Analysis of the Energy Permitting Reform Act of 2024

S.4753, the "Energy Permitting Reform Act of 2024," would modify numerous federal laws relating to energy production and transmission regimes. Earthjustice has reviewed the bill in detail. In summary:

- Section 101 of the bill limits judicial review of a broad category of federal actions related to energy and mining projects by, among other things, substantially reducing the statute of limitations for challenging such actions.

- Sections 201-203 of the bill aim to expand onshore oil and gas development on public lands through various mechanisms. For example, they would make the government's ability to lease public land for renewable energy development even more contingent on the government's decisions to hold oil and gas lease sales for locations specifically identified by oil and gas companies.

- Section 210 of the bill would significantly expand the ability of mining companies to claim and use lands beyond the bounds of their mining claims. For instance, it would allow mining companies to claim a potentially unlimited number of five-acre parcels of land adjacent to their mining claims for use as mining waste disposal sites.

- Section 301 of the bill would remove many limits on offshore oil and gas leasing that are contained in current law. Notably, it would override the existing five-year plan for offshore oil and gas leasing, erasing the limits and protections of that plan. In place of the deleted plan, the bill would require the government to hold at least one large annual offshore lease sale for the remainder of this decade and give it the ability to hold as many more sales as it chooses, without prior planning.

- Sections 401-402 of the bill would facilitate expansion of transmission infrastructure, which is needed to bring clean energy generation online and cut power sector emissions. Among other things, these provisions expand FERC's authority to permit transmission lines and direct FERC to issue a rule requiring interregional transmission planning and cost allocation.

- Section 501 of the bill creates a process that requires the North American Electric Reliability Corporation to issue reports on the reliability impacts of proposed agency regulations.

- Sections 601-602 of the bill would encourage increased liquefied natural gas production and export. These sections would do so by, among other things, setting a 90-day timeline for DOE's approval of proposed exports, backed up with an automatic approval process that could preclude any possibility of judicial review.

We provide our more detailed analysis below.

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Judicial Review

[Title I, Section 101]

Section 101 of the Manchin-Barrasso bill would, among other things, (1) significantly reduce the statute of limitations for challenges to a broad category of federal actions related to energy and mining projects; and (2) require courts that remand such actions to set a deadline of 180 days for the agency to take a new action. Specifically, it would:

- Shorten the statute of limitations for challenges to agency decision: The bill would shorten by more than 90 percent the deadline by which plaintiffs must bring a court challenge to many lease sale and permitting decisions relating to energy, carbon storage, or mining projects. The bill would shorten the statute of limitations for challenging such actions from the current 6 years to just 150 days.

  Impacted communities, particularly those with limited access to legal resources, often do not learn of agency decisions that affect them until well after they occur, and they often face difficulties in obtaining legal representation. A 150-day limitations period therefore is likely to bar many legitimate legal claims. Paradoxically, short limitation periods can also increase litigation because plaintiffs file lawsuits immediately to preserve potential legal claims instead of initially pursuing less adversarial tactics.

- Expedite certain cases and set remand deadlines: The bill also orders federal courts to expedite review of certain cases and, when remanding agency actions, to set a 180-day deadline for agency action. That deadline is unrealistic for many important and complex agency actions and will lead either to rushed decision-making or industry lawsuits aimed at enforcing the unrealistic deadlines.

Onshore Oil & Gas Leasing

[Title II, Sections 201-203]

The Manchin-Barrasso bill would foster increased drilling for oil and gas on public lands. It would effectively transfer significant authority from the federal government to the oil and gas industry to determine which federal lands should be offered for oil and gas leasing, and it would limit the federal government's ability to protect public lands, wildlife, and water from harm caused by oil and gas development. Among other things, it would:

- Tighten the IRA prohibition against issuing renewable energy rights of way without a certain amount of recent onshore oil lease sales, effectively allowing the oil and gas industry to determine which federal lands are offered for oil and gas leasing: For a ten-year period commencing in 2022, the Inflation Reduction Act (IRA) prohibits the Bureau of Land Management (BLM) from issuing rights-of-way for wind or solar energy development on federal land unless it has offered a certain number of acres of federal land for oil and gas leasing during the previous year. 43 U.S.C. § 3006(b)(1)(B). Under current law, BLM has wide discretion to determine which lands to offer for leasing in order to satisfy this linkage provision. The Manchin-Barrasso bill (§ 201(a)) would make

the IRA linkage provision more restrictive by requiring BLM to offer for oil and gas leasing much or all of the acreage nominated for leasing by oil and gas companies. This new provision would transfer much of the control over deciding which federal lands are leased for oil and gas from BLM to the oil and gas industry, since BLM would have to embrace at least some of the industry's selections of specific federal lands for oil and gas leasing if it wants to approve renewable energy projects on federal land. Under the terms of the bill, industry could force BLM to offer millions of acres selected by industry for oil and gas leasing as a prerequisite for approving renewable energy projects.

- Limit protective conditions that could be attached to oil and gas leases: The Manchin-Barrasso bill (§ 201(b)(1)) would limit the protective terms and conditions BLM could include in new oil and gas leases to those prescribed by the applicable resource management plan (RMP). RMPs often remain in effect for decades, and the terms in a given plan can be many years out of date. This new provision would therefore preclude BLM from addressing changed conditions and novel environmental threats when selling oil and gas leases. For example, if new science shows that a species is declining due to the impacts of certain oil and gas drilling practices, the bill appears to prohibit BLM from inserting terms in new leases aimed at prohibiting those practices, unless the relevant RMP—which could be decades old—called for those same terms.
  The bill would also allow BLM to continue offering oil and gas leases under old RMPs while the agency is in the (often-delayed) process of revising those plans. This provision would likely lead to more leases being issued under outdated RMPs even where BLM believes that those plans fail to reflect current conditions. Especially in an anti-environment administration, it would also create strong incentives for BLM to delay or stop updating outdated RMPs in order to avoid doing anything that might lead to new, protective conditions on oil and gas leases.

- Remove protections against harm from horizontal drilling to access federal oil and gas: Horizontal drilling techniques allow oil and gas companies to access federally owned oil and gas from wells located miles away on non-federal land. Under current law, a well operator must obtain a federal permit to access that federal oil and gas. The Manchin-Barrasso bill (§ 203) would remove that federal permitting requirement in many circumstances, which would in turn remove the federal government's ability to impose conditions on the drilling aimed at protecting the environment. For example, the federal government regularly includes provisions in drilling permits that are aimed at protecting drinking water aquifers (such as requirements for well casings). By allowing operators who start their wells from private land to avoid such permitting requirements, the Manchin-Barrasso bill would make it harder for the federal government to protect water, wildlife, air quality, and other environmental values on federal lands.

- Extend the life of oil-and-gas drilling permits: The Manchin-Barrasso bill (§ 202) would extend the life of oil-and-gas drilling permits from three years to four years. This

extension would apply retroactively to all existing permits that are less than two years old as well as to new permits. This provision would effectively expand the industry's already large stockpile of approved permits; oil and gas companies currently hold more than 6,600 of such permits that they have not used.

Hardrock Mining Mill Sites

[Title II, Section 210]

The Manchin-Barrasso bill creates a loophole that could allow companies to claim indefinite amounts of public land beyond their mining claims (as "mill sites") where they can process and dispose of mine tailings and waste. It would also weaken, if not negate, certain safeguards that have limited the damage to public land caused by mining development. According to current law, operators must first prove that there are in fact valuable minerals on a mining claim before they gain the right to conduct large-scale operations on those claims. Operators also cannot conduct operations outside of the area designated by a mining claim without obtaining additional permits, including for infrastructure such as pipelines and roads for the mine. Section 210 appears to remove both requirements, which have served a critical role in protecting public lands from overexploitation. Specifically, it would:

- Remove limitations on how much federal land could be used as a dumping ground by mining companies: The 1872 mining law allows companies to claim five acres of public land adjacent to their mining claims as "mill sites" where they can process and dispose of left over materials and waste. The new language effectively eliminates the five-acre restriction by amending the law to allow companies to claim as many mill sites as they contend are "reasonably necessary" for their mining operations. Because modern mining operations generate enormous amounts of waste rock and tailings, this could turn a 150-year-old provision for "mill sites" into a license for mine operators to deposit mine tailings on hundreds or thousands of acres of public land. Some companies have already advanced this theory in court; cementing it into the law would remove any meaningful limits on mill site claims and eliminate the requirement that mill sites be located only on non-mineral land, which prevents mine operators from burying valuable mineral deposits under waste rock.

- Allow mining companies to expand operations on other public lands without securing additional permits: Section 210(a)(c)(1)(B) would codify a regulation (43 C.F.R. 3809.5) that defines all activities related to mining "operations," even if they are not located directly on the mining claim. The government and mining industry have previously argued that this regulation gives mining companies a limitless right to conduct operations (such as building pipelines, roads, and transmission lines) on public lands beyond the boundaries of the mining claim. Though courts have rejected that argument, the proposed legislation arguably sanctions it, giving mining companies free rein to conduct a wide variety of activities on federal lands outside of the mining claim area without obtaining the necessary permits and rights-of-way that protect the environment and cultural sites.

These permits have been required for every industrial user of public lands since the passage of the Federal Land Policy and Management Act (FLPMA) in 1976; this bill could create an exemption that applies only to mining companies.

- Section 210(a)(c)(8)(D) states that mining companies still have to prove that there are valuable mineral deposits on claims within lands that have been withdrawn from mining prior to conducting operations. However, the exclusion of similar language for claims on unwithdrawn lands could be read by a court to imply that such checks are no longer needed for claims on unwithdrawn lands, which make up the vast majority of most public lands.

- Section 210(b) also establishes an abandoned hardrock mine fund to clean up federal, state, tribal, or private land and waters impacted by mining. Rather than funding it with new fees or royalties, the bill only designates the miniscule annual filing fees companies already pay for mill sites for that purpose. This will come very short of the estimated $54 billion it will take to clean up all the abandoned mines that mining companies have left across our country.

Offshore Oil & Gas Leasing

[Title III, Section 301]

The Manchin-Barrasso bill's provisions on offshore oil and gas leasing would remove limits on offshore leasing contained in current law. It would make it easier for an anti-environment administration to expand offshore oil development, and it would make it harder for a pro-environment administration to prioritize clean energy development, reform the offshore oil program, or scale back offshore oil development. Among other things, it would:

- Remove limits on offshore oil leasing under current law: The Outer Continental Shelf Lands Act (OCSLA) has long barred the Interior Department from offering an offshore oil lease sale unless the sale is specified in the Department's current five-year leasing program ("five-year plan"). OCSLA also gives Interior broad discretion to cancel lease sales scheduled in a five-year plan or to shrink the size of the sales.

  The bill contains (§ 301(a)) a provision that explicitly overrides the existing five-year plan, which provides for a maximum of three offshore oil and gas lease sales through 2029. In its place the bill mandates at least five lease sales during the same period, at least one per year from 2025 to 2029, with each sale required to offer at least 60 million acres for lease. The bill thus sets a floor but no ceiling; it would allow an anti-environment administration to schedule as many additional sales as it chooses, with no constraints on their location or size.

  This change would eliminate a significant limit on unchecked offshore oil leasing. For example, in 2017, the Trump administration proposed to expand offshore oil development to new areas that have never seen oil and gas production, such as the Arctic and Atlantic

Oceans. Under the OCSLA, however, the administration first had to revise the then-existing five-year plan, which only provided for lease sales in the Gulf of Mexico and a small area off the south coast of Alaska. That process proved challenging for the administration, in part because it was required to give affected states, Congress, and the public a chance to provide input on changing the five-year plan. The administration's inability to issue a new plan derailed its attempts to radically expand oil and gas leasing.

- Expand the IRA's requirements for extensive offshore oil leasing: For a ten-year period commencing in 2022, the IRA prohibits the Interior Department from issuing offshore wind leases unless it offers at least 60 million acres worth of offshore oil and gas leases in the preceding one-year period. 43 U.S.C. § 3006(b)(2). The Manchin-Barrasso bill (§ 301(b)(1)) contains a provision that refers to this IRA mandate and requires the Interior Department to "conduct offshore oil and gas lease sales of sufficient acreage to meet the conditions described in . . . 43 U.S.C. § 3006(b)(2)." If enacted, this ambiguous provision could give the oil industry two reasons to argue that the Manchin-Barrasso bill expands the IRA's requirement for offshore oil leasing. First, since the Manchin-Barrasso provision contains no reference to the ten-year limitation contained in the IRA, the industry might argue that the new legislation deletes the IRA's ten-year limit and makes the leasing-acreage requirement permanent. Second, since the Manchin-Barrasso provision mandates oil lease sales of sufficient acreage to meet the IRA's requirements but does not explicitly link that leasing-acreage requirement to Interior's ability to issue offshore wind leases, the oil industry might argue that the Manchin-Barrasso bill requires Interior to meet the IRA's acreage requirements for oil leasing regardless of whether it intends to issue offshore wind leases. Either of these arguments, if successful, would significantly expand the IRA's offshore oil and gas leasing mandates.

- Give the Interior Department less flexibility in issuing wind leases: As mentioned above, the IRA prohibits the Interior Department from issuing offshore wind leases unless offshore oil lease sales offering at least 60 million acres for lease have been held in the year prior to issuance of the wind leases. The Manchin-Barrasso bill would make this linkage even more restrictive. Under current law, there is no deadline after a wind lease sale for Interior to issue a wind lease. That allows the Interior Department, after a wind lease sale, to delay issuing a wind lease until it conducts a qualifying offshore oil lease sale. The Manchin-Barrasso bill (§ 302(a)(2)) would establish a new, 90-day deadline for issuing an offshore wind lease after a lease sale, which would remove Interior's ability to issue wind leases if a qualifying offshore oil lease sale occurs more than 90 days after a wind lease sale.

- Restrict agency discretion to attach environmentally protective conditions to offshore oil leases: The Manchin-Barrasso bill removes agency discretion that could be used under current law to reform the federal offshore oil program. For example, one route to reform would be to include environmentally protective conditions in leases issued in future oil and gas lease sales. The bill would prohibit the addition of any such conditions for the

remainder of this decade and instead mandate that leases be issued under the same terms as they have previously (§ 301(b)(2)).

- Remove agency discretion to reject offshore oil lease bids: Under current law, the Interior Department has considerable discretion not to issue offshore oil leases to individual bidders after a lease sale. The Manchin-Barrasso bill (§ 301(b)(3)) would impose a new requirement that Interior issue offshore oil leases to any qualified bidder within 90 days after a lease sale, removing the Department's existing discretion to reject such bids.

Electric Transmission

[Title IV, Sections 401-402]

The transmission provisions in the Manchin-Barrasso bill would facilitate the expansion of transmission infrastructure, which is needed to bring clean energy generation online and cut emissions in the power sector. The bill expands FERC's authority to permit transmission lines and directs FERC to issue a rule requiring interregional transmission planning and cost allocation. It also codifies the cost allocation principle of "beneficiary pays" and provides a non-exhaustive list of transmission benefits that must be considered. Specifically, it would:

- Expand FERC's authority to permit transmission lines: Section 401 amends the Federal Power Act (§ 216) by expanding FERC's backstop authority to permit transmission lines. Section 401 would allow FERC to issue permits to build or modify certain transmission facilities (100 kV +) that it determines to be "in the national interest" if a state has not issued a permit decision within a year. This section effectively replaces DOE's National Interest Electric Transmission Corridor (NIETC) designation process and FERC's current backstop authority within that NIETC framework. FERC's permitting authority under this section applies to FERC jurisdictional and non-FERC jurisdictional entities, except the Electric Reliability Council of Texas. Although the NIETC process is replaced, DOE would still be required to perform a triennial study of the congestion and capacity limits of the nation's grid.

  Eliminating the NIETC designation process and providing FERC with broader permitting authority would improve the timelines for building new transmission infrastructure and allow for easier disbursal of funds that are currently available only for projects in NIETCs. However, without the NIETC process, DOE has limited ability to prioritize funding to maximize the public interest, taking into consideration factors such as conservation and equity.

- Require FERC to issue an interregional transmission planning and cost allocation rule: Section 402 adds a new section to the FPA (§ 225) that directs FERC to issue an interregional transmission planning and cost allocation rule within 180 days. The rule would require neighboring transmission planning regions to jointly plan using criteria aimed at helping consumers and improving reliability ("improved reliability" is a term defined in the newly added FPA § 225) and to identify a method for allocating the cost of

interregional lines identified in the planning process. Planning regions would have to file interregional plans with FERC every four years and FERC must act on them (a departure from the role FERC currently plays with respect to regional planning, and one that would likely require more staff capacity).

Section 225 would help spur the development of interregional lines. It is possible – perhaps even likely – that FERC would issue an interregional planning rule in the absence of this provision, but specifically requiring FERC to do so would ensure that it happens and reduce litigation risk. (Some have raised concerns about FERC's authority to issue such a rule; we believe those concerns are unfounded, but this provision would eliminate any doubt.) Section 402 also extends interregional planning requirements to non-FERC jurisdictional entities except ERCOT.

- Identify transmission benefits and clarify cost allocation principles: Sections 401 and 402 address issues relating to the costs of transmission projects. Section 401 requires transmission providers who allocate the costs of projects arising from the interregional planning process to do so based on the cost-causation principle. That principle requires those who benefit from a transmission project to pay their proportional share of its cost. Section 401 provides a non-exhaustive list of the kinds of benefits that regulators must consider in allocating project costs, including increased reliability and carrying capacity, reduced congestion and power losses, improved operating reserve margin requirements, and access to lower cost generation. These cost allocation provisions should help important projects move forward, because disagreements about cost allocation can cause delays. Section 402 clarifies that utilities can recover costs related to community benefits agreements, which could increase the likelihood of utilities entering into such agreements.

Electric Reliability

[Title V, Section 501]

Section 501 of the Manchin-Barrasso bill creates a process for requiring the North American Electric Reliability Corporation (NERC) to issue reports on the grid reliability impacts of proposed agency regulations.

Whenever FERC determines–either on its own motion or in response to a request from state commissions, federal agencies, or impacted transmission organizations—that any federal agency's rule, regulation or standard will likely harm electric reliability (by violating a FERC-approved tariff requirement, resource adequacy process, or mandatory reliability standard), the Commission must order NERC to assess the impacts of the proposed federal action on grid reliability (including accounting for available mitigation strategies and the technical views of the affected transmission organizations). NERC must publish its report, provide it to FERC, and submit it in the administrative record for the proposed agency action.

There is no deadline by which the NERC must file its report in the agency docket, though section 501 notes that NERC should do so within the agency comment period if practicable. This

provision could potentially slow or chill action by a wide range of agencies including agencies charged with regulating the environment.

Liquefied Natural Gas Exports

[Title VI, Sections 601-602]

The Manchin-Barrasso bill would encourage increased liquefied natural gas (LNG) exports and domestic gas production. It would limit the federal government's ability to meaningfully review LNG export applications and create an automatic approval mechanism that insulates export approvals from judicial review. The bill's provisions would also make it harder for DOE to build a record needed to support a finding that exports are not in the public interest. Specifically, it would:

- Set a 90-day review period for LNG export applications and automatic approval: Section 3 of the Natural Gas Act requires that DOE approve exports to non-free trade countries unless there is a showing that allowing that export would be contrary to the public interest. The Act does not currently include a deadline by which DOE must act under Section 3, either for new applications or for applications to extend the time to start exporting under existing applications. For new applications to non-free trade countries, DOE currently conducts a supplemental NEPA review (assessing upstream and downstream impacts) after FERC completes its NEPA review and issues its decision on approval of the export terminal. After DOE conducts its NEPA review (and even if it does not conduct one, as was DOE's practice in fossil fuel-friendly administrations), DOE assesses whether exporting the proposed additional volume is inconsistent with the public interest.

  The Manchin-Barrasso bill dramatically limits DOE's review and approval process by imposing a decision deadline that is: (i) 90 days from the bill's enactment for pending applications where FERC has completed its environmental analysis of the relevant export terminal; (ii) 90 days from FERC's issuance of a final environmental review for any new export terminal applications; (iii) 90 days from the issuance of a draft environmental review for any new applications to re-export through Canada or Mexico; or (iv) 90 days from the date of the application for any requests to extend the life of an existing export authorization.

  For new applications to export, requiring DOE to decide whether gas export plans are in the public interest within 90 days of FERC's NEPA review would significantly restrict the scope of the public interest analysis. Notably, FERC currently does not evaluate upstream or downstream environmental impacts of gas export decisions in its NEPA review. DOE could not itself compile a meaningful analysis of those impacts within 90 days, which likely means that it would have to approve the export application without fully understanding its environmental consequences. Even worse, the bill's language would automatically approve export applications if DOE does not act within 90 days—regardless of the reason. This would create perverse incentives: during a fossil fuel friendly administration, DOE might intentionally avoid examining the environmental

consequences of export plans at all and rely on automatic approval instead. Similarly, industry applicants might choose to give DOE the bare minimum of information about the environmental impacts of their planned exports, knowing that DOE would struggle to deny their export applications before the 90-day period elapsed.

The 90-day deadline could also frustrate meaningful judicial review. On the one hand, it would be extremely difficult for DOE to compile an administrative record adequate to support denying a gas export application within 90 days. That would make it easy for industry claimants to challenge such a denial. On the other hand, if DOE were to affirmatively approve an export application, the bill could make it difficult to challenge the approval; industry could argue that the bill's 90-day deadline for action forecloses the possibility of remanding the decision for further proceedings.

For new applications to re-export through Mexico and Canada, the issues are the same, but the bill keys the 90-day period to the availability of "each draft" NEPA document, compounding the problem even further. For applications to extend export authorizations, the bill limits DOE's time to 90 days from when it receives the application, which eliminates DOE's ability to do any supplemental NEPA review and significantly limits DOE's ability to do a meaningful public interest determination that considers changed circumstances or other relevant factors.

- <u>Require DOE to use outdated environmental and economic studies to evaluate applications</u>: DOE paused its consideration of LNG approvals in January 2024 based on a recognition that the environmental and economic impact analyses it uses in making its determinations are outdated and fail to adequately analyze the harms to local communities. DOE is currently updating its studies and conducting an environmental justice analysis.

  Together with imposing deadlines aimed at undoing DOE's "pause" and forcing the agency to make export approval decisions on a shorter timeline, the Manchin-Barrasso bill explicitly requires DOE to base those decisions on the very economic and environmental impact analyses the agency concluded were flawed. This would force the agency to act in a way that is contrary to science and good government.