Insight

Outlook for Senator Manchin's Energy Permitting Reform

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EXECUTIVE SUMMARY

- As part of the deal to earn Senator Joe Manchin's support for the Inflation Reduction Act (IRA), Democratic leadership promised a vote on reforms to the federal energy permitting process by the end of the fiscal year.
- Sen. Manchin has released a list of energy permitting reforms he intends to include in the legislation, which would address some of the long-standing challenges of the federal permitting process; it is not clear, however, if the reforms would be entirely focused on energy projects or if they would have broader application.
- Despite the promised vote on Sen. Manchin's proposed reforms, the permitting package's passage is far from certain.

INTRODUCTION

As part of the deal to earn Senator Joe Manchin's support for the Inflation Reduction Act (IRA), Democratic leadership promised a vote on reforms to the federal energy permitting process by the end of the fiscal year on September 30. Soon after, Sen. Manchin released an outline of provisions he aims to include in the legislation.

Broadly, the reforms proposed by Sen. Manchin have bipartisan support. But the package faces a few hurdles, which may become easier or harder to clear depending on the final legislative text. Many congressional Democrats do not support the proposed reforms to National Environmental Policy Act (NEPA) or Section 401 of the Clean Water Act, as they view the imposition of timelines as antithetical to ensuring environmental protection. The same view applies to establishing a statute of limitations to challenge permitting decisions in court. On the other hand, while many Republicans support reforming the permitting

process, they may be reluctant to go along with a package that many may view as not going far enough.

This analysis reviews the key components of the (likely) future bill.

CURRENT PERMITTING ISSUES

The biggest governmental hurdle for energy projects is the NEPA permitting process. NEPA requires federal agencies to assess the environmental impact of their potential actions, including permit approvals. Yet what started out as a well-intentioned measure to ensure the consideration of environmental effects has morphed into a process used by opponents to delay, or even outright quash, certain projects. Delays in permitting approvals dramatically increase project costs and can even serve as a deterrent for some projects ever being proposed.

The NEPA process requires public input about possible environmental effects. Opponents have used those opportunities to continually raise objections to projects and assert that agencies have failed to consider certain possible impacts. These objections, which can sometimes be tenuous, lead to longer reviews and lengthy litigation. According to a 2018 study by the Council on Environmental Quality (CEQ), the federal agency that primarily implements NEPA, review times have more than doubled since the 1970s and 25 percent of reviews completed took more than six years.

In 2020, the Trump Administration's CEQ issued reforms designed to limit delays, including designating a lead agency for each review and setting deadlines to make decisions. Before these reforms ever got off the ground, however, the Biden Administration repealed some key provisions of the Trump rule and will likely make further changes in the near future.

Aside from NEPA, another bugbear for energy project approvals is Section 401 of Clean Water Act, which requires states and tribes to certify that water quality standards will be ensured for federal agencies to approve projects. In 2020, the Environmental Protection Agency (EPA) issued a final rule related to Section 401 that sought to increase certainty regarding decisions subject to the provision; specifically, it established that states and tribes would be held to a deadline for decisions and limited the factors they could consider in their review. Earlier this year, the Biden Administration's EPA proposed to repeal and replace the rule with one more like what was in place prior to 2020.

LIKELY REFORMS

In a document released in late July, Sen. Manchin outlined priorities for energy permitting reform legislation to be voted on by the end of the fiscal year. The reforms are centered

around increasing the certainty of decision timelines and creating processes for agencies to prioritize certain projects.

Regarding NEPA, the package would codify elements of the Trump Administration's 2020 rule, including designating a lead agency to coordinate interagency review and setting a timeline for review completion: two years for projects classified as major and one year for others. It also aims to "improve the process" for developing categorical exclusions under NEPA, which are classes of projects that typically will not require a substantive environmental assessment. While this language is vague, it would presumably entail making it easier to get certain actions added as categorical exclusions.

As for Section 401, the outline incorporates parts of the since-repealed 2020 rule and the Biden Administration's recent proposed rule. It would require a final action to be taken within one year, require states and tribes to set clear requirements for review, and establish that review is only on water-quality impacts from the permitted activity, among other changes.

A third provision would set a statute of limitations for court challenges to permitting decisions on energy projects. It would also require that any permitting decisions remanded (sent back to the agency) or vacated by a federal court be acted upon by the agency within six months.

Another component would require the president to designate a list of 25 high-priority energy infrastructure projects that would receive prioritized permitting review. This would help ensure that projects the president determines to be strategic energy priorities are moved along in a timely manner. The list is to be "periodically updated," which should mean that as projects are approved, others are designated to take their place. Of course, it also likely means that as a new administration takes over, the president will reconfigure the list to their political preferences.

The remaining components would clarify and expand the authority of the Federal Energy Regulatory Commission regarding hydrogen projects and electric transmission facilities and require relevant federal agencies to move quickly to approve the Mountain Valley Pipeline, an ongoing project in Sen. Manchin's home state of West Virginia.

Taken as a whole, these reforms would address some of the main drivers of permitting delays. Incorporating deadlines should incentivize agencies to make decisions, though it remains unclear what remedies will be available to applicants if a decision is late. Limiting the scope of what can be considered, as with the proposed changes to Section 401 permitting and the increase of categorical exclusions, will help focus agency resources on

reviewing only the impacts that are reasonably foreseeable. Setting a statute of limitations will help prevent the endless litigation that has become a hallmark of the federal permitting process.

What remains unclear is whether the proposed reforms, particularly for NEPA and Section 401, apply to all federal permitting review or just those pertaining to energy. If they are narrowly focused on energy, then many of the permitting challenges outlined above will continue to apply to non-energy reviews – greatly reducing the effectiveness of the potential reforms.

CONCLUSION

The energy permitting reforms proposed by Sen. Manchin would help address some aspects of the cumbersome federal permitting process. At the same time, it remains unclear if the legislative reforms, expected to be considered by late September, would be entirely focused on energy projects or if they would have broader application.