

The SPEED Act will be [up for a vote in the House of Representatives later this week](#), and the vote will likely be close. The Act is an effort to do permitting reform for NEPA compliance, in theory to accelerate reviews and provide more certainty about what those reviews cover. I've already provided an assessment of many of the provisions of the Act in an [earlier blog post](#) – and most of those provisions remain in the Act as it stands.

But a key issue for permitting reform proponents is an issue that [I have flagged elsewhere](#) – why would clean energy proponents ever want to support a permitting reform deal when the Administration is using any tool it can to stop wind and solar projects? All the streamlining in the world is useless if the Administration can refuse to use it, or is continuing to yank permits for existing or under construction projects. And without those promises, then this is just a bill to speed through fossil fuel projects – something that Democrats are probably not too enthusiastic about, and as I've noted [any permitting reform deal will need to be bipartisan](#) to get through the Senate.

Recent amendments to the SPEED Act in committee in the House [attempted to address these concerns](#) – they are efforts to provide some sort of certainty for federal permit holders for existing projects that they will not have the rug yanked out from under them by this Administration.

Unfortunately, I'm not sure those efforts succeeded. At the very least, I can see a lot of plausible arguments that the SPEED Act does almost nothing for permit certainty except with respect to NEPA permitting, which is of limited benefit for most project proponents. To see why, let's look at the [text of the bill](#).

The key provision is in Section 2 of the bill, which adds a subsection entitled "Certainty" to NEPA. First is this paragraph:

(1) ENVIRONMENTAL DOCUMENTS.—A Federal agency may not rescind, withdraw, amend, alter, or otherwise render ineffective any environmental document completed under this Act for a project or action where there is an applicant unless the Federal agency has been so ordered by a court or the applicant has agreed in writing to such rescission, withdrawal, amendment, or alteration

This paragraph means that an agency cannot undo a previously approved NEPA document for a permitting project unless ordered to by a court. There are pros and cons to this approach. It eliminates the ability of an agency to do supplemental NEPA if circumstances change, and it's not clear if an applicant changes the project whether the agency's hands are tied in terms of doing updated NEPA. In addition, this approach does have some limits – if the government wanted to revoke a NEPA permit, it can just settle a lawsuit by an opponent to a project and acquiesce in a court order to revoke the permit (another provision in the bill prevents the government from asking for the permit to be revoked). So it is not airtight. But that has some constraints (you need a plaintiff at least), so it does provide some certainty. (That being said, this Administration [has been very happy to work cooperatively with opponents to off-shore wind farms to stop projects](#).) But this paragraph only applies to NEPA. What about other laws that might be the basis for federal permits?

The next paragraph attempts to broaden the scope of permitting certainty. It purports to limit agency revocation of authorizations (which are broadly defined in the bill to be almost any federal approval):

(A) IN GENERAL – Except as provided in this subsection or existing law, a Federal agency may not revoke, rescind, withdraw, terminate, suspend, amend, alter, or take any other action to interfere with an authorization unless—

(i) the Federal agency is required to take such action by order of a court of competent jurisdiction;

(ii) the holder of the authorization has materially breached the terms of the authorization, or otherwise violated applicable law;

(iii) the authorization was obtained through fraud, intentional concealment, or material misrepresentation;

(iv) such action is necessary to prevent specific, immediate, substantial, and proximate harm or damage to life, property, national security, or defense that was not considered in the underlying environmental review process or final agency action for the authorization; or

(v) the Federal agency has received a request from the holder of the authorization or project sponsor to take such action.

The bill tries to put some teeth behind these limitations on revocation of authorizations by requiring “clear and convincing evidence” for the basis for revocation, and that revocation is “reasonably limited in duration and scope by the agency to address the specific issue” that is the basis for revocation. The bill requires notice to the authorization holder, allows for judicial review of a revocation, and prohibits an agency from seeking vacatur by a court of an authorization without approval by the authorization holder.

But there may be much less than meets the eye here, for three reasons. First, because this is an Administration that has no compunction about pushing legal limits, and does not appear to generally act in good faith, I have little doubt the Administration will continue to try to yank permits by claiming one of the provisions above apply – many of them are quite broad, such as “materially breached the terms of the authorization” – and that there is “clear and convincing evidence” to support such a claim. Of course, that will get litigated in court by the authorization holder, but if the authorization holder is litigating, then they are probably losing, as they face project delays and escalating costs. In other words, we are right back where we were before.

Indeed, the provision in (ii) above, which allows for revocation for a violation of “applicable law” is a potentially giant loophole. The Administration is already pointing to [claimed violations of \(for instance\) the Migratory Bird Treaty Act \(MBTA\) by wind projects](#) to potentially shut projects down. It is hard to see how this really changes the status quo.

Second, there are three key words in the above quote: “Except as provided in this subsection *or existing law*.” Those last three words exempt provisions in all other federal laws that provide for revocation of authorizations from the requirements in the SPEED Act (otherwise, what are those words doing there?). So does that mean that an agency could point to a violation of some underlying law, such as the “unnecessary or undue degradation” provision of FLPMA, and claim that means the permit can be revoked, without complying with the SPEED Act? Or purported violations of the ESA or the MBTA? Or do those three words just apply to other specific revocation provisions in other statutes (for instance, [this provision in FLPMA](#), which broadly applies to any right to use public lands)? Does it include the

regulations implementing those provisions (see for instance the [BLM regulations for revoking rights of way](#))? Even if those three words just protect revocation authority under other statutes, that is still a lot of power for the executive. There are an awful lot of ways for an agency to revoke a permit under existing authorities. That greatly undermines any certainty the bill would provide.

Third, the bill has a puzzling savings clause, that applies to the limits on authorization revocations:

(E) SAVINGS CLAUSE.—Nothing in subparagraph (A) shall be construed to provide any Federal agency new, enhanced, or expanded authority, or to limit any existing authority, concerning any authorization

But if the limits on authorization revocations don't give agencies any new authority, or limit any existing authority, what, exactly do they do? Something, I guess, but I'm not sure what.

One possibility is that the bill is intended to eliminate any "inherent" executive power to revoke federal permits, perhaps under Article II, unless such authority is specifically granted under this provision or some other provision of federal law. If so, that is perhaps something (but probably not that much). But even that is open to question. Such inherent authority is "existing law" under (A) and "existing authority" under the savings clause, and is it constitutional for Congress to limit this power if it is inherent in Article II?

Even if (A) does not do much for other statutes, the SPEED Act does still limit agency revocation of NEPA approvals. But that, in and of itself, also provides very limited certainty. That's because the reason we are concerned about NEPA for these projects is that, by and large, NEPA is the result of another federal permit that is required – whether it is authorization to use federal lands or waters, or permits under other laws. And so if all we are doing in terms of providing permit certainty is restricting the revocation of the NEPA approval, we actually are not doing anything. The Administration could still revoke the permit based on the underlying law – that seems to be the upshot of the provisions above – and thus, we really get nothing at all. (Indeed in something of a tell, [a key fossil fuel lobbyist said](#) that the SPEED Act would allow the Administration to kill renewable projects it did not like anyway.) At least, that seems to be the most obvious reading of the text from what I can see. (If

any readers see something I am missing, please do let me know!)

I would note that, in defense of those who were tasked with drafting a permit certainty provision for the SPEED Act, they were being asked to do something that is very difficult. One could make all existing permits untouchable – but then you have no recourse if someone violates the terms of their permit, which is not tenable. Or one could put in some basis for permits to be revoked – but then you have to (a) decide which laws are not worth enforcing because you won't revoke the permit for violations; or (b) allow a broad range of legal violations to count for revocation, which defeats the purpose of permit certainty. That is not an easy needle to thread, even if we had an Administration operating in good faith.

Finally, one last problem with this effort at permit certainty. These provisions only apply to permits that have already been approved. They do nothing to prevent this Administration from selectively denying clean energy projects using some trumped-up excuse, and using streamlined authority to ram through fossil fuel projects. That is not a deal that is worth making.