

Last month [two Senators proposed another](#) permitting reform bill, the FREEDOM Act. This is a revised version of a bill that was introduced in the House earlier this year, which I [wrote about before](#). (And yes, if you are having trouble keeping up with all the permitting reform bills floating around, you are not alone.)

This bill is very similar to the House version, but it omits some of the provisions that I thought were most problematic. The basic concept is that applicants for certain kinds of energy projects can start a clock with a filing with the agency – the agency then has between 90 days and one year (depending on the complexity of the project) to complete its analysis and make a decision. Failure to meet that deadline allows the applicant to go to court and get an order for the agency to complete the job. Applicants can also get the court to approve an outside contractor to prepare any remaining analysis, with a 120-240 day deadline for that additional analysis – the contractor would be paid by the government from a special appropriated fund (not from the agency’s own budget, as past proposals had suggested). The agency can only reject the contractor’s additional analysis in limited circumstances (such as a finding it is incomplete or inconsistent with relevant law). Otherwise, the agency then has to make a decision based on that analysis.

The bill also attempts to constrain the ability of Presidents to revoke existing permits. It restricts the ability of agencies to revoke existing permits for qualifying energy projects to situations where there is a “clear, immediate, and substantiated harm for which the Federal order, directive, or action is required to prevent, mitigate, or repair” and there is “no other viable alternative that would allow a previously authorized activity, such as construction, to continue,” or there is a violation of federal law and revocation is the “only available remedy.”

Overall, the bill does a decent job of trying to thread the needle between constraining Executive discretion to approve projects (or not) and revoke permits (or not). It may be the best option to achieve that result. Some possible issues that I see:

- The ninety day deadline for “routine” approvals may not be enough in a range of circumstances, such as where there is informal consultation under the ESA (only formal consultation triggers the longer deadline). That may mean that agencies start to overestimate the regulatory compliance required for projects to buy themselves the necessary time. I’m also not sure that one year will always be sufficient for some project reviews.
- As I noted before, one risk with the outside contractor model is that contractors

will try to build a reputation as “helpful” to project sponsors so as to get picked – which may lead to lower quality reviews.

- On the other hand, one important check for rushed or sloppy reviews with the timeframes and outside contractors is the possibility of outside litigation challenging project approvals, which creates an incentive to do things right. But if permitting reform more broadly trims back on the ability of outside parties to challenge project compliance, this will be more of an issue.
- I wonder how agencies will do enforcement against permit holders whose violations do not meet the standards in the bill. Revocation is off the table. So could permit holders just ignore the agency? At some point, perhaps, it becomes a violation of federal law – for instance, the agency issues an order to comply, and that is legally binding, and then can be enforced by revocation. But that may not solve the problem of arbitrary permit revocation.
- I also wonder how much this will really restrain the Trump Administration. The standards for harm and illegality are malleable. The Trump Administration does not appear to care about losing in court – but the litigation and delay will still be harmful to project proponents. And as [I’ve noted elsewhere](#), there are arguments that there is inherent executive power here. For instance, this Administration might well argue that it has a constitutional power to enforce the laws, and Congress cannot interfere with that by constraining its powers. (The Administration has made much more extreme arguments!)

Another part of the bill would make it easier for corporations mining on federal lands to get mill sites (additional lands) for processing mining materials. I’ve blogged [about this before](#), and from what I see, I don’t think there is enough environmental protections to warrant giving the mill site provisions to mining companies.