I’ve flagged an additional issues from the permit certainty provision (Section 1401 of the bill) that I think are quite important and worth considering in assessing the merits of the permitting reform bill.

As I noted in my prior post on Section 1401, it has potentially sweeping scope because it prohibits any federal agency action that would “interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits.” And as I noted in that prior post, there are exceptions to this prohibition, most importantly where the permit holder’s actions “otherwise violated applicable law.” But importantly, the federal agency must, if its action is challenged in court, demonstrate that violation by “clear and convincing evidence.”

I think that these provisions, put together, basically mean that all federal enforcement actions against any activity regulated by the federal government now must be supported by clear and convincing evidence. That’s civil penalties, administrative orders, injunctive relief, anything. That is incredibly broad. And this is not just energy projects. The breadth of the provision means that it might apply to an individual who enters a national park (they received authorization to do so) and hikes (could that be a project? The term is undefined in the statutory language) and is given a ticket by a ranger and ordered to leave the park for vandalism (ordering the individual to leave, or detaining them, would interfere with “full capacity” of the individual’s project to hike).

Again, I want to emphasize how sweeping this change is. It is a fundamental reworking of a large swath of federal enforcement of all federal laws and regulations (not just environmental ones) against anyone doing anything with the permission of the federal government.

I don’t think that’s what the drafters intended, but it is plausible that a court that wants to be aggressive in interpreting this language could push the borders very far. And that’s a problem. It’s enough of a problem that I think this risk warrants killing this deal, if it isn’t fixed. (And I really want to support this deal!) And of course I might be missing something here (and if I am, please do pass that on!).

Update: Looking more at the language, I think the definition of “permit or authorization” in the section is so broad that the issues I identify above apply to the entire section, not just the “full capacity” component.