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Eric Biber's recent posts have done a terrific job providing an overview of many of [the Senate permitting bill's](#) provisions. I want to revisit the issue of NEPA remedies he discussed [here](#), and the bill's broader approach judicial review of NEPA claims, because I think there are dramatic implications hiding under the hood. This approach is laid out in two sections, the new § 111 section the bill would add to the NEPA statute, and one of the bill's sections on project certainty that is not limited to NEPA claims.

The dramatic implication I see is this: Despite the elaborate structure for judicial review the bill creates, it would effectively eliminate judicial review of most NEPA claims. And if that's what it accomplishes, we should go in eyes wide open—and preferably with clearer text that won't sow confusion among litigants, agencies and courts.

Proposed Judicial Review Provisions

Those consequences flow primarily from the scope of § 111; how it, along with § 1401 of the bill, changes the remedies available in NEPA litigation; and how § 111 impairs supplemental claims brought under other statutes. Specifically:

- 111(a) defines the word “claim” for purposes of the section as a claim that “seeks judicial review under any provision of Federal law of an authorization based on a claim that an environmental review [under NEPA] failed to be properly conducted.”
- 111(c)(5) provides “the only remedy the court may order to redress that violation [of NEPA] is to remand, without vacatur or issuance of an injunction, the applicable authorization” with instructions to cure the defect on a reasonable schedule that “shall not exceed 180 days.”
- 111(c)(5)(B) makes it more difficult for a plaintiff to obtain a preliminary injunction for a non-NEPA claim if a lawsuit also includes a NEPA claim.
- 111(c)(6) provides that an authorization “shall remain in effect” during a remand.
- 1401 provides that for non-federal projects, agencies cannot terminate, suspend, or amend any authorization that is “in effect” (subject to narrow and unrelated exceptions).

I don’t mean to downplay the numerous limitations and requirements contained in § 111—a 150-day statute of limitations, original jurisdiction in the court of appeals, expedited procedures, and more—but the limitation on remedy is the most significant change, for the reasons I’ll discuss, and § 111(a) defines those claims subject to that limitation.

What Claims Are Covered?

To understand what is covered, we need to refer to the new definition of “authorization” in proposed NEPA § 3(2), which is both broad . . . and a bit confusing. Here it is, unabridged:

The term ‘authorization’ means any lease, right-of-way, easement, license, permit, approval, finding, determination, or other administrative decision issued by a Federal agency or any interagency consultation that is required or authorized under Federal law to implement a proposed agency action.

This definition suggests that § 111 might not apply to the sliver of NEPA reviews related to procurement decisions, promulgation or amendment of regulations, or provision of grants or other forms of financial assistance—although proposed revisions to the definition of major federal action would exempt most financial assistance decisions. Those kinds of decisions are not regulatory approvals like the other items identified in the definition.

All manner of regulatory permissions would appear to be covered. The first half of the definition describing what kinds of actions are authorizations is familiar. It parallels the definition in FAST-41 and covers direct regulatory authorizations and consultations, such as those under the ESA and NHPA, required for authorizations to issue.

The connection of those authorizations to implementation of “a proposed agency action” is new and odd. It could be read to mean that the only authorizations covered by § 111 are those necessary to authorize a federal project—for example, if BLM applies for a § 404 permit from the Army Corps of Engineers to construct a road across a jurisdictional waterway. As a comparison, the definition in FAST-41 defines authorizations as permissions needed to “site, construct, reconstruct, or commence operations” of projects covered by that title.

I think it’s unlikely that this is what Congress intends, or, more importantly, how a court would construe § 111. First, this reading would mean that § 111 doesn’t apply to federal permitting as it is ordinarily understood—federal authorizations for non-federal projects—even though permitting is the primary subject of the bill. Second, throughout the bill the term “agency action” is given inconsistent meanings. Sometimes it appears to mean the conventional understanding of agency action as an action taken by an agency, and at others, it appears to mean a non-federal project seeking one or more federal authorizations.

Federal Projects

Where an authorization relates to a federal project, § 111 would prevent a court from enjoining the project during a remand to cure a NEPA violation, although injunctive relief could be available for claims under other laws—more on that below. During such a remand, an agency could decide to modify a federal project based on additional analysis ordered by the court, meaning that the analysis conducted during remand could meaningfully influence the design of the project, or the mitigation measures undertaken to ameliorate its effects.

The 180-day limit § 111 imposes on remands would, however, make it unlikely or impossible for the agency to adjust course in light of additional analysis when the agency has most dramatically violated NEPA. If, for example, an agency approves a major project—say a flood control facility—without performing any NEPA at all, how can it complete a meaningful EIS from scratch in only 180 days?

I don't want to overstate the point: maybe a court would set a longer deadline, or simply not enforce a deadline it sets, if both the federal agency and the plaintiff agree that more time is needed, although the statutory text doesn't provide for that to occur. But alternatively, an agency could point to the 180-day statutory deadline to justify a truncated analysis.

Non-Federal Projects

The prognosis for NEPA claims related to non-federal projects is even more dire. Because authorizations remain in effect during remand under § 111, § 1401 prevents the agency from modifying or rescinding them. That means that even if the agency believes that the additional analysis it performs on remand *should* lead to a change in the agency's decision, it cannot make such a change.

Here's a hypothetical example: 1) Agency authorizes project near a municipal well that supplies a town's drinking water without conducting any environmental review, 2) Court finds NEPA violation and remands to agency to complete an EIS within 180 days, 3) Agency analysis reveals that over the next few years the project is likely to render groundwater unsafe to drink and that an adjustment to the project, or the implementation of mitigation measures, could avoid or prevent that from happening. The agency might well want to modify its authorization based on its analysis, but because the authorization is in effect, § 1401 prohibits it from doing so. The upshot is that the analysis performed on remand is essentially an empty paperwork exercise entirely untethered to informing the agency's decision. As a corollary, the obligation to perform NEPA to inform decisions on authorizations for non-federal projects is no longer legally enforceable.

A further implication may be that plaintiffs no longer have standing to bring NEPA claims related to non-federal projects. As the Supreme Court explained in *Massachusetts v. EPA*, redressability for procedural claims such as those under NEPA is premised on the "possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." § 1401 would appear to destroy (or at least substantially undermine) that premise, because it prevents the agency from modifying its decision after completing a legally adequate NEPA analysis.

The Shadow of § 111

The analysis I've laid out so far suggests that NEPA claims could remain viable, if

substantially circumscribed where federal projects are concerned, and perhaps precluded on standing grounds for non-federal projects. Why, then, did I opine that the bill will effectively eliminate judicial review of most NEPA claims? The reason is that § 111 substantially undermines claims alleging violations of other statutes if they are filed with NEPA claims. As a result, the bill transforms NEPA claims into pills that poison the other claims a plaintiff may have.

Here's what I mean. "Supplemental claims," meaning claims filed under other statutes in a lawsuit that also includes a covered NEPA claim, are subject to the statute of limitations, forum, and other provisions established by § 111. Even more significantly, though, the bill establishes a new and stricter standard for preliminary injunctive relief for these non-NEPA claims than would apply if they were filed apart from a NEPA claim. For example, § 111(c)(5)(B) requires a court to find that a plaintiff has a "substantial likelihood" of success on the merits of a supplemental claim, rather than simply a likelihood of success, which is the ordinary standard. I don't know the extent of the difference between a likelihood and a substantial likelihood, but I know which is easier to demonstrate. Potentially more problematic still, by expressly authorizing issuance of preliminary injunctions for supplemental claims, the bill could be read to bar permanent injunctions.

As a result, I have trouble imagining a circumstance where a plaintiff should pursue a NEPA claim, no matter how strong the claim is, because the potential relief is so narrow and the collateral consequences to the plaintiff's other claims so severe.

What about APA Claims?

In thinking about the judicial review provisions I've discussed, I've come across two views of how § 111 might leave injunctive relief available under the APA.

The first, and broader, view is that injunctive relief would remain available for NEPA violations because claims brought under the Administrative Procedure Act (APA) would not be subject to § 111. I can understand why someone might suggest, or perhaps hope, that this would be the case, but as someone who litigated NEPA claims at DOJ and has taught administrative law and environmental law in the years since, I don't think it stands up to careful scrutiny. Here's why:

NEPA does not include an independent cause of action, so "NEPA claims" are always claims brought under another statute—most commonly the APA. Thus, as the Supreme Court most recently reiterated in its *Seven County Infrastructure Coalition*

decision, that means NEPA claims are, in effect, claims that “an agency action was arbitrary and capricious due to a deficiency” in its NEPA compliance. In those circumstances where an agency decision is reviewed under another statutory cause of action, for example FERC orders under the Natural Gas Act, claims under the APA cannot be brought.

The language in § 111 is also very broad, indicating that it applies to any claim seeking “judicial review under any provision of Federal law of an authorization based on a claim that an environmental review failed to be properly conducted pursuant to the requirements of [NEPA].”. That language means that even if we could distinguish between NEPA claims and claims under the APA about NEPA violations, § 111 would cover both.

Finally, even if there exists a creative argument that the text could be read to preserve injunctive relief for APA claims alleging NEPA violations, it is highly improbable that a court would find that to be the best reading of the statute. Such an interpretation would allow plaintiffs to circumvent § 111 through artful pleading, which is a result a court is unlikely to find that Congress intended.

The second, narrower view is represented in a portion of a broader analysis of the bill Alex Mechanick offered on his substack [Artificial Weights](#). He describes the bar on injunctive relief as among the bill’s most important reforms, explaining that we should not be concerned because:

[T]he APA still allows anyone wronged by an unreasonable (arbitrary or capricious) action to stop that action . . . So if an action harms the environment for little benefit . . . an APA suit would stop it regardless of NEPA.

In one sense he’s right, because § 111 would not prevent a court from enjoining an action a court found to be arbitrary and capricious for reasons unrelated to NEPA, particularly if the plaintiff does not also file a NEPA claim (which would trigger the consequences described above).

But arbitrary and capricious review does a lot less than he suggests. I am unaware of a court finding an agency action is arbitrary and capricious because a project’s environmental costs significantly outweigh the benefits, or that environmental harm from a project could be easily avoided. Those kinds of considerations could be relevant if a specific substantive statute requires them to be considered, but I’m doubtful that generic arbitrary and capricious review meaningfully constrains anti-

environmental agency decisions.

Moreover, courts adjudicate APA claims based on the administrative record the agency has assembled at the time of its decision. NEPA is often the mechanisms through which information on environmental harm is included in the administrative record for a permitting decision, and in many contexts, may provide the only requirement for the agency to seek public comment on a permitting decision. An agency that ignores NEPA could, therefore, assemble a record bereft of information about environmental harm, or how such harm can be avoided. Because injunctive relief would be unavailable for any claim related to the sufficiency of the NEPA analysis, a plaintiff may find that the record contains no information that can serve as the basis for arguing that a decision is arbitrary and capricious due to its environmental harm.

Conclusion

I end where I began: the bill will effectively end judicial review of most NEPA claims. It shouldn't take this long to explain why.

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