American Petroleum Institute (API)-watermarked Permitting "Reform" Bill

Overview

The draft permitting "reform" bill bearing the watermark of the American Petroleum Institute (API) would significantly weaken protections under the National Environmental Policy Act (NEPA) and make it easier to approve fossil fuel and mining projects (among other projects) without adequate environmental analysis or meaningful public input. The bill also would undermine the ability of impacted communities to enforce legal protections against these fossil fuel and mining projects by changing the rules that govern judicial review of project-approval decisions. The bill also includes provisions that require the President to prioritize oil and gas projects, that constrain time for state review under Section 401 of the Clean Water Act, and that alter FERC's obligations regarding transmission infrastructure.

Limiting NEPA Environmental Review for Energy and Mining Permitting Decisions

NEPA is America's charter environmental law and, in many instances, it is the only tool that frontline communities have to influence federal infrastructure projects that will impact them the most. It requires federal agencies to analyze the impacts of a proposed decision (such as a decision to grant a permit or authorize a project) and consider alternatives that may be better for people and the environment. NEPA also requires agencies to include the public in agency decisionmaking, by providing the public with full information about a project's environmental impacts, alternatives and by enabling informed public input to the agency before it makes its permitting decision.

The API-labeled bill would curtail the NEPA process, limiting environmental review of energy production, generation, storage, or transportation projects; carbon capture, removal, transportation, or storage projects; and mining extraction or processing projects. Fossil fuel and mining projects can cause enormous air and water pollution and other harms to people, communities, and the wider environment, but the API-labeled bill would allow federal agencies to approve them based on a more cursory environmental analysis than NEPA requires. Some of the API-labeled bill's provisions mirror language in previous legislation that applies to a narrower category of projects (mostly transportation projects), but the bill also contains provisions that limit NEPA review to a greater degree than prior legislation.

Here are some of the most troubling provisions related to permitting in the API-labeled bill:

Limiting and Biasing Alternatives Analysis: NEPA currently requires agencies to evaluate a proposed action and reasonable alternatives to that action in "substantially similar" manner. This leads agencies to make good decisions by considering their options on a level playing field. The API-labeled bill, by contrast, would allow agencies to evaluate the "preferred alternative" – almost always a decision to approve the industry proposed project in question –at a higher level of detail than other alternatives. That shortcut will inevitably bias agencies towards viewing the original proposal as the best option available, despite its flaws.

Allowing Uncritical Adoption and Reliance on Potentially Invalid Existing Data, Analyses, and Documentation: The API-labeled bill authorizes federal agencies to adopt and rely on data and analyses previously prepared for a project under state law, without evaluating the accuracy or adequacy of those data and analyses. This provision could allow agencies to approve fossil fuel or mining projects based on inaccurate data and analyses, perhaps prepared by or on behalf of the self-interested project proponent.

Pressuring Agencies to Develop More Categorical Exclusions: NEPA allows an agency to establish "categorical exclusions" that exempt certain categories of projects from meaningful NEPA analysis if those projects do not individually or cumulatively have significant impacts on the health or environment. The API-labeled bill would require the Secretaries of major federal agencies to survey their use of categorical exclusions

(CEs), solicit ideas for additional ones from project sponsors, and potentially formalize some of those exclusions through rulemaking. Those Secretaries would have to repeat this process every four years. These bill provisions would effectively pressure agencies to create new CEs, creating the risk that entire categories of projects might avoid environmental review or public scrutiny.

Limiting Public Involvement and Transparency: The API-labeled bill would drastically reduce the public comment period for environmental impact statements to no more than 60 days. It would also give the sponsors of fossil fuel and mining projects the ability to veto any extension of public comment periods on NEPA documents for their projects, no matter how lengthy or complicated the environmental analyses might be, or how significant the potential impacts. The bill also prohibits agencies from asking project proponents to resubmit potentially inadequate project application, which could discourage agencies from seeking information they legitimately need to make informed decisions.

Limiting and Biasing Judicial Review of Permitting Decisions

Pressuring Communities to File Lawsuits Quickly or Prematurely: NEPA provides for a six-year statute of limitations on lawsuits challenging agency decisions. The API-labeled bill shortens the statute of limitations for filing suit over projects it covers to just five months (from the current six years). This means that communities would have to file lawsuits within a few months of project approval or lose their chance to challenge the project forever. The five-month limitation period would bar plaintiffs who have legitimate legal claims but didn't know of the action or couldn't find a lawyer to formulate a case in time. Paradoxically, the short limitation period could actually lead to more litigation, because plaintiffs may rush to court to preserve legal claims before the limitation period expires.

Allowing Gaming Assignment of Lawsuits to Judges: The API-labeled bill contains a cryptic provision requiring random assignment of judges to decide lawsuits that challenge projects, including fossil fuel and mining projects, covered by the bill. Since nearly all federal lawsuits are already assigned randomly to judges, the provision is puzzling. A separate provision of the bill suggests its aim. That provision states that when the preparation of a supplemental or revised NEPA analysis is "required" for a proposed project—a requirement that typically arises when a court rejects an initial NEPA analysis as inadequate—the new NEPA analysis "shall be considered to be "a separate final agency action." API may be hoping that these two provisions, taken together, will allow their members to avoid having a revised NEPA analysis for a project reviewed by the same judge who found an earlier analysis inadequate. Federal courts have developed rules to assign related or "comeback" cases of all kinds to the original judge to ensure judicial efficiency and fairness. API and its members should be subject to those assignment rules in the same way as every other federal litigant, and Congress should not take this unusual action to meddle in the assignment process.

Other problematic provisions.

Pressuring Approval for Projects of "Strategic Importance"

Another provision in API-labeled bill requires President to maintain a list of 25 "energy projects" of "strategic national importance" and take actions to prioritize environmental review and authorizations of those projects. Importantly, the bill requires the President to prioritize at least five fossil fuel projects and three new mining projects, plus two projects "to capture, transport, or store carbon dioxide," and one "to produce, transport, or store clean hydrogen." These types of projects can obviously cause significant harms; "prioritizing" them could lead to insufficient review or hasty approval. Moreover, CCS and hydrogen projects are typically cost-ineffective means of reducing carbon emissions, and typically expose frontline communities to increased levels of toxic fossil fuel pollution.

Hurrying Clean Water Act Section 401 review

The API-labeled bill includes provisions that would change procedures by which state and some tribal governments certify federal permitting actions, as provided by Section 401 of the Clean Water Act. While the bill's Clean Water Act provisions are not as damaging as regulatory rollbacks promulgated by the Trump administration (which were struck down by a district court order that has itself been stayed by a Supreme Court order), they do limit state and tribal authority. For example, the bill sets the default time period in which a state or tribe must act on an application to 180 days; and does not expressly give them the ability to extend that period. Industry may well contend that this means the bill *forecloses* such extensions. The bill also restricts states and tribes to evaluating the impact of federal decisions on compliance with "appropriate water quality requirement[s] of State law." This is a malleable standard that industry will likely attempt to exploit through litigation. And in addition, the provisions in the bill designed to force states and tribes to make Section 401 certification decisions quickly are likely to have the perverse effect of making those states deny such applications (thereby spawning litigation) rather than asking applicants to withdraw and resubmit them with more complete information.

Problematic changes related to electricity transmission

The API-labeled bill generally encourages more electricity transmission construction and could help bring more projects online at a time when they are desperately needed. However, the bill eliminates crucial guardrails that protect consumers and improve permitting processes associated with the National Corridors construct, which requires DOE to identify where deficiencies in the transmission grid are adversely affecting customers. The bill replaces DOE's existing responsibility to consult with Tribes to proactively flag deficient electricity transmission corridors with a new approach that fails to provide a holistic review of the nation's transmission deficiencies and neglects the specific transmission needs of Tribal communities. The draft also expands a transmission developer's eminent domain power by removing a provision that prevented state-owned lands (e.g., a state park) from being condemned.