place for over two years and for which the contract ceiling is \$80 billion, there have only been about \$104 million in new contracts for six projects.<sup>21</sup>

The underutilization of ESPCs is problematic because the Federal government has committed itself to reducing energy intensity by 30% by 2015 and increasing on-site

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<sup>15</sup> “US \$80 Billion in Contracts Awarded by DOE” RenewableEnergyWorld.com, December 23, 2008 at: <http://www.renewableenergyworld.com/rea/news/article/2008/12/us-80b-in-contracts-awarded-by-doe-54378>.

<sup>16</sup> *Id.*

<sup>17</sup> (a) See: John A. Shonder and Patrick J. Hughes, Evaluation of the Super ESPC Program—Reported Energy and Cost Savings (Interim Report, May 2007, ORNL/TM-2007/065), Oak Ridge National Laboratory, May 2007; (b) The Department of Energy’s Golden Field Office is responsible for awarding and administering the Super ESPC umbrella contracts that can be used by all Federal agencies for facilities worldwide (<http://www.ig.energy.gov/documents/IG-0822.pdf>).

<sup>18</sup> <http://www1.eere.energy.gov/femp/financing/espcs.html>.

<sup>19</sup> Notes from: “Federal Retrofits and Greening of the Government,” Federal Performance Contracting Coalition (FPCC), <http://federalperformancecontracting.com/>.

<sup>20</sup> *Id.*

<sup>21</sup> [http://www1.eere.energy.gov/femp/pdfs/do\\_awardedcontracts.pdf](http://www1.eere.energy.gov/femp/pdfs/do_awardedcontracts.pdf).

renewable energy generation by 20% by 2020.<sup>22</sup> DOE's 2008 *Federal Energy Management Report*<sup>23</sup> estimates that between 2009 and 2015 the Federal government will have to invest upward of \$9 billion (approximately \$1.4 billion annually) to meet the energy intensity reduction goals set by Executive Order 13423 and the Energy Independence and Security Act of 2007 (EISA). E.O. 13423 requires Federal agencies to reduce energy intensity by 3% each year, leading to 30% by the end of fiscal year (FY) 2015 compared to an FY 2003 baseline; this goal was given the weight of law when ratified by EISA.<sup>24</sup>

One reason why the ESPC program has been underutilized of late is that it is believed that the Recovery Act,<sup>25</sup> which uses large amounts of taxpayer-footed funding, has served as a major source of available, appropriated funds for projects that improve energy efficiency. The use of Recovery Act funds results in a significant cost to the taxpayer, but nonetheless this influx of readily available appropriated dollars has been a disincentive to use of the ESPC program. The reasoning is understandable: why use the ESPC process when there is plenty of stimulus money already available. GAO reports that as of March 10, 2011, DOE has obligated the full \$3.2 billion of Recovery Act funding provided for the Energy Efficiency and Conservation Block Grant Program,<sup>26</sup> which according to DOE "can be used for energy efficiency and conservation programs and projects communitywide, as well as renewable energy installations on government buildings."<sup>27</sup>

The Recovery Act lacks staying power; because most of its funds have been accounted for, it is winding down, leaving out this source of funds in the future for support of energy savings initiatives. Moreover, it has been found in one large study that appropriations-funded projects took almost four years longer to implement than ESPCs.<sup>28</sup> Nonetheless, competition with readily-available, taxpayer-funded grants has been a continual problem for ESPCs. For instance, in 2003, an Oak Ridge National Laboratory (ORNL) study reported: "Despite the Congressional and Presidential directives to use ESPCs, some agencies have been reluctant to do so. Decision makers in these agencies see no reason to enter into long-term obligation to pay interest on borrowed money out of

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<sup>22</sup> See, e.g., Executive Order 13423 - Strengthening Federal Environmental, Energy, and Transportation Management—see <http://www1.eere.energy.gov/femp/regulations/eo13423.html>, which set more challenging goals than the Energy Policy Act of 2005 (EPA Act 2005) and superseded E.O. 13123 and E.O. 13149. E.O. 13423 requires Federal agencies to reduce energy intensity by 3% each year, leading to 30% by the end of fiscal year (FY) 2015 compared to an FY 2003 baseline. This goal was given the weight of law when ratified by EISA 2007 (<http://energy.senate.gov/public/files/RL342941.pdf>).

<sup>23</sup> <http://www.nrel.gov/docs/fy09osti/46021.pdf>.

<sup>24</sup> Energy Independence and Security Act of 2007 (EISA), available at [http://www1.eere.energy.gov/femp/financing/espcs\\_regulations.html](http://www1.eere.energy.gov/femp/financing/espcs_regulations.html).

<sup>25</sup> [http://www.recovery.gov/About/Pages/The\\_Act.aspx](http://www.recovery.gov/About/Pages/The_Act.aspx).

<sup>26</sup> <http://www.gao.gov/newitems/d11483t.pdf>.

<sup>27</sup> <http://www1.eere.energy.gov/wip/eecbg.html>.

<sup>28</sup> DOE Office of Inspector General, *Report on DOE's In-House Energy Management Program, DOE/IG-0317, January 1993*.

their own operating budgets if instead Congress will grant them appropriations to pay for the improvements up front.”<sup>29</sup>

A second problem preventing widespread ESPC use is a lack of familiarity with the ESPC program among Federal government officials: Super ESPCs are an untraditional and complex contracting mechanism, and there is no strong incentive in the Federal government to do things that are innovative.<sup>30</sup> With regard to using ESPCs, agency officials often report that they lack technical and contracting expertise.<sup>31</sup> Moreover, a recent GAO report indicated that, while agency officials are participating in training and implementing initiatives for energy management personnel, Federal facilities may lack staff dedicated to energy management and may find it difficult to retain staff with sufficient energy or contracting expertise.<sup>32</sup>

In regard to the above observations, GAO reports:

Lack of expertise in energy management and high staff turnover may create challenges for negotiating and overseeing alternative financing mechanisms. Energy projects funded through alternative financing often require a high level of expertise in complex areas such as procurement, energy efficiency technology, and federal contracting rules. Many agencies told us that without experienced personnel, they face challenges in undertaking contracts that are necessary to meet energy goals. Officials from multiple agencies commented that high turnover rates exacerbate the difficulties associated with alternative financing.<sup>33</sup>

Similarly, in a September 2009 audit report, DOE’s Office of Inspector General, which also noted the need for more guidance for agency officials, observed: “Our testing revealed that the majority of those Federal and facility contractor officials charged with management of ESPC orders had either received no training or received training that was not sufficiently detailed to permit them to fully understand or perform all required duties.”<sup>34</sup>

DOE has taken steps to address the deficiencies noted.<sup>35</sup> Moreover, under the Super ESPC contract vehicle, ESCOs have always been required to guarantee proposed savings, implement Measurement and Verification (M&V) procedures, and take financial

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<sup>29</sup> Hughes, et. al., *Evaluation of Federal energy Savings Performance Contracting – Methodology for Comparing Process and costs of ESPC and Appropriations-Funded energy Projects*, paper prepared by Oak ridge National Laboratory (March 2003).

<sup>30</sup> Notes from: “Federal Retrofits and Greening of the Government,” Federal Performance Contracting Coalition (FPCC), <http://federalperformancecontracting.com/>.

<sup>31</sup> U.S. Government Accountability Office (GAO), *Energy Savings – Performance Contracts Offer Benefits, but Vigilance is Needed to Protect Government Interests* (GAO-05-340), June 2005.

<sup>32</sup> GAO, *Federal Energy Management* (GAO-08-977), September 2008.

<sup>33</sup> *Id.*

<sup>34</sup> Office of Inspector General, U.S. Department of Energy, *Audit Report – Management of Energy Savings Performance Contract Delivery Orders at the Department of Energy* (DOE/IG-0822), September 2009.

<sup>35</sup> *Id.*

responsibility for any shortfall between guaranteed and actual savings for the term of each ESPC task order. The government maintains aggressive oversight of all ESPC projects throughout their terms, which does not occur in other contract types.<sup>36</sup>

It has also been noted that agencies have a tendency to eliminate project elements having longer payback times, such as renewable energy installations or those items that are targeted toward sustainability goals broader than energy savings.<sup>37</sup> For example, renewable electricity projects have a median payback period of 18.1 years, while installation of advanced metering technology has a payback period of less than a year.<sup>38</sup> This situation can complicate the simultaneous achievement of several energy goals, such as increased use of renewable energy, reducing energy intensity, and ensuring a lower carbon footprint. The use of an ESPC allows those longer term payback items to be bundled with shorter term measures for a comprehensive approach

### **C. Unlocking the Potential of ESPCs Will Lead to Jobs**

How useful and important are ESPCs? In 2007, James L. Connaughton, Director of the White House Council on Environmental Quality, commented that one of our best opportunities to retrofit the energy systems needed to achieve Executive Order and legal requirements is greater use of private government-wide Energy Savings Performance Contracting.<sup>39</sup> He urged Federal agencies to “lead the way – and to lead the way by example in the wise use of our energy resources and elimination of inefficient energy practices.” Achieving these goals, he remarked, “requires that Federal agencies look beyond appropriated funds to further accomplish their energy objectives and by using market-based solutions found through the use of innovative performance contracting programs that fund the investments upfront allowing the government to pay for improvements through the guaranteed saving obtained.”

The use of ESPCs provides multiple benefits, including<sup>40</sup>:

- Access to private-sector energy savings expertise.
- Built-in incentives for ESCOs to provide high-quality equipment, timely services, and thorough project commissioning.
- Infrastructure improvements to enhance mission support.
- Healthier, safer working and living environments.
- Flexible, practical contract and procurement processes.

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<sup>36</sup> The new Super ESPC contract requires even more rigorous M&V procedures and processes to ensure guaranteed savings are achieved or exceeded than the previous program; *see* note 9, *supra*.

<sup>37</sup> Notes from: “Federal Retrofits and Greening of the Government,” Federal Performance Contracting Coalition (FPCC), <http://federalperformancecontracting.com/>.

<sup>38</sup> Testimony of Drury Crawley before the Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security Committee on Homeland Security and Government Affairs, U.S. Senate, July 16, 2009.

<sup>39</sup> James L. Connaughton, Director, Council on Environmental Quality, “Memorandum to Heads of Executive Branch Departments on Substantially Increasing Federal Agency Use of Energy Savings Performance Contracting,” August 3, 2007.

<sup>40</sup> *See* [http://www1.eere.energy.gov/femp/pdfs/espc\\_intro.pdf](http://www1.eere.energy.gov/femp/pdfs/espc_intro.pdf).



- Expert, objective technical support through FEMP assistance, including legal and financing guidance, project facilitators, advanced technology experts, and training for Federal agencies.
- Guaranteed energy and cost savings.
- Enhanced ability to plan and budget energy, operation, and maintenance accounts.
- Minimized vulnerability to budget impacts due to volatile energy prices, weather, and equipment failure.

What would be the benefits of utilizing the entire Super ESPC \$80 billion contracting authority? This issue was recently evaluated by John Shonder and Robert Slattery at ORNL.<sup>41</sup> In performing their analysis, various assumptions were made, including spending out the \$80 billion over 15 years (using \$32B as the investment amount with the rest being financing and O&M); that on average there was a 17 year payback; and that savings lasted for 20 years. ORNL found that reaching the \$80 billion contract authority through private investment and financing could provide:

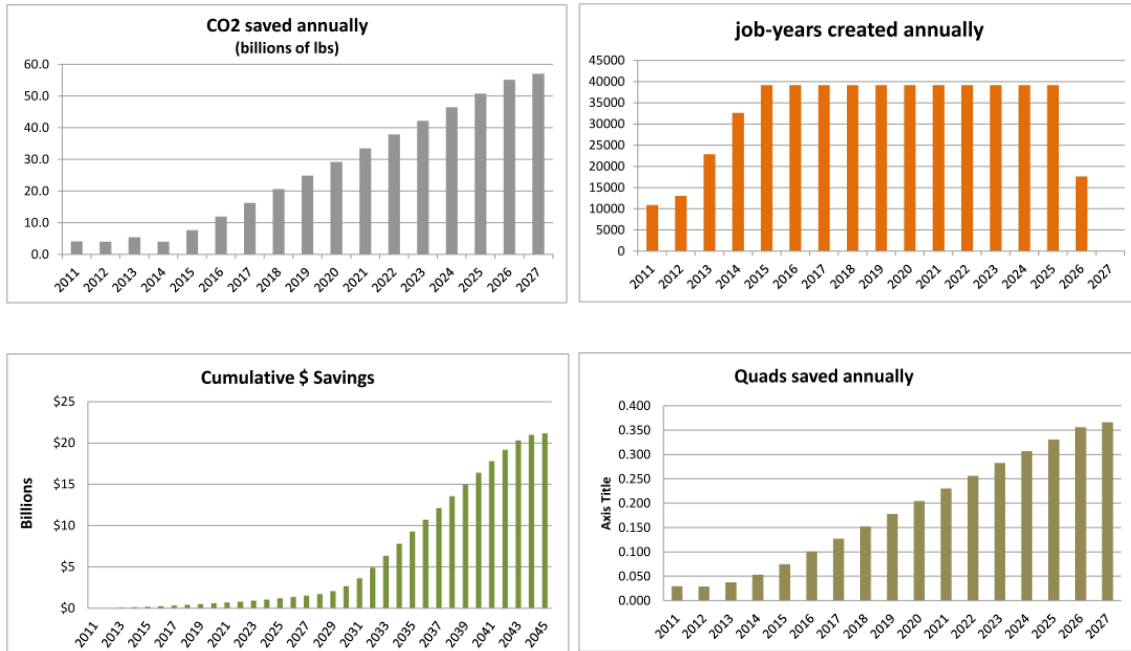
- ❖ \$21 billion in net savings to the U.S. Government;
- ❖ 32 billion of avoided federal expenditures on infrastructure and equipment;
- ❖ Energy savings of 6.8 Quads (about 1.2 billion barrels of oil on a barrel of oil equivalent basis);<sup>42</sup>
- ❖ Creation of 527,000 job-years; and
- ❖ The equivalent of taking approximately 10,000,000 cars permanently off the road.

The charts below, produced by ORNL, illustrate the significant savings over time that full utilization of the ESPC program would provide.



<sup>41</sup> John Shonder and Bob Slattery at ORNL performed the analysis at the request of Skye Schell of DOE’s FEMP program.

<sup>42</sup> The barrels of oil estimate is based on: 6.8 Quads ( $6.8 \times 10^{15}$  Btus) and the IRS definition of a “barrel of oil equivalent” as 5.8 million Btu (<http://www.irs.gov/pub/irs-drop/n-99-18.pdf>).



#### D. Recommendations for Strengthening the ESPC Program

Meeting the mandated Federal energy intensity reduction and other goals noted above will require that more private investment occur and at a higher rate than has so far been committed to. Yet while the use of ESPCs could help achieve large energy savings (and create jobs) at no up-front costs, this, as seen from the above discussion, is not happening.

The general consensus among the ESCOs is that the program as designed functions reasonably well, and that major legislation to “fix” ESPCs is not needed. More than anything, it seems, resistance to ESPCs is a function of built-in culture at various agencies, and change in culture can best be addressed from the top down.<sup>43</sup> The Chamber recommends the following actions, done jointly by Congress and the Executive Branch, to maximize the benefits of the ESPC program:

- *Issuance of a Presidential Executive Order directing that agencies use ESPCs for the majority of their energy projects and energy related infrastructure acquisitions.* The Executive Order should state a preference for private sector financing mechanisms such as ESPCs and Utility Energy Services Contracting<sup>44</sup> to upgrade Federal facilities and meet energy

<sup>43</sup> Obviously the fact that the Federal government resists energy efficiency measures in the face of laws requiring it to do so speaks volumes to the massive educational campaign that must be done for American citizens if a similar initiative were to be undertaken.

<sup>44</sup> Utility energy service contracts (UESCs) offer Federal agencies an effective means to implement energy efficiency, renewable energy, and water efficiency projects. In a UESC, a utility arranges financing to cover the capital costs of the project, which are repaid over the contract term from cost savings generated by the energy efficiency measures. With this arrangement, agencies can implement energy improvements

efficiency and sustainability-related mandates and goals. These programs should be the first energy efficiency options for agencies, not the last. In order to meet the various government energy goals (such as energy savings as well as renewable energy and emission reduction objectives) many ESPC projects should be comprehensive in nature. Agencies should be required to ensure that program managers understand the need to and how to bring about this outcome. Finally, agencies should be permitted to request appropriated dollars for energy infrastructure only after showing why an ESPC could not be used.

- Expanded training for Federal ESPC employees and improvement of the level of contracting knowledge among agency officials responsible for management of ESPC programs. Where deficiencies in the knowledge base among contracting officials are noted, immediate steps should be undertaken to address and correct this problem. Moreover, steps should be implemented to ensure the adequacy of staffing levels necessary to process and manage ESPCs, and steps should be taken to retain highly trained and knowledgeable staff.
- Congressional oversight and reporting. Agencies should be required to make periodic reports to Congress as to the progress they are making in achieving the \$80 billion ESPC target. In reporting to Congress, they should report on all energy projects undertaken and why an ESPC was or was not used in each case. Such a requirement will not only keep agencies focused on the program, but will also further the transparency goals of the Administration by informing the public about progress in using these contracting mechanisms to achieve the Federal government's energy goals. Moreover, heightened transparency enables sharing of lessons learned, thereby stimulating familiarity and confidence in ESPC programs.

ESPCs are a critical tool that will enable the Federal government agencies to meet statutorily-mandated energy reduction goals at no upfront cost to taxpayers. If utilized to their full potential, ESPCs can create tens of thousands of full-time jobs. The Chamber strongly urges increased Federal use of ESPCs, and stands ready to work with Congress and the Executive Branch to maximize the ESPC program.

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Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

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with no initial capital investment. The net cost to the Federal agency is minimal, and the agency saves time and resources by using the one-stop shopping provided by the utility (see <http://www1.eere.energy.gov/femp/financing/uescs.html>).