Permitting Under the Microscope in Both Congress and the Court

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Lawyers who have practices in the energy and environmental areas frequently must confront an arcane and piecemeal system of review and permitting, one that to some observers seems designed to frustrate the infrastructure build-out necessary to facilitate the transition from carbon. Clean energy developers, for example, are finding it increasingly difficult to site and build projects, from utility-scale solar plants and wind farms, to new transmission and energy storage facilities, to carbon sequestration sites and CO_2 pipelines, to low-carbon hydrogen facilities—many of which are subject to lengthy and inefficient federal, state, and local review processes, exacerbated by years of litigation.

Congress and the Supreme Court are both stepping into the fray. On the Hill, Senator Joe Manchin (I-WV) is making his last push for comprehensive permitting reform legislation—an objective he has relentlessly pursued in recent years. His latest attempt, the Energy Permitting Reform Act, was introduced in July, with Senator John Barrasso (R-WY) as a cosponsor. Importantly, the bill advanced out of committee on a bipartisan, 15-4 vote—making it the most serious, and likely final, attempt at enacting comprehensive permitting reform in the current Congress.

The need to build out infrastructure is running into strong regulatory headwinds

The bill addresses a vast array of issues, which means that an equally vast array of stakeholders are lined up on both sides. Among other things, the law would streamline judicial review processes for energy projects; accelerate and expand renewable energy siting and electric grid projects, including by streamlining the federal backstop authority for permitting national interest transmission projects; expedite the Federal Energy Regulatory Commission's consideration of liquefied natural gas export and re-export authorizations; and extend the time to commence construction of hydropower projects. Consistent with Manchin's "all of the above" energy strategy, the bill also seeks to ensure oil, gas, and coal leasing on federal lands are given priority equal to wind and solar leasing.

While the prospects of the bill passing in an extremely compressed time period may be remote, it tees up any number of important transition proposals that could be taken up by the next Congress, although Manchin will no longer be in office.

The Supreme Court, too, has its sights on infrastructure permitting, having granted certiorari in an important NEPA case at the intersection of energy and climate. *Eagle County v. Surface Transportation Board* raises the question of whether and to what extent agencies must analyze the far-reaching upstream and downstream indirect effects of energy infrastructure projects.

Under review is a D.C. Circuit decision (highlighted in a previous column), setting aside a decision by the Surface Transportation Board to approve an 80-mile rail line in Utah to connect the Uinta Basin to a national rail network. The rail line's primary purpose would be to transport waxy crude oil to refineries in Texas and Louisiana. The Court vacated the STB's order, holding that the environmental impact statement improperly ignored several types of indirect impacts, including certain upstream and downstream greenhouse gas effects.

While an agency "need not foresee the unforeseeable," the D.C. Circuit reasoned, "by the same token" the STB "cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments."

The petitioners, who want to see the D.C. Circuit reversed, argue to the Supreme Court that NEPA was never intended "to require exhaustive consideration of remote contingencies or tie infrastructure projects in endless red tape." They posit that the statute only requires analysis of environmental effects with "a reasonably close causal relationship" to the agency action, and that agencies should be able to "safely ignore far downstream potentialities in another agency's lane."

The United States, which had opposed certiorari, has weighed in on the side of the STB and the project proponents in its merits brief, albeit with a somewhat different perspective. "NEPA did not require the board to" analyze "the upstream and downstream consequences of oil and gas development in determining whether to authorize" the rail line, the solicitor general tells the Court, but this "does not mean that an agency may impose artificial restrictions on its NEPA analysis." The SG insists that an agency may not "exclude consideration of an effect merely because the agency does not directly regulate it or because other agencies share regulatory authority in the relevant arena."

The implications of this case for permitting will likely extend far beyond conventional energy and transportation projects. Argument will be heard this fall.

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