As Congress wraps up its lame duck session before the new Congress and President arrive in January, there is a lot of debate about whether to move forward on permitting reform within a quickly shrinking window of time. The basis of debate is the Energy Permitting Reform Act (EPRA) co-sponsored by Senators Manchin and Barrasso. Environmental groups are generally opposed, as are some environmental law professors; a list of climate researchers signed a letter in opposition; but clean energy groups support. Is the deal on the table worth taking? And how should we think about permitting reform more generally? I'll deal with those two questions over the next few posts. First, an overview of the legislation, with specific responses to those provisions. In the next post, I'll explore whether the deal overall is worth it given the climate benefits or costs of the projects it would accelerate. And in the final post, I'll talk about what more we could for permitting reform, or how we could do it better.

EPRA has a few key provisions for our purposes. Overall, it seeks to accelerate the approval processes for energy infrastructure projects – which the statute defines as including electricity transmission, renewable energy and battery storage, geothermal, oil and gas leasing, and liquified natural gas export terminals. It also includes mining projects on federal lands. This latter inclusion might be justified on energy/climate grounds based on the importance of a range of minerals (including rare earth minerals) for batteries, electric vehicles and other clean energy infrastructure.

Judicial Review. First, it implements a short (150 days) statute of limitations for challenging included projects, as well as a requirement that if a court remanded an agency project, the agency should respond to the remand in 180 days. The statute of limitations is short, though not infeasible for most groups (especially those with notice) to respond to in terms of filing a complaint. As Justin Pidot notes in this blog post, other NEPA streamlining legislation has used a two year statute of limitations, and that legislation also provided better notice (in terms of ongoing public awareness and information about eligible projects). In a markup, a Senate committee added forest management projects on federal lands to the list of projects covered by the judicial review provisions.

Oil and Gas Leasing on Federal Lands: Second, EPRA makes more stringent a connection that was drawn in the Inflation Reduction Act between approvals of renewable energy projects on federal lands and the offering of lands for oil and gas leasing. In the IRA, the law prohibited issuing more renewable energy project approvals on federal lands unless a certain acreage of federal lands was offered for

oil and gas lease sales; EPRA tightens the requirement for lease sales by mandating that the minimum acreage for lease sales must be of land that industry has nominated (i.e., proposed) to the federal government for leasing. This makes it harder for an administration generally opposed to oil and gas leasing to just offer lands that are not favorable to oil and gas development to satisfy the IRA requirement and unlock more renewable energy development. Relatedly, EPRA also requires offering areas that are nominated by the oil and gas industry for leasing as is in the lease sale, unless the areas are restricted from leasing under the relevant land-use plan. Finally, EPRA generally eliminates federal permitting and environmental review requirements for oil and gas development where the federal government does not own the surface lands, only the mineral rights, for a particular location, and where there is state regulation of the oil and gas development.

Overall these provisions likely make it harder for an administration that is hostile to fossil fuels but sympathetic to renewable energy to restrict oil and gas leasing on federal lands (though note an administration hostile to both could just restrict both!). The restrictions on agencies shrinking parcels nominated for lease sales creates a risk that federal agencies may be forced to offer for lease lands where oil and gas development might have significant environmental or cultural resource impacts, though some of those concerns might be addressed through stringent conditions on the leases that are offered (including no surface occupancy requirements). The elimination on permitting on lands where the federal government does not own the surface will, on the margins, allow more oil and gas production and potentially some additional harm to surface resources on those lands (since currently it is possible those impacts would be considered in NEPA analysis by the federal government, even though they are non-federal lands).

Coal Leasing on Federal Lands: EPRA sets a deadline for agencies to make a decision when industry proposes land for a lease sale. However, it does not mandate that the agencies approve any particular request for a lease sale.

Renewable Energy on Federal Lands: EPRA sets a deadline for completion of reviews of permit applications for renewable energy projects on federal lands. It mandates the creation of categorical exclusions (essentially exemptions) from NEPA for a range of “low disturbance activities” associated with renewable energy projects. It sets national goals for approval of more renewable energy projects on federal lands, requires agencies to develop plans to meet those goals, and to also set consistent national review standards for projects. The categorical exclusions and possible consistent national review standards might have the most importance

among these provisions in terms of accelerating renewable energy development.

Geothermal Leasing on Federal Lands: The bill mandates categorical exclusions from NEPA for geothermal exploration, increases the frequency of when agencies are required to offer leases for sale, and sets deadlines for consideration of permit applications. Again, the categorical exclusions probably move the needle the most here, though all the provisions will be helpful.

Transmission on Federal Lands: The bill mandates categorical exclusions from NEPA for a range of transmission project activities on federal lands, including energy storage projects, that are on preexisting rights of way or previously disturbed lands. As above, these provisions are probably net beneficial from a climate perspective.

Hard Rock Mining on Federal Lands: EPRA would overrule a recent court of appeals case that restricted the ability of mining companies operating on federal lands to use federal lands to store or dispose of mining waste. (Modern mining operations produce a lot of mining waste because they are working with ores that have very low percentages of usable minerals.) However, prior to that case, mining companies had generally been operating under a regulatory system that did allow for storage or disposal of mining waste on federal lands.

Offshore Oil and Gas Leasing: As with the onshore leasing, the IRA mandated acreage targets for offshore oil and gas leasing in order to allow for offshore wind leases. The bill mandates lease sales on an annual basis through 2029 of minimum sizes in order to meet the minimums for the IRA targets, requires the terms and conditions of those leases to be identical to lease sales in 2023, and mandates acceptance of bids that meet the lease sale requirements within a certain timeframe. These provisions are probably the most aggressive in terms of advancing energy development on federal lands, especially in limiting agency discretion as to the nature of the leases being offered – the terms and conditions requirement might well restrict the ability of future lease sale offerings to reduce environmental damage (though they would also prevent the Trump Administration from weakening those terms and conditions as well!).

Offshore Wind Energy Leasing: The bill mandates lease sale with minimum acreages offered, sets a production goal, but with exemptions for a range of protected areas (other than for underwater transmission lines). These provisions would likely increase leasing, particularly with a hostile administration.

Electricity Transmission: The bill would federalize permitting for new lines that are designated as in the "national interest" – overriding the current status quo where, in practice, states (and sometimes local governments) must give approval for construction of new transmission lines. It does provide for consultation with states and provides for how to allocate costs for new lines. It mandates that the Department of Energy create a transmission planning process, and requires reliability assessments. These provisions would likely greatly increase electricity transmission construction in the US, one of the primary barriers to scaling up renewable energy.

Liquid Natural Gas (LNG) export terminals: Sets a 90 day deadline for the regulatory agencies to act on applications once environmental review is complete. If the agencies fail to meet that deadline, then the application "shall be considered to be granted." Requires use of preexisting studies (from 2018 and 2019) for pending projects for environmental review of greenhouse gas emissions and economic impacts until revised studies meeting stringent standards are prepared.

These provisions have been amongst the most controversial. The statute does not change the underlying standard for approving projects; it just imposes a deadline for approval, but one with real consequences for missing it. The provisions mandating the use of previous studies requires use of analyses that likely weigh in favor of approval. But those provisions also make clear that climate impacts should be considered in NEPA review of these projects (something that has been disputed in litigation). There are concerns that the strict timeframes may interfere with adequate environmental review for these projects. Some concerns have been expressed that the mandatory approval of projects if the deadlines are missed might foreclose judicial review of the final decision. The statute does not explicitly say that, and courts are wary of foreclosing judicial review in general.