Analysis of the Updated Dirty Permitting Deal

Overview

On December 7, 2022, Senator Manchin released the *Building American Energy Security Act of 2022*, which is a revised version of the broadly opposed *Energy Independence and Security Act of 2022*. While the original Dirty Permitting Deal language is harmful for frontline communities and the environment, this version is even worse.

The most recent iteration of Senator Manchin's legislation maintains the most problematic provisions of his previous permitting bills, including codifying approval of the Mountain Valley Pipeline. Manchin's proposal still significantly weakens protections under the National Environmental Policy Act (NEPA) and makes it easier to approve fossil fuel and mining projects (among other projects) without adequate environmental analysis or meaningful public input. The bill also still undermines 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. In addition to the ways previous iterations of Senator Manchin's proposal harmed communities, his new bill has gotten worse in several critical ways, including by:

- **Expanding NEPA Rollbacks**: The bill's rushed permitting scheme now applies not only to a broad swath of prospective projects, but also to projects initiated prior to enactment of the bill.
- **Making Arbitrary and Rushed Deadlines Enforceable in Court:** The updated language creates a right of action for industry to challenge an agency's failure to meet a deadline for environmental review or an authorization by filing a petition in court. This subsection requires the courts to expedite consideration of these cases and, if industry wins, the bill provides that the Court must order compliance with the deadline within 90 days. Given the complicated nature of many projects, the short deadlines outlined in the bill, and the fact that at times industry delays its own applications or submits incomplete ones, this would limit the amount of in-depth analysis that is needed to vet projects with potentially significant impacts on communities and the environment.
- **Interfering With the Judicial Branch**: In an unwarranted intrusion on the judicial branch, the bill would undermine prompt and efficient resolution of cases by giving non-parties to litigation the opportunity to object to agreements reached by the parties.
- **Watering Down Language on Transmission**: While the original bill would have reduced the amount of approval needed to permit and site transmission lines and, therefore, increased the approval rate for them, the new bill largely reverts back to the status quo of existing Federal Power Act provisions.

Overall, Senator Manchin's new proposal is more of the worst ideas outlined in previous versions of the bill, a downgrade on transmission, and a doubling down on cutting out frontline communities from major decisions on critical infrastructure. The analysis below reviews the sections of the bill which have remained largely consistent between the different versions of the Dirty Permitting Bill and concludes with an analysis of the harmful changes included in the latest iteration of the text.

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 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 Dirty Permitting Deal 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 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 project reviews in the 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 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 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 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 bill shortens the statute of limitations for filing suit over nearly any energy or extraction project 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 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 case 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 Provisions That Expedite Fossil Fuel Development

Approval of the Mountain Valley Pipeline: Among the most shocking provisions in the bill is a section that mandates the approval of all federal agency permits for the 303-mile, fracked-gas, Mountain Valley Pipeline (MVP) within 30 days. In doing so, the bill declares that this provision supersedes any federal laws that might otherwise apply to the issuance of those permits and prevents further legal challenges to those permits. The MVP has repeatedly violated the terms of permits it has been granted and has been fined for more than 300 water quality violations. If built, the MVP would result in nearly 90 million metric tons of carbon dioxide emissions per year at a time when climate scientists have said we cannot afford to build any new fossil fuel projects. Senator Manchin's bill leaves communities with virtually no recourse to fight federal permits for this disastrous pipeline.

Pressuring Approval for Projects of "Strategic Importance": Another provision in 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 least six fossil fuel projects and five mining or critical mineral processing projects, plus two projects "to capture, transport, or store carbon dioxide," and two "to produce, transport, or store clean hydrogen." Based on the list of agencies which are supposed to provide recommendations to the President under this section, these projects could include mines, oil export terminals, pipelines, and other dirty energy facilities. 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.

Differences Between the Newest Version of the Bill and the Originally Released Bill Text

Mandating Compliance with Arbitrary NEPA Deadlines: The original bill language included a one year deadline for agencies to complete reviews of projects requiring an Environmental Assessment (EA) and two years for projects requiring an Environmental Impact Statement (EIS). The updated language creates a right of action for sponsors of any major project to challenge an agency's failure to meet a deadline for environmental review or an authorization by filing a petition to the DC Circuit or any "court of competent jurisdiction under any other Federal law." This subsection requires the courts to expedite consideration of these cases and, if the sponsors win, the bill provides that the Court must order compliance with the deadline

within 90 days (unless more time is required to comply with another law). Given the complicated nature of many projects and the short deadlines outlined in the bill, this could limit the amount of in-depth analysis that is needed to vet projects with potentially significant impacts on communities and the environment.

Interfering with Litigation: The bill also includes a host of requirements for agencies to provide notice of lawsuits challenging projects and to seek and consider comments on any proposed settlements. These provisions are an unwarranted intrusion on the judicial branch. It effectively provides a voice to non-parties – who have an insufficient stake in the outcome to otherwise participate in the case— to object to agreements reached by the parties. Overall, it would undermine, not foster, prompt and efficient resolution of cases though settlements negotiated in good faith between the parties by delaying resolution for an unknown period of time while the agency takes and considers comment. This could also affect the range of terms and conditions government agencies are willing to agree to as part of the give and take of negotiation.

Changes Related to Electricity Transmission: The primary benefit to proponents of the previous iteration of the bill, a provision giving the Federal government plenary power to permit transmission projects, has been removed. The bill could potentially encourage more electricity transmission construction and help bring more projects online at a time when they are desperately needed but not significantly more than the existing provisions of the Federal Power Act.