



CleanLaw 85

Quick Take: The Debt Ceiling Bill and NEPA Permitting Reform, with Hannah Perls, Carrie Jenks, and Ari Peskoe — June 8, 2023

Hannah Perls: Welcome to CleanLaw from Harvard's Environmental and Energy Law Program. I'm Hannah Perls, and in this Quick Take episode, I speak with EELP's Executive Director Carrie Jenks and Ari Peskoe, director of EELP's Electricity Law Initiative, to break down recent changes to federal permitting passed as part of the Fiscal Responsibility Act, aka the debt ceiling bill, which President Biden signed on June 3rd. Hi, Carrie. Hi, Ari.

Ari Peskoe: Hello.

Carrie Jenks: Hello.

Hannah: I think first we just want to flag for listeners, there's a lot that is in this law that we're not going to discuss today, and that includes restrictions on discretionary spending for the next two fiscal years, changes to eligibility rules for food stamps and temporary assistance for needy families, and also the expediting of federal approvals for the Mountain Valley pipeline. So again, we're not going to dive into that now. We're really going to focus on changes to NEPA, the National Environmental Policy Act, and of course transmission. So Ari, maybe we can start with you on that last one. Do you want to talk a bit about what's not in this bill?

Ari: Yeah. Great. Let's talk about transmission. So at some point in the negotiations, there was a bill that would've been a boon for transmission development that actually has nothing to do with permitting reform. So a major challenge for transmission development is pushing the utility industry to build beneficial projects or having them get out of the way and let other companies build those projects. So utilities have local transmission monopolies and they are generally eager to build new projects or refurbish old projects within their monopoly territories. Utilities have also organized themselves into about a dozen regional planning groups and they're supposed to build larger-scale projects. We've seen mixed results at best in these larger-scale regional planning processes because regional projects can expose utilities to competition and they generally don't like that.

The biggest challenge for transmission has been inter-regional projects. That is projects that connect these 12 or so regions and it's really no one's responsibility to build these inter-regional projects. And utilities generally are not in favor of them, because again, they expose utilities to competition. And so there haven't really been any significant projects. So what this bill would have done was establish a minimum level of connectedness between regions, and that would've required the industry to do quite a



lot of development, would've benefited consumers by lowering energy costs, by improving reliability. And also, this would've been key for the clean energy transition, but again, not in the bill.

Hannah: So speaking of, can you talk about what is actually in the bill and how you feel about it?

Ari: Yeah, so this minimum connectedness requirement, minimum transfer capability, instead of actually requiring that, what Congress is instead doing is ordering a study of this minimum connectedness requirement, minimum transfer capability requirement. So the bill tells NERC, which is the organization in charge of setting reliability standards, to do a study about the sort of inter-regional connections. It's a three-year-long study process. And NERC, as I said, focused on reliability, which is only part of the benefit here for these sorts of projects. So I think we'll probably get back a study that's limited in scope. There are already many studies done by the Department of Energy, the national labs, academics, advocacy organizations, the industry, et cetera, all about this very topic. So it's not clear we need another study but that's what's in the bill.

Hannah: So Congress has essentially kicked the can down the road on inter-regional transmission. In the interim, is there anything federal agencies can do with their existing statutory authority?

Ari: So FERC already has a proceeding looking at the possibility of FERC itself setting this minimum transfer capability requirements. So it's not clear how the FERC commissioners are going to view this study, whether they think it means they should wait for the study before they do anything. Certainly it doesn't require them to wait. They could take action right away. FERC has a number of other proceedings about various transmission issues. The Department of Energy also is in the process of performing various studies, planning studies about the sorts of projects that would be in the national interest. And the last thing I'll mention about all this is that both DOE and FERC are also in the process of issuing rules about how they can permit projects under authority that's in the Infrastructure Act of 2021 that they have yet to use.

Hannah: So TBD.

Ari: TBD.

Hannah: Well, maybe we can shift gears to the National Environmental Policy Act, NEPA, federal permitting. Carrie, do you want to just start with what changes stuck out to you the most?

Carrie: Yeah, I'll start with a few. I think it's important to think about what their objectives were. And I think here there's been a long debate over the past year or so of about how to make permitting go faster and how to make it more deliberate so that we know what the decisions are. So I think you're seeing some of the ideas in here to try to expedite



that process, but I think in the end, there is still a lot to be worked out. CEQ is going to have to now develop regulations to implement these statutory changes that are in this bill.

And so there's still a lot of questions. I think there's more questions than answers. But talking through a few of the things to tee up, they've clarified the relevant scope of NEPA. So they use the words "reasonably foreseeable" environmental effects of the proposed action. So that's giving additional language to the statute of what they have to look at for environmental reviews. But I don't know that it changes it that much. I think it'd be odd to think about the fact that you had to look at something that was not foreseeable.

Hannah: And that language is in CEQ's regs already?

Carrie: Exactly. Yep. So it's putting some of the regulatory and the case law into the statute. I think that's key. Another helpful addition is that the same section requires agencies to consider an analysis of negative environmental effects of not implementing the proposal. So if you think about climate change, I think this gives some grounds to maybe think about what would happen if you're not building a wind farm? What are the climate impacts of that? So that could be important also. But how do you interpret it? Who's interpreting it? Is it the courts? Is it CEQ? Which administration is in the White House? All of that's going to be really important to understand what the implications are.

Hannah: And there's a lot that this bill does on inter-agency coordination. And can you talk a bit about what is the problem that that's trying to solve and then what are the components of the bill that stood out to you on that piece in particular?

Carrie: Yeah, I think one thing to talk through is that one of the problems is that the federal government moves slowly, and so part of it is a resource issue, not having enough agency expertise to be able to move through all these projects that are before them quickly. But what they're trying to do here is to coordinate the agencies that would be involved in any one given project. So they find one they now require to name a lead agency so that there's coordination among the federal government to try to make this work better. One piece of that though is how do project proponents also engage the communities? Do you want to talk a little bit about how this would affect that?

Hannah: Sure. So community engagement, and in general, getting public feedback, in particular from communities that might be impacted by a proposed action, is a fundamental part of what NEPA is and the sort of service that it provides as part of this permitting process. I think one thing to consider before we jump into the specific changes is if you're already in the NEPA process, the project is almost fully baked, and so there's not much that community engagement can do to meaningfully change the outcome. And so I think one piece I just wanted to flag is that truly meaningful community engagement happens long



before you're really into the NEPA process and there's nothing in this bill that really encourages or discourages that early community engagement. So that is something that we need to keep our eye on but it's not something that is changed by this bill in particular.

There are changes to specific parts of NEPA. One big area is categorical exclusions. These are categories of projects that are not required to go through an environmental assessment or environmental impact statement process because the agencies have determined that these projects normally don't have a significant effect on the environment. And they've really been in use since the late 1970s. And each agency has their own rule about how to determine if a categorical exclusion would apply to a particular project or how to adopt a new categorical exclusion. I know this is a lot of words but I think it's important just to think through how these things work before we dive into what the bill changed. The other piece to note is that when an agency adopts a new categorical exclusion, they have to go through notice and comment. So there is this public comment process that's baked into that.

What this bill does is it takes a change that was made in 2020 by the Trump administration and makes it law. So an agency now can, if it wants, adopt a categorical exclusion from another agency. So if the Forest Service has a categorical exclusion for a particular type of project and the USDA wants to do that, they can essentially borrow the categorical exclusion from the Forest Service. Again, this is a "may," but there's no public comment process that would go along with that borrowing. I think the question for us is just thinking through what is the consequence. I think in one situation we could see that's a really efficient thing to do. One example is thinking about prescribed burns before wildfire season. That's not something you want agencies to take a long time to ponder, especially if it's over a minimal geographic scale. And there is guidance from CEQ that's still in effect that really delineates the boundaries of what a categorical exclusion can be.

It has to be limited, often in time. It might be limited if there's critical habitat in the area. And of course, categorical exclusions don't get you out of other types of environmental laws. So I'm thinking about the National Historic Preservation Act, the Endangered Species Act, things like that. That said, you could see a world in which this provision is abused. And so I think it's going to be really interesting to see how CEQ interprets this provision that's now in statute as part of their phase two rules. So that was a lot on categorical exclusions but I think that's one piece that people are really thinking a lot about. The other pieces that I would just flag are the page and the time limits. So the statute explicitly says that the EIS should be no more than 150 pages, environmental assessment, no more than 75 pages. If it's an extraordinarily complex project, no more than 300.

But that does not include citations and appendices. And if anyone knows lawyers, they know we love our citations. So I think the practical effect is that we're going to see these



environmental documents that have the same amount of content. It's just moved to the back. I don't think this changes what we'll see in these documents. There are new time limits in the law. So an EIS should take no more than two years, an environmental assessment, no more than one year. And there is a piece now where there's a way to petition a court to review agency decisions if they don't meet their deadlines. And so again, I think now we're looking at what does it mean to involve the courts in this way? Do the agencies have the capacity to meet these timelines? There are back doors where an agency can request more time but really the devil will be in the details.

Carrie: So why do this? We keep saying it depends on who's implementing it. Does it make a difference? I guess my take, and I'm curious what you both think, is that it can make a difference. It can force the government to make decisions. And if they have good information in front of them, they can make better decisions. And it makes everyone sit at the table and work it out. It can also make, on the other side of the spectrum, a rushed decision and then you end up with a bad decision. So do we think this is a good thing, a bad thing?

Hannah: Yeah. I mean, I think it depends on what is the source of the delay. If it is just agencies aren't talking to each other and they need to be talking to each other and this is how you're going to get them to the table, that's great. If it's "there's a real scientific question mark here and we need the time to really think it through and do assessments and figure out the answer, or we just don't have the expertise and the staffing capacity that we need to do this in a thorough, methodical way," a core decision is not going to give you the money you need to hire more staff. So I think the question is what is the problem? If it's a solvable problem, just by kicking people in the butt, great. But if it's bigger than that, I don't see a solution here. Ari did you want to say anything about the deadlines?

Ari: Well, I mean, I think on the transmission side, federal permitting is not usually the major obstacle, but when it is, we have recent projects where the federal permitting process can take five, 10 years, even longer than that. So I just wonder, will these deadlines really provide the certainty that project developers really want that might actually encourage more projects? If they knew they would get the yes or no within a year or two or whatever it is, then I think we might actually see at least proposals. But if it doesn't really provide that certainty, if there's still contingencies, then maybe not. I think we'll want to see a couple of test projects go through the process before maybe the developers feel really confident about how this is going to work.

Carrie: Well, maybe talk about the FAST Act, the amendments to the energy storage there, because there is a process for the federal government to have more accountability and to move big projects faster, and they've added energy storage to that list of types of projects. Do you think that those are helpful?



- Ari: I'm just not sure how effective it's been for transmission at actually getting it done in a timely manner, even when it goes through that process. But again, we have a limited number of projects that have gone through them and I think they've still taken several years.
- Carrie: Yeah. And I think the one thing that I hear from companies trying to build clean energy projects is that they just need an answer. A faster path to get to no is very helpful, even though it's a no, because the financing is tied up on timing and trying to get good answers from the government is what they're doing. But maybe shift to the project proponent EISs and what that means.
- Hannah: Sure. Really quick on the deadlines, I just wanted to make one implicit thing explicit, which is we haven't talked about community engagement as a source of delay. I think there's been a lot of noise made that community engagement takes a really long time, slows projects down, and that's really not what the agencies tell us. And there was a great hearing about NEPA, we can link to that hearing in the show notes. But when we talk about cutting down on these timelines, it's not about cutting back on community engagement. It's really trying to find the efficiencies and building out agency capacity to get the information they need and share it effectively amongst themselves.
- Carrie: And I think you made the right point or really helpful point that the community engagement needs to happen before the NEPA process happens so that you can go through the NEPA process in a very efficient way, but you've really engaged the community so that they are part of that project. And both sides have revised the project so that it's a project that actually can work.
- Hannah: Right. The last thing I wanted to touch on is project proponent prepared EISs. That's a lot of Ps. But there is a provision now in the law that says the lead agency, so the agency that's heading up this NEPA process shall, so it's a mandate, prescribe procedures that allow the project sponsor to prepare the EA or the EIS under the supervision of the agency. There's also pieces where the federal agency can provide appropriate guidance and can assist in the preparation of that document and also has to independently evaluate the document and take responsibility for its contents, meaning defend it in court. So again, I think this is a situation where we see federal agencies that are incredibly strapped.
- If the project sponsor does it well and in a transparent way that the lead agency really kicks the tires on that assessment and says, "No, we identify a gap," and they send it back. And you're able to use the resources of the project sponsor to get this robust study done. I think that's really effective. And of course, there is a lot of skepticism that this is a backdoor for companies to pull the wool over the eyes of the federal government. The federal government doesn't have the capacity to look at it in a critical way. And I think there's concerns about abuse. So again, I think this is just a situation where we'll have to see what are the guidelines that CEQ sets out for this particular



process? Does the agency have the capacity to review those documents? And what does that mean when we actually look at these documents in litigation?

Carrie: Right. And I think perspective matters. I think you want the federal agencies to have the expertise to review the projects and the documents that are submitted. You want the project proponents to have the certainty and be able to have the resources to hire the best experts that are credible and transparent. And you also want the courts to be able to look at that and defer to the agencies. All of those though have a ton of risks in them depending on who's doing what and who's reviewing them. And you need the agencies to have the expertise and that requires resources and time and budget. And those have been a challenge in history.

Hannah: Maybe that's a good transition to talking about the addition of reliable data source and the types of information the agency should use. Do you want to talk about that?

Carrie: Yeah. So they added in new language that says that the agencies may use any reliable data source and that new research is not necessary unless new scientific or technical research is essential to a reasoned choice among the alternatives. It makes sense that if there's good data out there, you should be able to rely on it. You don't have to repeat and do new science. But what does reliable data mean? Science and what does science mean? We've seen that go back and forth with the courts under the Trump administration. And so it makes people nervous, but at the same time, if you do it with good faith, that makes sense to me too. So it depends, again, who's implementing it.

Hannah: So we alluded to the phase two rule. So CEQ decided to split its rulemakings under NEPA. They issued a phase one rule that rolled back some of the most important parts of the Trump 2020 rule and promise to get to the rest of it in a phase two rule. That rule has been sitting with OIRA at the Office of Management and Budget since January 30th of this year. What is likely going to happen is that CEQ will now withdraw that proposal and have to redo the proposal given all of these changes to NEPA. And I think it is the first time that NEPA's been significantly amended since it was passed. So it really is significant as a moment in time, even if the changes themselves aren't a massive overhaul of the statute. So we'll likely see CEQ withdraw and re-send a new proposal to OIRA. The question is, of course, when all of this happens, they'll have to get public comment and ultimately finalize that rule.

Carrie: I think it's important though to think through many of these concepts were probably in the regulations that they were drafting. These are new ideas. I think they were thinking through how do they start to evaluate climate change impacts? What is reasonably foreseeable? How do you rely on the best data? How do you make the process work better? Page limits, time limits, they were all things that were being discussed. So I think it'll be interesting to see now they can rely on the statute for that authority but they're still going to have to interpret what does reasonably foreseeable mean? And these terms that are now in here, how do they start to implement them and have some



guardrails, as you've talked about, to make sure that they are done well and thoughtfully?

Hannah: And I think the other part that folks are obviously aware of is it does set up a question for the courts to assess whether that interpretation is correct in the eyes of the court. So again, it depends on who's interpreting that language, and that's just something we'll have to wait and see. Well, Carrie, Ari, thank you so much for breaking down the Fiscal Responsibility Act of 2023. It was great to talk with you.

Hannah: One part of the Fiscal Responsibility Act of 2023.

Carrie: Thanks.

Ari: Thank you.