

What is being called “permitting certainty” is now a [central component of any permitting reform that might pass through this Congress](#). Permitting certainty is the concept of making it harder for the Executive Branch to capriciously revoke permits based on personal grudges, political vendettas, or other factors that Congress does not wish to be the basis of permitting decisions. It is a response to this Administration’s capricious war on renewable permitting. The SPEED Act that just passed the House has a permitting certainty provision – which based on my analysis [appears to do very little](#).

In response to the President’s [latest escalation of his war on renewable energy](#) (a freeze on all offshore wind projects), there are efforts to find a more robust version of permitting reform. Here is [one Twitter thread](#) by a policy analyst arguing for “smart” reforms to fix the problem. Their ideas are stricter restrictions “to cover all types of abuses and prevent revocations,” “streamlined judicial review” for quick responses to any abuses, and stronger remedies that include compensation for “all damages suffered during overturned revocations/stop work orders.”

But unfortunately, the problem is more difficult than that to solve. First, what does one mean by “all types of abuses”? Does that include any and all revocations of permits for any reason – even if a permittee is (allegedly) in violation of their permit conditions? What about demands for information from permittees, demands that can use up valuable time and resources? Refusals to issue renewals of permits when they reach the end of their permit term? Civil or criminal investigations based on alleged violations of the law? The human mind can come up with a wide range of ways that permittees can be harassed by an Administration. Indeed, one can see this in the whack-a-mole that state governments like California have played with local governments when states seek to constrain local government powers to reject or delay housing development projects. Local governments have proven ingenious in coming up with workarounds for state restrictions on local control – leading to an endless cycle of legislation.

Of course, one can solve the problem by making permits irrevocable. But that would be undesirable – after all, we need to be able to hold permit holders accountable if they violate the terms of their permits. Similarly, one could eliminate the power of local governments to do zoning at all – but that has been consistently rejected by state governments as undesirable (for good reason I believe).

So a proposal for stricter restrictions “to cover all types of abuses and prevent revocations” is begging a lot of difficult questions, and might produce an ongoing

whack-a-mole problem. Indeed, the problem here is worse compared to states trying to constrain local governments. Local governments can not veto legislation they believe improperly constrains their discretion – Presidents can. So the Administration could find a workaround for any legislative fix, and then veto any efforts to address the workaround.

Similarly, “streamlined judicial review” only takes you so far. Yes, if a court provides a preliminary injunction within a week, that probably minimizes the harm from the interruption. But it does not eliminate it. And that assumes the Administration complies with the injunction (an assumption that may not be a sound one to make). And nothing precludes the Administration coming back with yet another revocation, and another one after that. That’s what they’ve already done with offshore wind. Eventually, the repeated uncertainty will cause projects to be abandoned, even if the lawsuit

Compensation for delays might be helpful – except, in theory that already should be available, for instance on the grounds of breach of contract by the federal government. (See [this case from the Supreme Court for an example](#).) Perhaps we want to make that remedy more easily available. The jurisdictional ping pong in terms of remedies between damages and injunction have been deeply harmful to plaintiffs challenging illegal Administration actions. Stiff fines have been effective in deterring local governments in California from dragging out opposition to housing project. But the federal context is different – monetary penalties in and of themselves probably do not significantly constrain a determined Executive Branch with the resources of the federal Treasury behind it. In the end, this Administration might be happy to just pay a bunch of money for these projects to go away – and I do not think that is what members of Congress have in mind in terms of permitting certainty.

So what tools could one use? As [noted by Chris Elmendorf](#), we might take some lessons from state efforts to constrain local land-use regulation. Instead of trying to constrain decisionmaking, we might instead mandate outcomes. In California and other states, this takes the form of imposing additional, burdensome requirements on local governments if they do not approve enough housing (and actually have it built). Adapting this to the federal context, one could peg the amount of oil and gas leases that an administration could issue to the amount of renewable energy investment, construction, and production on federal lands (or in general). Indeed, [the IRA had a version of this](#) – albeit in the form of limiting the ability to issue renewable permits on federal lands unless enough oil and gas leasing was

undertaken. That is backwards from the solution we need now.

Unfortunately, this solution does not translate so neatly to revocation of existing permits. We wouldn't want to prevent an administration from yanking permits because of violations simply because it hasn't revoked an equal number of permits from another energy sector. That is a much more difficult policy problem to solve, and I'm much less confident that a solution that surpasses the imagination of a determined Executive can be developed.