Last week, Senator Manchin unveiled his latest permitting bill, negotiated with Senator Barrasso and set to be marked up by the Senate Committee on Energy and Natural Resources on Wednesday. After recently completing a 3 ½ year stint as general counsel at the White House Counsel of Environmental Quality, I recognize that continuing to improve federal permitting and environmental review processes is important work. But without extensive surgery, this bill should not pass.

The Manchin-Barrasso Bill seeks to exploit concerns by climate advocates that delays in permitting new transmission and renewable energy will stall America's clean energy transition. In exchange for some useful reforms to address those concerns, the bill would extract major concessions to promote and expand oil, gas, and coal.

While the Biden Administration has an impressive record permitting renewable energy development, we have a long way to go to meet our climate objectives, and there is an urgent need to make permitting transmission lines more efficient, because the Department of Energy estimates that decarbonizing America's electric grid will require quintupling interregional transmission by 2035. The Biden Administration has already taken major strides in this direction by adopting regulations and a memorandum of understanding among the permitting agencies (including CEQ, while I was general counsel) implementing previously unused authorities of the Federal Power Act to improve interagency coordination and expedite permitting processes. But more must be done and only Congress can take some of the steps necessary to get new transmission built at the pace that we need.

The Manchin-Barrasso Bill includes some important, common-sense reforms. It is deeply disappointing that Congress has not already addressed transmission, because grid reliability should be a bipartisan issue affecting every state and region. Expanding federal authority over interstate transmission lines to eliminate roadblocks and bring more energy to the grid is critical, and the bill includes important provisions to do so.

On the other side of the ledger, however, the Manchin-Barrasso Bill guarantees the fossil fuel industry 400,000 acres of oil and gas leasing on the outer continental shelf each year, severely limits federal authority to require oil and gas companies to mitigate harm from drilling, kickstart renewed leasing of federal coal, and substantially limits DOE's authority over liquid natural gas export terminals, which would override the current pause on new approvals, inhibit DOE's ability to rely on new studies of LNG that are underway, and generally impede efforts to consider the climate impacts of such terminals. A recent analysis suggests that the LNG provision of the bill alone would lock in new greenhouse gas emissions that are the equivalent of at least 165 coal-fired power plants.

A particularly odious provision of the Bill would reshape a bargain struck in the Inflation Reduction Act, which ties the Bureau of Land Management's authority to authorize wind and solar energy development on public lands to the agency holding massive oil and gas lease sales of public lands each year. That deal is already bad enough, but the Manchin-Barrasso bill would limit BLM to leasing only those public lands that have been nominated by the oil and gas industry. This is a truly terrible provision that would severely undermine public lands management and let industry effectively decide where oil and gas development should occur, without regard to sacred sites, drinking water supply, critical wildlife habitat, or other important uses and values.

These climate tradeoffs in the Manchin-Barrasso are bad ones. More is needed to meet our transmission challenge and accelerate the deployment of renewable energy, but not at the cost of increasing oil and gas drilling and coal mining, because we cannot tackle the climate crisis by extracting more of the very fossil fuels that cause climate change.

By expediting and expanding fossil fuel extraction, the Manchin-Barrasso Bill also undermines environmental justice, because the communities harmed by oil, gas, and coal development, and by prolonging our nation's reliance on combusting fossil fuels for our energy needs, are often the same communities—often low-income communities, Tribal communities, and communities of color—that already face disproportionate environmental burdens.

The statute of limitations provision in the bill is an even more insidious, if less obvious, threat to environmental justice.

Currently, challenges to many federal permitting decisions enjoy a six-year statute of limitations. The bill would slash this time by almost 95 percent, requiring any claim related to federal authorizations for mining, energy, or carbon capture projects to be brought within 150 days.

This change is unprecedented, because no other statute of limitation comparable in length applies to such a broad class of actions, from so many agencies, and without any public notice or participation requirements. It would have severe and disproportionate consequences for any community that lacks the resources to retain lawyers to constantly surveil every federal agency website to sniff out decisions that could cause harm.

A comparison with Title 41 of the FAST Act, often called FAST-41, underscores the radical nature of the Manchin-Barrasso statute of limitation. FAST-41, which Congress permanently reauthorized as part of the 2021 Bipartisan Infrastructure Law, is supposed to be the

preeminent federal permitting program for the most consequential projects.

FAST-41 allows companies, state and local governments, tribes, or other parties proposing certain infrastructure projects across 18 sectors (including those covered by the Manchin-Barrasso Bill)—generally those involving more than $200 million in investment and requiring preparation of an environmental impact statement (EIS), which is the most thorough form of environmental review—to opt to become a "covered project," and have their permitting processes watchdogged by the Federal Permitting Council.

FAST-41 covered projects enjoy a two year statute of limitations and a slew of interagency coordination and permitting efficiencies, and involve multiple opportunities for communities to learn about (and participate in) federal decision making, including: (1) covered projects are identified on the Federal Permitting Dashboard, a single website with schedules and milestones for all federal decisions needed for a covered project; (2) the dashboard is updated whenever schedules and milestones shift, so there is no question about when decisions are made, and (3) there are opportunities for public participation through the EIS process and multiple notices published in the Federal Register.

The FAST-41 process shortens the time communities have to file lawsuits from six years to two years, but in exchange, provides a single, consolidated place for them to learn about the relatively few FAST-41 projects. Because projects are posted on the dashboard early in the decisionmaking process, communities also can learn about projects in the pipeline well in advance. Communities can also learn about potential impacts of projects through a draft EIS and have a minimum of 30 days between publication of a final EIS and any decision to actually authorize the project.

FAST-41 is a fair trade. The time to file suit is shorter, but still reasonable, and communities are provided with tools to learn about decisions that affect them.

The Manchin-Barrasso Bill would include a statute of limitations massively shorter than that provided by FAST-41 without providing any of the transparency. Because the bill would cover projects analyzed through environmental assessments (EAs) – which are abbreviated environmental reviews – and not just EISs, there may be no opportunity for communities to learn about a project before an agency issues an authorization, no opportunity for public participation in the decision making process, no Federal Register notice of any kind, and no centralized resource for the public to learn about projects or decisions.

Paradoxically, the Manchin-Barrasso Bill could also undermine the efficacy of FAST-41—which, again, is supposed to be the premier federal permitting process—because

it is unclear which statute of limitations would apply to projects covered by both. That uncertainty could lead project sponsors to avoid FAST-41, notwithstanding the many permitting improvements it provides, to avoid any question that they are entitled to the 150-day statute of limitations in the Manchin-Barrasso Bill.

Another aspect of the statute of limitations provision would sew confusion and inadvertently lead to increased and unnecessary litigation. This arises from the identification of an incidental take statement (ITS), which is part of the consultation process under section 7 of the Endangered Species Act, as among the authorizations covered by the 150-day statute of limitations. These statements are, however, just one part of a consultation and always accompany biological opinions, which are not covered by the bill. This odd differential treatment of ITSs and biological opinions will puzzle agencies, litigants and courts.

Moreover, ITSs are finished before, and sometimes substantially more than 150 days before, any decision is made on whether, or under what conditions, a project will be authorized. That means that parties would need to file lawsuits challenging ITSs even if a project may never ultimately be authorized or may be authorized under conditions that reduce or ameliorate the harms of concern to the parties. Such ballooning litigation is good for no one.

I am sympathetic to concerns that the current six-year statute of limitations creates undue uncertainty for project sponsors, although I am unaware of any data on how often (if ever) plaintiffs wait this long to file suit. The Manchin-Barrasso Bill's approach is, however, deeply unfair and ill-conceived. If Congress is determined to establish a new statute of limitations for this (or any other) class of projects, it should, at a minimum: (1) use the two year statute of limitations that is part of FAST-41, avoiding statutory conflicts and providing communities with a more reasonable amount of time to evaluate federal decisions and, if necessary, find legal representation and file suit, (2) require a Federal Register notice to clearly identify when the statute of limitation begins to run, (3) require that any project enjoying a shortened statute must be included on the Federal Permitting Dashboard, and (4) either delete any reference to ITSs, or alternatively, tie the statute of limitations for challenges to all aspects of the section 7 consultation process to when authorizations actually occur.

Making these changes to the statute of limitations provision would, in my estimation, strike an acceptable balance between providing certainty to project sponsors (including the fossil fuel industry) and accounting for the important interests of communities that may be harmed by federal decisions. They would not, however, rehabilitate the bill as a whole. That can only occur if the provisions that specifically and expressly promote oil, gas, and

coal production are removed.

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