

The permitting reform bill now being considered in the Senate has provoked fairly vicious fights between “abundance” advocates and at least some environmental groups. I think that there are valid critiques of many of the arguments that each side is making, and I think unpacking those critiques can be helpful in trying to find a path forward for environmental law. In this blog post, I will start with what I think many environmental groups get wrong about permitting reform.

[Note that in both of these blog posts, I am not going to link to specific people who have been making these arguments online, because I don’t want to personalize these critiques. But if you’ve been following the online discussion about the bill, you will have seen many versions of the arguments I am criticizing.]

Many environmental groups object to the bill’s restrictions on NEPA reviews and litigation to enforce NEPA, as well as the bill’s changes to the Clean Water Act, and the “permit certainty” provisions in the bill. I believe there are valid criticisms of all of [those changes, as I’ve written before](#). Yet, my goal is to make this bill better. The goal of many environmental groups (but not all!) is to kill this bill. That perspective is, to my mind, downstream of a historical paradigm in which environmental groups focus more on stopping projects, rather than enabling good ones. That paradigm (as [JB Ruhl and Jim Salzman have noted](#)) has strong historical roots, and has produced real environmental benefits in the past. But in the present context, I think it has led environmental groups to make some serious errors both in terms of analyzing the bill, and in terms of broader strategy. I’ll focus specifically on two types of problematic objections to the permitting reform bill.

First, one criticism is that the bill will undermine the ability to stop fossil fuel projects. Explicitly or implicitly, this argument is sometimes paired with a claim that any permitting reform or streamlining should only occur for “good” projects, which might be defined differently depending on the advocate, but generally focuses on transmission lines and renewable energy projects. But there are fundamental political problems with such an approach. It is improbable that any permitting reform bill will get through the Senate without bipartisan support, and bipartisan support does not exist for streamlining that is only limited to renewables. Advocates might hope for a Democratic trifecta and elimination of the filibuster to ram through streamlining for only renewables with a simple majority in the Senate – setting aside whether that scenario is possible, that isn’t a stable long-term outcome. Given current swings in partisan control of Congress, without the filibuster what can be passed with a simple majority can be repealed with a simple majority, and a future Republican trifecta is quite plausible in the not-too-distant

future. (Indeed, this was the problem with long-term stability for the IRA renewable energy provisions, and I think similar uncertainty and instability applies to many of the OBBA provisions too.) Finally, the politics of stopping fossil fuel projects is really difficult – Trump is doing a great job of reducing fossil fuel production globally, and look what it is doing to his approval numbers! (In addition, there are [also arguments](#) that focusing on reducing fossil fuel infrastructure is a counterproductive way to pursue climate policy.)

The second major argument builds on a theme that environmental groups, particularly environmental justice groups, have developed over the past two decades. Environmental review matters because it empowers communities, particularly disadvantaged communities. Community empowerment means those communities can better fight new polluting projects and also demand community benefits from clean energy projects, benefits that can offset historical injustices and inequities. Weakening environmental review in NEPA undermines community empowerment, and thus undercuts environmental justice. Compromise on NEPA reform is therefore to be rejected.

There's a lot one can unpack in this line of argument, but for this post I want to focus on why environmental review contributes to community empowerment. It is the case that public comment periods can provide some mechanism by which communities can engage with projects and gain some political leverage, especially if they show how unpopular the project is, and the relevant decisionmakers represent that community and depend on its votes. But note that is often not the case for federal projects, where decisionmakers are elected at a much broader scale. So in the context of NEPA, perhaps the most important way in which community empowerment occurs is through the uncertainty that the risk of litigation produces for the agency and the project proponent, if they disregard significant opposition. That uncertainty in turn gives the agency and project proponent a reason to negotiate and do deals with opponents (if a deal is to be had). Community empowerment in the context of environmental review is therefore a consequence of uncertainty. But that in turn comes at a high cost in terms of successful completion of infrastructure projects or other social goals that depend on the gatekeeping role of environmental review. More broadly, one can understand the uncertainty over litigation over NEPA review as creating a form of a veto point for projects. That veto power does empower environmental groups and efforts to empower historically disadvantaged communities. But it also empowers a lot of other actors, such as fossil-fuel funded opposition to renewable energy

projects. Whether that tradeoff in the aggregate is better for the environment or environmental justice is unclear to me.

There are other arguments that I think are stronger:

First, the bill doesn't do enough to constrain the Trump Administration, who will use the relaxation of NEPA and other environmental laws to do lots of bad things in the next two years. It is plausible that this outcome could happen, especially given how untrustworthy this Administration is. One difficult question is whether the upsides from the transmission provisions and permitting certainty benefits for renewable energy are worth the costs of weakening NEPA and other statutes, both in the aggregate, and in the short-term over the remaining two years of the Trump Administration. If the Democrats take the House (and even more so the Senate) they will have some power to constrain the Administration from doing harmful actions.

Second, eliminating NEPA as a constraint on executive action may increase the ping pong of policy we have seen over the past few decades, with results that in the aggregate may be worse for the environment because the impacts of harmful activities will be in part irreversible. Again, this is a real risk, and the permit certainty provisions do not address this problem (since they only enable development projects). As an example, do we see the Roadless Rule for National Forests flip back and forth in operation, and when it is not in place, there are timber and road projects that are harmful and can not be easily undone? Are these risks worth the gains on the transmission side?

Finally, my discussion here is really part of a broader criticism of how too many environmental groups have gone into a defensive shell, desperately trying to protect the existing environmental legal system, and when they aspire to change, focusing on probably politically infeasible gains in federal regulatory powers. I do think that environmental groups would be better served by exploring a new paradigm that examines creatively what we are trying to protect, and new ways to achieve that protection. (That being said, I also feel strongly there are core components of the current system that are worth defending.) For instance, groups should be looking at ways to adapt law to a new landscape where developing new infrastructure is a key component of environmental protection. That in part means that groups should positively engage with negotiations about how to make environmental law work better (as in the case of permitting reform), rather than reflexively opposing change.

