This is the second post in a series on the FREEDOM Act, a bill in the House of Representatives to address the issue of permit certainty. Part one, explaining why permit certainty is now a hot topic in Congress, is here.

All of the reforms in the FREEDOM Act turn on the creation of a timing structure, under which an applicant gets a determination by the agency that their application is complete, which in turn starts a clock that runs for the agency to make a decision. This is an approach that California (and other states) have taken in trying to prevent local government obstruction for housing and other land-use permit approvals. One challenge with this approach has been a "whack-a-mole" dynamic in which local governments keep coming up with new regulatory requirements and information required for permit applications – that problem is less of an issue in this context, since local governments can more leeway to enact new regulatory laws than federal agencies. There are some tweaks I would make to the timing – for instance, Section 12301(a)(2)(B) of the draft legislation allows applicants to indicate their "anticipated" regulatory requirements, and then the agency has to determine if the applicant's list is correct. But the way the statute is written, it seems like what the agencies sign off on is what the "anticipated" list is, not what the actual list is – a drafting error, but one that can be corrected. Likewise, I'm not sure about the one year blanket timeframe for all authorizations in Section 12302(b)(2) – some regulatory decisions, such as biological opinions under the ESA, may take more time to complete.

The judicial review provisions basically establish that failure to meet the timeframes constitutes unreasonable delay under the Administrative Procedure Act – that in turn requires courts to set timeframes for completion of the permitting requirement. In addition, the provisions give proponents a wide range of venue choices for filing suit, including directly in the Court of Appeals, which might reduce delay in judicial review. And the bill requires courts to impose stiff delay fines (up to $100,000/day!) for failure to comply with judicially imposed deadlines.

(There is also a provision that provides for shorter timeframes for challenging approved projects by third parties. In general, I don't think shorter statutes of limitation are that major a reform, or particularly problematic. However that provision also limits judicial remedies when permit violations are found, and that provision might be problematic, depending on how courts interpret it.)

The bill provides other remedies for unreasonable delay, and these are the ones that are more problematic.

First, it allows project proponents to ask for the court to designate a contractor to complete the permitting review, and then submit that review for the agency's approval. There are obvious potential problems with having a proponent select the contractor to do their permitting review, and the bill does try to impose strict conflict of interest rules. But unfortunately, I think those efforts miss the mark. The problem here is not any obvious conflict of interest (such as a contractor having a stake in the project), but instead that contractors who want to get selected by proponents will market themselves as doing work that is friendly to, and responsive to, proponent needs – even if that marketing is not explicit, there will be an incentive for contractors to be proponent-friendly. The conflict of interest rules in the bill do not address this problem. I've heard that some states have taken similar approaches, and I would want to know more about how those programs have worked in practice before endorsing this at the federal level, where the permitting stakes are much higher. (There's another example of some problematic drafting in the bill here. Section 12303(h)(2)(C) allows an agency to only identify a deficiency in the contractor's permitting review once, and require one revision – that of course means that a contractor can just refuse to fix the problem, and the agency would then have to just approve the permit.)

Second, the bill creates an insurance scheme in which project proponents identify the capital investments they have committed to the project, and can elect to pay an annual premium (pegged at 1.5 to 3 percent of their investments). If their project misses the relevant deadlines, they can get compensated from the insurance scheme for their investments. As another observer has noted, this is probably a terrible idea. Because proponents can choose to participate, only participants who know they are likely to run into permitting problems will pay up – which means the insurance scheme will be woefully underfunded. Indeed, this might even create an incentive for proponents to submit proposals that are unlikely to be approved (but require lots of review work that creates the risk of a delay), estimate a high capital investment, pay their premium, and cash in. (Economists call this problem moral hazard, and it is a real issue with insurance schemes that are voluntary.)

Third, the bill allows project proponents to collect from the government damages that result from delays. This might be a much more generous path for compensation than generally occurs now under either tort claims or breach of contract claims against the government, though the details would depend on how damages are measured, which the statute . . . does not specify. (A frustrating gap in the proposal.) It seems that this provision (as well as the fines for noncompliance

with court orders) is intended to create a strong incentive for agencies not to slow walk permit applications. But if a sympathetic executive branch wants an agency to slow walk a permit for political reasons, my hunch is that they will find the funds to pay any penalties. (This blog post from one of the advocates for the legislation claims that damages would be paid out of appropriated funds for the agency, and can't be backfilled from other sources – my reading of the legislation is that this statement is incorrect. The limitation to appropriated funds only applies to the penalties for missing court ordered deadlines. If the drafters did intend a broader scope for the limitation of payments to appropriated funds, then that is another provision to fix in the draft.)

Whether this last provision on damages makes sense depends on the specifics, yet to be detailed, about how damages would be calculated (Expectation damages? Reliance damages?). Moreover, there is the risk that we overdeter agencies, and they start granting permits that are inconsistent with the underlying law, or at least consistently shade the interpretation of the underlying law against environmental protection and in favor of permit applicants. That may be the goal of the sponsors, but it is not how they are pitching the bill.

Finally, the bill tries to limit executive authority to revoke permits by limiting that power to situations where there is "clear, immediate, and substantiated harm" (which is otherwise not specified), and there is no other "viable alternative" to avoid the harm, or where the original permit was "illegal." This does solve the problems I flagged with the SPEED Act, which appeared to do nothing to constrain permit revocation authority. But I have two concerns here. On the one hand, a determined executive (like this one!) will surely argue they have found "clear, immediate, and substantiated harm" or that prior permits are "illegal" and will keep on with permit revocations. The bill sponsors, I think, are hopeful that the consequences for improper permit revocation – which trigger the swift judicial review and damages provisions above – will deter the executive. As noted above, I'm not so sure this Administration cares about that – if an environmental protection agency has its budget slashed because it was ordered by the White House to kill a project, I think this Administration would see that as a win-win!

And if those incentives to avoid permit revocation are super strong, then there is a real risk we prevent real and valid enforcement against permit holders, including needing to respond to changed circumstances. This is the flip side of the SPEED Act, which did not change the underlying law at all – this bill overrides all other laws, in ways that might be problematic.

In the next post, I'll discuss the possible paths forward to address permit certainty.