This post continues my review of the provisions of the Senate Permitting Reform Bill, focusing on the permit certainty provisions in Title IV. My introduction to the coverage of the bill is here. My discussion of Title I, covering NEPA is here (for remedies) and here (everything else). My discussion of the Clean Water Act provisions in Title II is here. My discussion of the Endangered Species Act provisions in Title III is here.

(I am indebted to this prior analysis on these provisions for informing my thinking.)

Title IV of the bill adds new statutory requirements for "project certainty". This is an attempt to respond to the blatant Trump Administration efforts to revoke permits for renewable energy projects, often on flimsy pretextual grounds. My overall take on this is that this is one of the most sweeping parts of the bill, that it is half-baked and potentially quite problematic, that it might also be ineffective, and creates the risk that agencies will be unable to revise or update regulatory standards (even pursuant to existing law) for existing projects, locking in those regulatory standards in perpetuity for all federally permitted projects. And that is not a good thing. In short, it is a hot mess and if the drafters are going to fix anything, they really need to fix this part of the bill.

Section 1401 makes clear that the project certainty provisions are sweeping in scope – they apply to pretty much any permit or authorization a non-federal actor would get from the federal government.

Section 1401(b)(1) has the problematic language:

> For projects or actions with non-Federal sponsors or holders of a Federal authorization or permit, a Federal department or agency shall not take any new action that would revoke, rescind, withdraw, terminate, suspend, amend, or alter a Federal authorization or permit in effect on or after September 16, 2026, or take any other action to interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits

The first important question is how these provisions will interact with specific statutory requirements for permit revocation. Section 1401 has no "notwithstanding any other provision of law" clause, so that raises the issue about

whether it implicitly repeals all those specific statutory requirements. Courts tend to disfavor implicitly repeal, and generally hold specific provisions override general ones, so my guess is that those provisions override these provisions. Does that undermine the effectiveness of this provision? It might well do so. The Administration might look to revocation provisions under other provisions of law and use those provisions to justify revocation under laxer standards. And I think they will probably win on that approach. (I do think the language is broad enough to potentially eliminate claims that the President has non-statutory discretion to revoke permits, but again, that is not explicitly covered in the bill and that is a problem.)

The provision is also potentially wildly overinclusive. The first part of this paragraph is less problematic along thses lines – it would prevent agencies from revising permits or authorizations that have been issued (with exceptions that I discuss below). In general, permits will have provisions for how agencies are to update or revise relevant standards. Some also have generic compliance requirements, such as the permittee will comply with Endangered Species Act requirements. Those allow for agencies flexibility in applying and enforcing permits, and I have less concerns about setting a higher bar in general for agencies to revoke permits.

The second part – "take any other action to interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits" – is much more problematic. Note that it is not connected to the revocation or alteration of a permit. It is much more generic than that. It locks in "operation at full capacity" of all permitted projects, even with respect to issues or impacts that are not covered in the permit. It basically creates regulatory certainty even for issues not covered by the permit. If that is the case – and I think the text basically requires that – does that mean that agencies could not enforce legal standards against permittees if those standards are not covered in the permit? Does it mean that agencies for existing standards cannot update those standards (make them more stringent) if they would in any way affect the "operation at full capacity of a project"? Can agencies no longer update regulatory standards to make them more stringent? Does this even mean that if a permit expires (for instance, NPDES permits under the CWA require regular renewal every five years currently) the agency must renew that permit on its current terms because otherwise it would affect the facility's "operation at full capacity"?

Taking the last question first, the restriction on agency action applies where a project has "secured all necessary Federal authorizations and permits." How would

a permit renewal be considered? The project has secured those permits in the past. NPDES permits in fact continue in effect until the renewal occurs, even if the term of the prior permit has expired. It depends on how broadly courts interpret this language, so I think this is fairly uncertain.

To answer the other questions, we need to look at the circumstances in 1401(b)(1) that allow an agency to take an action that would affect a permit or "interfere with . . operation at full capacity". Those include a court order ((b)(1)(A)), fraud in obtaining the permit ((b)(1)(C)), action "necessary to prevent specific, urgent, substantial, and proximate harm or damage to life, property, national security, or defense that is based on new information that was not considered in the underlying" permitting process ((b)(1)(D)). But most relevant for our analysis is (b)(1)(B), which allows the agency to act if

> The holder of the Federal authorization or permit has materially breached the terms of the Federal authorization or permit or otherwise violated applicable law.

It is the "otherwise violated applicable law" that might potentially allow an agency, implementing an existing law, to argue that the agency's interpretation of that law, or a regulation issued pursuant to that law, or enforcement of a legal or regulatory standard not covered in the permit, allows the agency to restrict operation of the project. But that depends on what we mean by "violated applicable law". Is that the law at the time the permit is issued? Or can law change over time?

My take on this is that there is a possibility that courts will interpret "otherwise violated applicable law" to allow for agencies to update regulatory standards for permits, even if not explicitly provided for in the permits, and even if that is the result of new agency interpretations of statutes and regulations. (Note that this flexibility would also give the Trump Administration leeway to continue its mischief with respect to renewable energy projects.) But there is also a possibility courts will interpret this provision to "lock in" regulatory standards in perpetuity for all Federally permitted projects – and that is . . . a problem.

Addressing these important questions would require more detail in the provisions. What does "violated applicable law" mean? What about permit renewals? How does the provision interact with existing law? And I also think that these issues

highlight how very difficult the problem of permit certainty is to solve (and thus my sympathy for the drafters). On the one hand you want to give agencies flexibility to respond to new situations and apply new policies – that is one reason we elect a President! On the other hand, flexibility can be and has been abused. Threading that needle may just be impossible.

There are additional procedural burdens on agencies that wish to take action with respect to permits or permittees "operation at full capacity" – burdens that likely exacerbate the problem agencies will face with avoiding "lock in" of existing standards in perpetuity. If challenged in court, the burden is on the agency to establish its justification for its action by "clear and convincing evidence." The remedies for violations are potentially sweeping: reinstatement of the permit, injunctive relief against future permit actions without a court order, attorneys fees, delay costs, and 25-50% of project costs incurred by permit holder as of date of permit action (based on bad faith, pattern of agency behavior, economic harm). Claims go to the district court, not the court of claims (solving jurisdictional issues).

My guess is that the stringent requirements of proof and potentially draconian monetary penalties will deter agency action to change permit terms, and update regulatory standards. But I also think that a determined White House (like this one) won't care about those penalties and will continue to push the envelope. So one possibility is that this provision gets us the worst of both worlds – we don't do enough to stop bad faith actors (who don't care about penalties and just want to gum up the works) but we will deter good faith agencies from taking steps to update regulatory standards when required.