Summary & Analysis of Energy Permitting Reform Act of 2024

Overview

On July 22, 2024, Senators Barrasso and Manchin released the "Energy Permitting Reform Act of 2024." The legislation is a sweeping giveaway to the fossil fuel industry at a time when a swift and equitable transition to a clean energy economy is needed. While the bill does indeed include positive provisions facilitating much needed transmission infrastructure, the massive hand-outs of public lands, resources, and policy to the oil and gas industry are so severe as to outweigh progress on renewable energy. Accelerating fossil fuel development and shielding such decisions from meaningful review, input, and accountability will only further harm frontline communities who have long disproportionately endured the burdens of reckless energy development. The path to a clean energy future is through legislation like the A. Donald McEachin Environmental Justice for All Act and the Clean Electricity and Transmission Acceleration Act, not legislation expanding fossil fuel development of the guise of "permitting reform."

Judicial Review (Title 1)

Summary: The bill (1) Sets 150-day statute of limitations for challenges to "authorizations" for energy projects of all stripes (authorizations include NEPA, Mineral Leasing Act, Outer Continental Shelf Lands Act, permits, and even an ITS or Section 10 permit under the Endangered Species Act); (2) Requires courts to set such cases for expedited review; (3) Requires courts to set remand deadlines of no longer 180 days.

Analysis/Comments: Legal challenges brought under the Administrative Procedure Act have (at least) a six-year statute of limitations to bring lawsuits challenging agency decisions. The bill inappropriately shortens this time to file suit for covered projects to a mere 150 days. 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 with legitimate legal claims, but didn't know of the action or couldn't find a lawyer to formulate a case in time. This abbreviated time frame also places an undue burden on interested parties and communities with limited resources and could exacerbate environmental injustice. Paradoxically, the short limitation period could lead to more litigation, because many plaintiffs may rush to court to preserve legal claims in this short time window.

The bill also inappropriately interferes with case management by federal courts by ordering them to expedite review of a case over other cases on a court's docket. This will necessarily delay justice for other parties in federal court. If court delays are a concern, Congress should properly fund the judiciary and add sorely needed new federal judges, not cherry pick which cases the court should prioritize. The bill also declares a supplemental environmental review a "separate"

action from an original review. This appears designed to try to prevent the judge that originally reviewed and ruled on the inadequacy of an agency action from hearing the follow up environmental review. This will not only further waste judicial resources, but could also trigger inappropriate "judge shopping" that would seek to evade having a judge already familiar with a legally inadequate agency action from providing appropriate oversight.

Limiting Review, Disclosure, and Public Input on Federal Decision-making (All Titles)

Summary: A litany of provisions in the bill undermine review and public input under the National Environmental Policy Act (NEPA). Most notably, in addition to other NEPA related provisions outlined below, the bill unnecessarily requires agencies to promulgate several categorical exclusions.

Analysis/Comments: 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 and alternatives and by enabling informed public input to the agency before it makes its permitting decision.

Sections 206, 208, and 209 of the bill would curtail the NEPA process, limiting environmental review of energy production, generation, and transmission by pressuring agencies to develop more categorical exclusions. NEPA already allows an agency to establish "categorical exclusions" that exempt certain categories of projects from further NEPA analysis if those projects do not individually or cumulatively have significant impacts on the health or environment. When properly substantiated and established, categorical exclusions are an appropriate form of review under NEPA. However, when Congress directs agencies to establish categorical exclusions, it risks bypassing agency expertise and pressures agencies to prioritize approval over consideration of impacts.

This legislation would require the Secretaries of Interior and Agriculture to adopt several categorical exclusions related to the electric grid, geothermal development, and renewable energy projects. These bill provisions would effectively pressure agencies to create new CEs, creating the risk that entire categories of projects might avoid meaningful environmental review or public scrutiny. Even renewable projects can cause significant impacts and harms to people, communities, sacred sites, and the wider environment.

Onshore Energy (Title II)

Summary: The bill would limit BLM's authority to protect public lands, waters and other resources, and give more control over leasing and drilling to oil and gas companies and states.

Analysis/Comments:

Section 201 would limit the protective terms BLM can include in new leases to those prescribed by the applicable Resource Management Plan (RMP). RMPs often remain in effect for 20-30 years and many of the terms in those plans are decades out of date. The bill appears to preclude BLM from addressing new environmental threats, and changed conditions, when selling new oil and gas leases. For example, if new science shows that a species is declining due to rampant oil and gas drilling, BLM apparently would not be permitted to include no surface occupancy stipulations on new leases to protect its habitat, unless those terms were called for in a decades-old RMP.

Section 201 also allows BLM to continue offering leases under old RMPs while it is in the process of revising the plans. This provision will likely lead to more leasing under RMPs that BLM recognizes are outdated and lack requirements necessary to address current conditions.

Section 201 would expand the restrictions in the 2022 IRA provision requiring BLM to offer a certain number of acres of oil and gas leases if it wants to issue rights-of-way for renewable energy projects. Currently, BLM selects which lands it wants to offer for oil and gas development, and those leases count toward meeting the IRA threshold. Section 201 would require that leases offered only count if they were nominated for leasing by an oil and gas company. This would give the industry greater control over federal oil and gas leasing choices because companies will dictate the pool of lands BLM must lease for oil and gas development if the agency wants to approve renewable energy projects.

Section 201 also requires BLM, if it offers a parcel of land nominated by industry, to lease the parcel as nominated rather than subdividing it. This will limit BLM's ability to shape or divide lease parcels to better carry out its resource management goals.

Section 201 would amend the fee companies must pay when submitting expressions of interest (EOIs) nominating lands for leasing (this fee was added by the 2022 IRA). Under the bill, if a company other than the company nominating the land ultimately wins the lease at an auction, the winning bidder must also pay the EOI fee, and that sum will be refunded to the company that had submitted the EOI. This provision seems likely to encourage companies to submit more speculative EOIs.

Section 202 would extend the life of a drilling permit from three years to four years. This change would apply not only to new applications for drilling permits, but also to: (a) all drilling permits approved during the two years prior to passage of the bill, and (b) all applications pending when the bill passes. This provision likely will increase industry's stockpile of approved but undrilled permits.

Section 203 would excuse oil and gas companies from the requirement to get a BLM permit in many circumstances when the company's subsurface wellbore is capturing federally-owned oil and gas but the company is drilling from a surface well pad located on private land. This section would also preclude BLM from imposing mitigation, bonding or reclamation requirements in such situations. This provision could prevent BLM in many cases from requiring companies to construct their wells adequately to protect drinking water aquifers. In cases where federal lands are interspersed with private lands, BLM also would be prevented from ensuring that drilling operations don't harm wildlife and other resources on nearby federal lands.

Mining (Title II)

Summary: Section 210 includes three provisions related to hardrock mining. First, Section 210(a) amends the Mining Law to allow companies to file an unlimited number of mill site claims to support their mining operations. Second, Section 210(b) established an abandoned hardrock mine fund but fails

to impose any new fees or royalties to support the fund. Finally, clarity is needed to ensure the discovery requirement for "valid" mineral claims is retained.

Analysis/Comments:

Section 210 should be titled "Unlimited Mining Mill Sites." Subsection 2(A) allows mining companies to claim as many mill sites as "reasonably necessary" for their mining operations. Under that approach, a company could claim hundreds or thousands of acres of land for toxic waste rock, tailings and other mining operations, notwithstanding the constraint in the Mining Law limiting mill sites to five acres. That unlimited-mill-site approach is a giveaway of public lands. It also codifies a court decision out of the D.C. Circuit, *Earthworks v. Department of Interior*, 105 F.4th 449 (D.C. Cir. 2024), thereby cutting off democratically afforded avenues to appeal that decision or raise the issue in another circuit court.

The bill also contains problematic and unclear language that may eliminate the discovery requirement in non-withdrawn areas (the vast majority of our public lands). Since the inception of the Mining Law, discovery has been the prerequisite—the *sine qua non*—of obtaining a right to use or occupy public lands covered by a claim. The bill preserves that essential requirement for withdrawn lands, as stated explicitly in the savings provision at subsection 8(D) of the proposed amendment to the mining law. But in so doing, it may inadvertently eliminate the requirement for non-withdrawn lands (the negative implication of the savings provision). Clarity is essential to avoid that outcome as the discovery requirement is the heart of the Mining Law.

Finally, the bill lacks any provision setting new fees or royalties to fund the abandoned hardrock mine fund. Instead, it cannibalizes the miniscule annual mill site filing fees for mill sites for that purpose.

Offshore Energy (Title III)

Summary: The bill requires Interior to hold at least one offshore oil and gas lease sale and one offshore wind lease sale per year over the next five years (between 2025 and 2029), by Aug. 31 of each year. It requires Interior to offer at least 60 million acres per year in offshore fossil fuel lease sales and at least 400,000 acres per year in offshore wind lease sales. For any "acceptable bids," Interior must issue new leases (fossil fuel and wind) to high bidders within 90 days of a sale. New oil and gas leases cannot include new lease stipulations or conditions, apart from what Interior required in the last lease sale (i.e., Interior cannot add new stipulations to protect Rice's whales). The bill also requires Interior to establish an initial target date for the offshore wind production goal of 30 GW within 180 days after its enactment and to "periodically revise" national goals for offshore wind production. Finally, it amends OCSLA to allow offshore rights of way for energy transmission produced from renewable energy to go through national marine sanctuary areas.

Analysis/Comments: This provision has nothing to do with the permitting process and is instead a naked give-away to the fossil fuel industry. It requires additional lease sales at a time when the industry is already sitting on nearly 2,000 non-producing leases covering 10.5 million acres of the Gulf of Mexico. The bill effectively rewrites the 2024-2029 offshore oil and gas leasing program, which only schedules three fossil fuel lease sales over the next five years, adding two more lease sales to that existing program. In so doing, the bill seeks to bypass provisions in OCLSA that require the Secretary to carefully and rationally prepare a five-year schedule of proposed lease sales consistent with several defined principles to achieve a proper balance between the potential for development and the potential for environmental harm. It also flouts an express provision in OCSLA that grants Interior authority to "revise and reapprove" a program, but only if Interior follows certain procedural requirements, including consulting with states and local governments, before making any "significant revisions." In addition, the bill

hamstrings Interior from adding new lease stipulations to fossil fuel leases to protect the environment (including much needed protections for Rice's whales—the most endangered large whale on the planet). And it shortens the time Interior has to review bids and decide whether issuing each lease is fiscally and environmentally sound and in the public interest. Given that each lease gives oil companies exclusive access to public resources for at least 10 years (and usually for decades), artificially truncating this review risks harm to both taxpayers and the environment.

Apart from these problematic requirements, the bill includes provisions that strengthen and capitalize on the provisions in the IRA that tie fossil fuel leasing to wind leasing and also promote wind energy development. The IRA only allows Interior to issue a wind lease if Interior has held a fossil fuel lease sale (or sales) offering at least a total of 60 million acres in the year prior. As written, the IRA would still allow Interior to hold offshore wind sales even without holding a fossil fuel lease sale in the year prior – Interior would just have to wait to issue the wind leases that were sold. So, theoretically Interior could hold multiple offshore wind lease sales over the next five years and just wait until 2029 to issue all the wind leases sold until after holding one offshore fossil fuel lease sale in that year. (Such a strategy would not delay development on offshore wind leases because high bidders can move forward with site assessment – a long process – and even submit a site assessment plan before the wind leases issue). By requiring Interior to issue wind leases within 90 days of the sale, this bill would foreclose that flexibility. It also contains unrelated provisions supporting offshore wind development, such as an unobjectionable deadline to achieve 30 GW of offshore wind energy production and a more problematic provision allowing Interior to grant rights of way for transmission cables in National Marine Sanctuaries.

Electric Transmission (Title IV)

Summary:

Section 402 adds sections 224 and 255 to part II of the Federal Power Act. Section 225 establishes a mandatory process for planning regions to implement transmission planning processes that will identify and allocate costs for transmission projects that span multiple planning regions (called "interregional planning" e.g. between MISO and SPP; or MISO and PJM). And, importantly, it extends this requirement to non-jurisdictional entities, like the Bonneville Power Administration. To ensure that each region can identify joint projects, section 225 establishes certain parameters that must be consistent across the regions. With respect to timing, FERC is required to issue the rule in 6 months, and regions are required to comply within 2 years.

Section 224 basically eliminates DOE's NIETC designation process, as discussed below regarding section 402, but keeps the triennial study process. DOE is still required to study existing and prospective congestion and capacity limits on the nation's transmission grid, every three years, and in consultation with states, Tribes, and other stakeholders

Section 401 would significantly alter existing federal authority to permit transmission facilities by eliminating DOE's role in designating National Interest Electric Transmission Corridors (NIETCs) and instead providing FERC with broader permitting authority. Eliminating the NIETC process would remove provisions that have never been successfully used, allow the easier disbursal of funds that are currently available only for projects in NIETCs, and would simplify the path to FERC permitting of transmission projects. Section 401 would allow FERC to issue permits for larger, interstate transmission projects if states fail to act within a year or deny permits, though it is unlikely that FERC will override state permit denials.

With respect to cost allocation and cost recovery for sections 401 and 402, the bill codifies the Commission's cost causation principle. And section 402 clarifies that utilities can recover costs related to community benefits agreements.

Analysis/Comments:

FERC does not have regulations mandating interregional planning, so section 225 would help spur the development of interregional lines, which are sorely needed. And explicitly granting authority for FERC to require interregional planning will reduce litigation threats, especially claims raising the major questions doctrine. However, under the existing provisions of the FPA, FERC has authority to require interregional planning, although its ability to require cost allocation is unclear.

With respect to siting, reforming the NIETC process and giving FERC more authority to permit transmission lines will improve the timelines for building new transmission infrastructure. Neither FERC nor DOE has used the NIETC process since its inception 20 years ago. While the IIJA revised the NIETC process, there is no track record demonstrating whether the revisions will work. Further, the transmission principles that we drafted with our partners recommend giving FERC similar siting authority but for a higher voltage threshold to limit impacts to state authority. But the bill's requirement to give states a year to review permit applications still preserves state authority as FERC is generally against overriding state actions and would be able to approve lines when states lack authority or resources. On the other hand, without the NIETC process, DOE has limited ability to prioritize the designation of corridors or funding for conservation and equity proposes.

Finally, the cost allocation provisions will reduce prospective litigation challenges since the bill codifies the cost causation doctrine. This is also a recommendation from our transmission principles whitepaper. Allowing utilities to recover costs associated with community benefit agreements may make utilities more likely to engage in such arrangements that benefit affected communities.

Electric Reliability (Title V)

Summary: Section 501 allows FERC to determine, and states, federal agencies, or transmission providers to ask FERC to determine, that another agency's rule (or other action) will likely harm electric reliability. If FERC makes that determination, it must order an Electric Reliability Organization to report on the impacts of the federal action on reliability, and that report must be published, provided to the Commission, and put in the administrative record for the agency action in question.

Analysis/Comments: Section 501 essentially invites agencies, states, or transmission providers to invite criticism of federal actions that might affect the grid. The resulting reports on adverse reliability impacts may create problems for new agency rules such as pollution-control regulations or climate regulations. However, the bill does not prevent any agency from issuing a regulation despite potential adverse impacts on electric reliability. Additionally, it is already a trend for information about adverse reliability impacts to be submitted in the record for pollution-control or climate regulations. As such, it is not clear that this aspect of the bill will significantly change this trend.

Liquefied Natural Gas (LNG) Exports (Title VI)

Summary: The bill dramatically curtails the Department of Energy's (DOE) role in reviewing LNG exports and creates a pathway for a pro-LNG administration to conduct no review of LNG export applications, wait the 90-day period provided in the bill, and have an export application be automatically approved under the bill's new language in a manner that cannot be challenged in court. The bill requires

that DOE act on new export applications within 90 days of FERC's final NEPA analysis of the terminal, 90 days from the release of the draft NEPA analysis for applications to re-export LNG from Mexico or Canada, and 90 days from the receipt of applications to extend existing LNG export approvals. If DOE does nothing on any of these applications, they are automatically granted after the 90 days. The bill also requires that the ongoing updating of DOE's analysis of LNG exports' lifecycle GHG emissions and macroeconomic impacts go through a peer review process and eliminates the DOE pause on using existing outdated studies to evaluate pending applications. Each part of the bill is designed to allow or compel DOE (depending on the administration) to approve export applications.

Analysis/Comments: The Natural Gas Act currently does not provide any timeline for DOE to act on applications under Section 3, either for new applications or for application to extend the time to start exporting under existing applications. For new applications to non-free trade countries,[1] more environmentally friendly DOEs wait for FERC to complete the NEPA review and decide whether to approve the export terminal before conducting a NEPA review of upstream and downstream GHG emissions and upstream impacts of increased production. DOE takes the results of that review and assesses whether exporting the proposed additional volume is inconsistent with the public interest, including how that export volume would affect national security and macroeconomic conditions. Fossil-fuel-friendly administrations have typically forgone any additional NEPA review but still must comply with the Natural Gas Act's requirement that to determine whether granting or extending an export application is inconsistent with the public interest. The current language of the Natural Gas Act requires that DOE approve exports to non-free trade countries *unless* DOE concludes that such exports are contrary to the public interest.

The bill dramatically limits DOE's review and approval process in several ways. For new applications to export, it would require DOE to make a decision on the export application 90 days after FERC is done its NEPA review, which would eliminate DOE's ability to do a supplemental NEPA review and meaningful public interest determination based on the actual volume of exports from the terminal FERC approves. Even if DOE could do part of its analysis concurrent with FERC's process, it would still only have 90 days after it knows what FERC's final analysis will look like to supplement that analysis and incorporate those findings into its public interest determination—a timeline that simply is unrealistic. Critically, court cases have made clear that FERC is not reasonable for evaluating upstream or downstream impacts and FERC has consistently refused to include that analysis in its NEPA review. The bill thus will deprive DOE of the opportunity to compile a true and accurate record of the export's harms, which likely means that it would have to approve the export application under the Natural Gas Act standard. Even worse, because the bill provides that DOE's failure to act in 90 days results in automatic approval, it gives fossil fuel friendly administrations the ability to do nothing and have exports automatically approved with no record and no basis or opportunity for opponents to challenge. For new applications to re-export through Mexico and Canada, the issues are the same, but the bill keys the 90-day period to the availability of the *draft* NEPA document, compounding the problem even further. For applications to extend export authorizations, the bill limits DOE's time to 90 days from when it receives the application, which eliminates DOE's ability to do any supplemental NEPA review or meaningful public interest determination to consider changed circumstances or other relevant factors.

[1] Applications to export to countries with which the US has a free trade agreement are automatically deemed to be in the public interest under the current text of the Natural Gas Act. That does not apply to applications to ship gas to free trade partners like Canada and Mexico if the gas will be liquefied there and then re-exported to a country that does not have a free trade agreement with the United States.

The bill also requires that DOE use studies that DOE has said are outdated to evaluate pending applications, undoing the pause we fought so hard to secure and forcing DOE to assess pending applications using deeply flawed climate and economic information and without any environmental justice analysis. Because the bill also requires that DOE's updated studies go through a peer review process—which can take years—the number of applications that will be evaluated based on inaccurate data will only grow. And because the old and inaccurate studies present a positive view of the impacts of LNG exports, forcing DOE to rely on these studies means that DOE will be even less likely to be able to build an accurate record and meet the statutory standard that would allow it to deny an application. In short, the bill's LNG provisions separately and especially when taken together are designed to compel or allow DOE to approve every export application.

Hydropower (Title VII)

Summary: The Federal Power Act requires developers to commence construction on a hydropower project within two years after FERC issues a license, and the statute allows FERC to extend this deadline by up to eight years. If a developer fails to commence construction within this timeframe, FERC shall terminate the license. Section 701 of this bill would allow FERC to extend the existing statutory deadline to commence construction on a hydropower project by an additional four years, but only for projects that FERC licensed before March 13, 2020.

Analysis/Comments: Unlike many of the other provisions of this bill, the hydropower provisions in section 701 apply to previously approved projects—specifically hydropower projects that FERC licensed before March 13, 2020. By allowing a project developer to request an additional four years to begin construction on a previously licensed project, this bill would reduce the likelihood that a developer would lose its FERC license due to construction delays.