

This post continues my review of the provisions of the Senate Permitting Reform Bill, focusing on the disparate treatment permit 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](#). My discussion of other provisions in Title IV is [here](#).

The other major provision in Title IV that I think is particularly problematic is Section 1402, entitled “Ensuring Fairness for Specific Types of Covered Projects.” But a more accurate title might be: What if we tried to apply employment discrimination law to federal permitting (but incorrectly)? Again, I think this provision has real issues – though it is probably more easily fixed than Section 1401.

Section 1402 applies to “specific type[s] of covered applications,” and those in turn are defined in a very long list to include renewable and fossil fuel energy projects of all types (including extraction) as well as mining projects. The basic thrust of the provision is that if a project applicant has their application delayed beyond statutory timeframes, or is denied, they can raise a “disparate treatment” claim that the agency is biased against that type of project (e.g., wind power, or oil and gas production), and get injunctive relief and very large damages.

The problem that the drafters are trying to solve here is an Executive that has made a policy choice to try and stop certain types of energy projects through discretionary decisions about whether and how to approve those projects. The Biden Administration did this to a limited extent for oil and gas leasing. As usual, the Trump Administration has been much more extreme in its efforts to stop new renewable energy projects.

The basic framework is this: An applicant who has had a project delayed or denied can sue the agency, alleging “disparate treatment.” That applicant can submit evidence to create a prima facie case of disparate treatment, such as “[e]mpirical evidence demonstrating a pattern of improper denial or unreasonable delay” for that project type “compared to the previous rate” of approvals for projects “for that same specific type of covered project,” as well as evidence of government officials or agencies “that demonstrates a bias in the permitting regime against the specific type of covered project at issue.” If so, the agency has to provide data showing permitting decisions (including delays or denials) over the past five years for projects of that type. The court then decides whether there has been disparate treatment based only on the prima facie evidence by the plaintiff, the

administrative record for that project, and the data. If the court finds there has been unreasonable delay or improper denial for the project at issue and there has been disparate treatment, it can issue injunctive relief, and damages from 50 to 100% of the project cost (which could be billions of dollars!).

The problem is that the way the provision is written, it is not really about “disparate treatment,” at least how that term is used in discrimination law which implies an unjustifiable difference in how one category of people is treated compared to another category of people. Instead, disparate treatment is a “substantial increase” compared to “5 most recent calendar years of empirical data” in “unreasonably delayed” approvals or “improperly denied” projects, over a 180 to 280 day period (the longer period is for EA or EIS required projects), and is the “result of an intentional course of action undertaken by the Federal Government to create such a pattern”. Because this is not a comparative assessment (e.g., that oil and gas projects are being rejected at a higher rate than renewables projects compared to relative approvals over the past five years), it essentially locks in permitting rates in perpetuity for all projects. In other words, it freezes any executive discretion for permitting for energy and mining projects – and prevents future administrations from increasing regulatory stringency in any way. In fact, it essentially creates a one way ratchet. An administration can make it easier to grant permits – what applicant is going to sue to challenge that? – but it cannot make it harder. That is a recipe for long-term weakening, and eventually elimination, of all regulatory standards for these types of projects, and ensuring that projects must be approved, regardless of their quality.

Moreover, the provision supposedly only applies to “improper denial” or “unreasonable delay” that has increased compared to the prior five years. But because the court only decides the case based on the raw empirical data of delay or denial rates, there is no way for the agency to show, or the court to conclude, that increases in delay or denial over historical rates were because of “proper denials” or “reasonable delays”. That really stacks the deck in favor of the applicant.

There are limits on how broadly this provision may in practice sweep because there are some substantial burdens for applicants to use this provision. The applicant has the burden of showing the project “satisfied all applicable Federal law,” or no possibility of cancellation for “violation of application Federal law” [sic]. To receive any remedy, the applicant must “demonstrate the technical and financial ability to construct the applicable specific type of covered project” And the applicant must complete the project or repay any damages.

The least problematic provision in Title IV is Section 1403, which sets a one year timeframe for all approvals not covered by NEPA, and it allows for judicial review by permit applicants. This is basically a gap filler for projects that are not covered by NEPA to receive similar timeframes and judicial review provisions as projects covered by NEPA under the bill.