I've written a bunch about the issues with the permit certainty provisions of the permitting reform bill. Apparently that provision was a demand of Democratic negotiators, seeking to protect renewable energy from the Trump Administration. If that is the goal, it comes at a steep cost in terms of an overbroad provision with lots of unintended consequences, as I've written before.

But there's another issue: Will it even accomplish its goal? In other words, will the provision actually stop the Trump Administration from blocking renewable energy projects? I'm skeptical it will do so, or at least, that it will have as substantial an impact as its advocates predict. Here's why.

First, the provision allows permits to be revoked for a range of reasons – many of which are the ones this Administration has relied upon. For instance, permits can be revoked because:

> such action is 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 environmental review process or final agency action for the Federal authorization or permit

For wind projects, the Administration has been using the Department of Defense review process for interference with military radar to hold up projects. That is "national security, or defense." Is a court going to say that that kind of review is not needed to "prevent specific, urgent, substantial, and proximate harm or damage" to "national defense" – especially given the conflict with Iran? Again, this Administration has not been shy in trying to rely on national defense to justify all sorts of actions. And the Administration can presumably rely on new models or assessments as "new information" to reconsider existing permits. There is always a new model based on new assumptions that can be developed. Similar wiggle room exists if the Admnistration argues a prior project has "materially breached" the terms of the permit or "otherwise violated applicable law." As I've written before, many of the relevant permits have broad language requiring compliance with federal law, and have broad powers for revocation that create ample room for mischief.

Of course, if the project proponent sues to challenge the revocation, the burden on

the government is to show, with “clear and convincing” evidence, that the standard for revocation has been met. I’ve written before about the risks here to genuine enforcement. But on the flip side – for an Administration that does not seem to care about flouting the law or losing in court – it may be happy to force delays and uncertainty, lose in court, and pay the damages (out of an unappropriated litigation fund that does not penalize any agency or the White House).

The permit certainty provision runs a real risk of being the worst of both worlds. For Administrations that care about the law, and agencies that care about losing lawsuits, it will be a real deterrent – which means likely reducing enforcement of all federal laws against approved projects, and potentially locking in existing regulatory standards for projects in perpetuity. But for a lawless Administration that cares little about losing in court, paying damages, and is subject to the whims of a mercurial President, it may have little deterrent value. At least as currently written, it’s not clear to me that the permitting certainty provision gains renewable energy interests enough to be worth the potentially broad and steep collateral damage. (See this article from Heatmap, which raises similar questions.)

If I had to choose, I would trim back the permit certainty provisions to reduce unintended consequences, because the tradeoff of those consequences for the (uncertain) ability to constrain this President is not worth it. That being said, I also do think that the provisions should not be completely dropped, as providing some constraint on delays and some minimal threshold for permit revocation has broader benefits in terms of policy stability.

(For another nice discussion of the scope and limits of the permit certainty provision see this article, though I think at times the analysis underestimates executive authority if the bill passes.)