Manchin's Newly Released Dirty Permitting Bill Analysis

Overview

The newer version of Manchin's Dirty Permitting Bill released on September 21, 2022, 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.

Overall, the text of the newer version of the Dirty Permitting Bill is very similar to that of the API-labeled bill leaked in the press earlier this summer. However, there are significant provisions that make the bill more harmful. We review those changes at the end of our analysis.

Limiting NEPA Environmental Review for Energy and Mining Permitting Decisions

NEPA is America's charter environmental law, and, in many instances, the only tool 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 decision-making, by providing the public with full information about a project's environmental impacts and alternatives, and by enabling informed public input to the agency before it makes its permitting decision.

The 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 bill would allow federal agencies to approve them based on a more cursory environmental analysis than NEPA requires. Some of the bill's provisions mirror language in previous legislation that applied 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 in the bill:

Limiting and Biasing Alternatives Analysis: NEPA currently requires agencies to evaluate a proposed action and reasonable alternatives to that action in a "substantially similar" manner. This leads agencies to make good decisions by considering different options on a level playing field. The 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 the fact that industry proposals tend to underplay harmful impacts and impose them on frontline communities.

Allowing Uncritical Adoption and Reliance on Potentially Invalid Existing Data, Analyses, and Documentation: The 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 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 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 applications, 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: The 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.

Gaming Assignment of Lawsuits to Judges: The 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." Federal courts have developed rules to assign related or "comeback" cases of all kinds to the original judge to ensure judicial efficiency and fairness. Every federal case should be subject to those assignment rules in the same way, 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 the bill requires the 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 all times over the next seven years, 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 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. The bill's Clean Water Act provisions seek to 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. 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 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.

Harmful Differences between the newer version of the Dirty Permitting Bill text and the earlier API-labeled text

Approval of the Mountain Valley Pipeline: The newer version of the bill mandates the approval of all federal agency permits for the Mountain Valley Pipeline within 30 days. In doing so, the bill declares that this provision supersedes most federal laws that might otherwise apply to the issuance of those permits and prevents further legal challenges to those permits. The bill potentially leaves communities with virtually no recourse to fight federal permits for the pipeline, including those that would be illegal under current law. In an egregious attempt at judge-shopping, the bill would strip jurisdiction over legal claims concerning the pipeline from the federal court that previously has ruled against it and instead vest jurisdiction in a different court that the pipeline's backers plainly hope will be more favorable to them. Passing legislation to fire a court that has ruled against a politically powerful constituency is a blatant and indefensible attack on the rule of law.

Further Dilution of Clean Water Act Protections: In addition to the Clean Water Act provisions covered previously in this analysis, the new bill adds a very problematic savings provision saying, "nothing in this section allows a [state/tribe] to deny or condition a certification based on non-water quality impacts, including those associated with air emissions." This could be viewed as a significant limitation of the discretion states/tribes have to deny or condition a permit. Certainly, the provision creates ambiguity that will cause a lot more litigation over water quality certifications and runs the risk of causing states and tribes to issue certifications that don't protect water quality. It also reflects a fundamental misunderstanding of the nature of water pollution and adopts industry's false narrative that the problems with the 401 process come from how the states/tribes are administering it. Even Trump's EPA found that the problem with delays stem from industry dragging its feet and refusing to provide complete information in a timely manner.

Moreover, the new version of the bill includes further attempts to limit the time states/tribes have to request additional information from applicants, short-circuiting the iterative process that should occur to ensure that the reviewing agency has all the information it needs to adequately assess a project's potential impacts to

water quality. The new version requires either that, within 30 days of receiving an application the state/tribal agency and the federal agency agree on "a process and timeline under which the [state agency] will notify the applicant of any specific additional materials or information that are necessary to make a final determination with response to the application" or, if no such agreement can be reached, that the state or tribe has only 60 days to "notify the applicant of any specific additional materials or information that are necessary to make a final decision." Neither option is reasonable given that, especially for more complicated projects, it can take far longer than 30 or 60 days for the state or tribe to know what additional information is needed. Arbitrarily truncating a reasonable back-and-forth process between the reviewing agency and the applicant stymies the goals of the Clean Water Act—either states and tribes will feel compelled to issue inadequate certifications that do not protect water quality based on incomplete information or will deny applications that otherwise could have been granted with the benefit of a more thorough review.

Potentially Prioritizing More Fossil Fuel Projects as Energy Projects of Strategic National Importance: The newer version of the bill adds projects under the Maritime Administration to the list of agencies that can receive applications for the President to review in deciding what projects to designate as "projects of strategic importance." This is notable because the Maritime Administration approves applications for oil terminal projects, so this provision expands the field of fossil fuel projects that can be prioritized by the President.

Expanding the Application of Harmful Judicial Review Provisions: The judicial review provisions in the newer version of the bill apply much more broadly than in the API-watermarked text. Under the API text, most of the judicial review provisions applied only to covered projects under Title 41 of the FAST Act. In the newer bill, they apply to any "project," which is defined to include any energy, carbon capture, or mining infrastructure project that requires an environmental analysis and an agency authorization. This is a much broader universe of projects that includes more fossil fuel and mining projects, which means that the weakening of judicial review contained in the bill would be much more broadly applicable.