

S.L.C.
Shelley Moore Capito

AMENDMENT NO. _____ Calendar No. _____

Purpose: To expedite consideration of permits and provide regulatory certainty for infrastructure and energy projects.

IN THE SENATE OF THE UNITED STATES—117th Cong., 2d Sess.

AMENDMENT N^o 5383

To By Capito _____ Con.
To: Amndt. No. 5194 _____
Re: _____ and
_____ and
Page(s) 22

GPO: 2010 63-070 (mac)

AMENDMENT intended to be proposed by Mrs. CAPITO to the amendment (No. 5194) proposed by Mr. SCHUMER

for herself and Mr. Inhofe

Viz:

- 1 At the end of title VI, add the following
- 2 **Subtitle F—Regulatory Authority**
- 3 **SEC. 60601. CODIFICATION OF NEPA REGULATIONS.**

4 The revisions to the Code of Federal Regulations
 5 made pursuant to the final rule of the Council on Environ-
 6 mental Quality titled “Update to the Regulations Imple-
 7 menting the Procedural Provisions of the National Envi-
 8 ronmental Policy Act” and published on July 16, 2020
 9 (85 Fed. Reg. 43304), shall have the same force and effect
 10 of law as if enacted by an Act of Congress.

1 **SEC. 60602. PROVIDING REGULATORY CERTAINTY UNDER**
2 **THE FEDERAL WATER POLLUTION CONTROL**
3 **ACT.**

4 (a) **WATERS OF THE UNITED STATES.**—The defini-
5 tions of the term “waters of the United States” and the
6 other terms defined in section 328.3 of title 33, Code of
7 Federal Regulations (as in effect on January 1, 2021),
8 are enacted into law.

9 (b) **CODIFICATION OF SECTION 401 CERTIFICATION**
10 **RULE.**—The final rule of the Environmental Protection
11 Agency entitled “Clean Water Act Section 401 Certifi-
12 cation Rule” (85 Fed. Reg. 42210 (July 13, 2020)) is en-
13 acted into law.

14 (c) **CODIFICATION OF NATIONWIDE PERMITS.**—The
15 Nationwide Permits issued, reissued, or modified, as appli-
16 cable, in the following final rules of the Corps of Engineers
17 are enacted into law:

18 (1) The final rule of the Corps of Engineers en-
19 titled “Reissuance and Modification of Nationwide
20 Permits” (86 Fed. Reg. 2744 (January 13, 2021)).

21 (2) The final rule of the Corps of Engineers en-
22 titled “Reissuance and Modification of Nationwide
23 Permits” (86 Fed. Reg. 73522 (December 27,
24 2021)).

1 **SEC. 60603. PROHIBITION ON USE OF SOCIAL COST OF**
2 **GREENHOUSE GAS ESTIMATES RAISING GAS-**
3 **OLINE PRICES.**

4 (a) IN GENERAL.—In promulgating regulations,
5 issuing guidance, or taking any agency action (as defined
6 in section 551 of title 5, United States Code) relating to
7 the social cost of greenhouse gases, no Federal agency
8 shall adopt or otherwise use any estimates for the social
9 cost of greenhouse gases that may raise gasoline prices,
10 as determined through a review by the Energy Informa-
11 tion Administration.

12 (b) INCLUSION.—The estimates referred to in sub-
13 section (a) include the interim estimates in the document
14 of the Interagency Working Group on the Social Cost of
15 Greenhouse Gases entitled “Technical Support Document:
16 Social Cost of Carbon, Methane, and Nitrous Oxide In-
17 terim Estimates under Executive Order 13990” and dated
18 February 2021.

19 **SEC. 60604. EXPEDITING PERMITTING AND REVIEW PROC-**
20 **ESSES.**

21 (a) DEFINITIONS.—In this section:

22 (1) AUTHORIZATION.—The term “authoriza-
23 tion” means any license, permit, approval, finding,
24 determination, or other administrative decision
25 issued by a Federal department or agency that is re-
26 quired or authorized under Federal law in order to

1 site, construct, reconstruct, or commence operations
2 of an energy project, including any authorization de-
3 scribed in section 41001(3) of the FAST Act (42
4 U.S.C. 4370m(3)).

5 (2) ENERGY PROJECT.—The term “energy
6 project” means any project involving the exploration,
7 development, production, transportation, combus-
8 tion, transmission, or distribution of an energy re-
9 source or electricity for which—

10 (A) an authorization is required under a
11 Federal law other than the National Environ-
12 mental Policy Act of 1969 (42 U.S.C. 4321 et
13 seq.); and

14 (B)(i) the head of the lead agency has de-
15 termined that an environmental impact state-
16 ment is required; or

17 (ii) the head of the lead agency has deter-
18 mined that an environmental assessment is re-
19 quired, and the project sponsor requests that
20 the project be treated as an energy project.

21 (3) ENVIRONMENTAL IMPACT STATEMENT.—
22 The term “environmental impact statement” means
23 the detailed statement of environmental impacts re-
24 quired to be prepared under the National Environ-
25 mental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

1 (4) ENVIRONMENTAL REVIEW AND AUTHORIZA-
2 TION PROCESS.—The term “environmental review
3 and authorization process” means—

4 (A) the process for preparing for an energy
5 project an environmental impact statement, en-
6 vironmental assessment, categorical exclusion,
7 or other document prepared under the National
8 Environmental Policy Act of 1969 (42 U.S.C.
9 4321 et seq.); and

10 (B) the completion of any authorization
11 decision required for an energy project under
12 any Federal law other than the National Envi-
13 ronmental Policy Act of 1969 (42 U.S.C. 4321
14 et seq.).

15 (5) LEAD AGENCY.—The term “lead agency”
16 means—

17 (A) the Department of Energy;

18 (B) the Department of the Interior;

19 (C) the Department of Agriculture;

20 (D) the Federal Energy Regulatory Com-
21 mission;

22 (E) the Nuclear Regulatory Commission;

23 or

24 (F) any other appropriate Federal agency,
25 as applicable, that may be responsible for navi-

1 gating the energy project through the environ-
2 mental review and authorization process.

3 (6) PROJECT SPONSOR.—The term “project
4 sponsor” means an agency or other entity, including
5 any private or public-private entity, that seeks ap-
6 proval from a lead agency for an energy project.

7 (b) TIMELY AUTHORIZATIONS FOR ENERGY
8 PROJECTS.—

9 (1) IN GENERAL.—

10 (A) DEADLINE.—Except as provided in
11 subparagraph (C), all authorization decisions
12 necessary for the construction of an energy
13 project shall be completed by not later than 90
14 days after the date of the issuance of a record
15 of decision for the energy project by the lead
16 agency.

17 (B) DETAIL.—The final environmental im-
18 pact statement for an energy project shall in-
19 clude an adequate level of detail to inform deci-
20 sions necessary for the role of any Federal
21 agency involved in the environmental review and
22 authorization process for the energy project.

23 (C) EXTENSION OF DEADLINE.—The head
24 of a lead agency may extend the deadline under
25 subparagraph (A) if—

1 (i) Federal law prohibits the lead
2 agency or another agency from issuing an
3 approval or permit within the period de-
4 scribed in that subparagraph;

5 (ii) the project sponsor requests that
6 the permit or approval follow a different
7 timeline; or

8 (iii) an extension would facilitate com-
9 pletion of the environmental review and
10 authorization process of the energy project.

11 (2) ENERGY PROJECT SCHEDULE.—To the
12 maximum extent practicable and consistent with ap-
13 plicable Federal law, for an energy project, the lead
14 agency shall develop, in concurrence with the project
15 sponsor, a schedule for the energy project that is
16 consistent with a time period of not more than 2
17 years for the completion of the environmental review
18 and authorization process for an energy project, as
19 measured from, as applicable—

20 (A) the date of publication of a notice of
21 intent to prepare an environmental impact
22 statement to the record of decision; or

23 (B) the date on which the head of the lead
24 agency determines that an environmental as-

1 (B) ENERGY-RELATED CAUSE OF AC-
2 TION.—The term “energy-related cause of ac-
3 tion” means a cause of action that—

4 (i) is filed on or after the date of en-
5 actment of this Act; and

6 (ii) seeks judicial review of a final
7 agency action to issue a permit, license, or
8 other form of agency permission for an en-
9 ergy project.

10 (2) DEADLINE FOR FILING.—

11 (A) IN GENERAL.—Notwithstanding any
12 other provision of Federal law, an energy-re-
13 lated cause of action shall be filed by—

14 (i) not later than 60 days after the
15 date of publication of the applicable final
16 agency action; or

17 (ii) if another Federal law provides for
18 an earlier deadline than the deadline de-
19 scribed in clause (i), the earlier deadline.

20 (B) PROHIBITION.—An energy-related
21 cause of action that is not filed within the ap-
22 plicable time period described in subparagraph

23 (A) shall be barred.

24 (d) APPLICATION OF CATEGORICAL EXCLUSIONS FOR
25 ENERGY PROJECTS.—In carrying out requirements under

1 the National Environmental Policy Act of 1969 (42 U.S.C.
2 4321 et seq.) for an energy project, a Federal agency may
3 use categorical exclusions designated under that Act in the
4 implementing regulations of any other agency, subject to
5 the conditions that—

6 (1) the agency makes a determination, in con-
7 sultation with the lead agency, that the categorical
8 exclusion applies to the energy project;

9 (2) the energy project satisfies the conditions
10 for a categorical exclusion under the National Envi-
11 ronmental Policy Act of 1969 (42 U.S.C. 4321 et
12 seq.); and

13 (3) the use of the categorical exclusion does not
14 otherwise conflict with the implementing regulations
15 of the agency, except any list of the agency that des-
16 ignates categorical exclusions.

17 **SEC. 60605. FRACTURING AUTHORITY WITHIN STATES.**

18 (a) DEFINITION OF FEDERAL LAND.—In this sec-
19 tion, the term “Federal land” means—

20 (1) public lands (as defined in section 103 of
21 the Federal Land Policy and Management Act of
22 1976 (43 U.S.C. 1702));

23 (2) National Forest System land;

24 (3) land under the jurisdiction of the Bureau of
25 Reclamation; and

1 (4) land under the jurisdiction of the Corps of
2 Engineers.

3 (b) STATE AUTHORITY.—

4 (1) IN GENERAL.—A State shall have the sole
5 authority to promulgate or enforce any regulation,
6 guidance, or permit requirement regarding the treat-
7 ment of a well by the application of fluids under
8 pressure to which propping agents may be added for
9 the expressly designed purpose of initiating or prop-
10 agating fractures in a target geologic formation in
11 order to enhance production of oil, natural gas, or
12 geothermal production activities on or under any
13 land within the boundaries of the State.

14 (2) FEDERAL LAND.—The treatment of a well
15 by the application of fluids under pressure to which
16 propping agents may be added for the expressly de-
17 signed purpose of initiating or propagating fractures
18 in a target geologic formation in order to enhance
19 production of oil, natural gas, or geothermal produc-
20 tion activities on Federal land shall be subject to the
21 law of the State in which the land is located.

22 **SEC. 60606. FEDERAL LAND FREEDOM.**

23 (a) DEFINITIONS.—In this section:

1 (1) AVAILABLE FEDERAL LAND.—The term
2 “available Federal land” means any Federal land
3 that, as of May 31, 2013—

4 (A) is located within the boundaries of a
5 State;

6 (B) is not held by the United States in
7 trust for the benefit of a federally recognized
8 Indian Tribe;

9 (C) is not a unit of the National Park Sys-
10 tem;

11 (D) is not a unit of the National Wildlife
12 Refuge System; and

13 (E) is not a congressionally designated wil-
14 derness area.

15 (2) STATE.—The term “State” means—

16 (A) a State; and

17 (B) the District of Columbia.

18 (3) STATE LEASING, PERMITTING, AND REGU-
19 LATORY PROGRAM.—The term “State leasing, per-
20 mitting, and regulatory program” means a program
21 established pursuant to State law that regulates the
22 exploration and development of oil, natural gas, and
23 other forms of energy on land located in the State.

1 (b) STATE CONTROL OF ENERGY DEVELOPMENT
2 AND PRODUCTION ON ALL AVAILABLE FEDERAL
3 LAND.—

4 (1) STATE LEASING, PERMITTING, AND REGU-
5 LATORY PROGRAMS.—Any State that has established
6 a State leasing, permitting, and regulatory program
7 may—

8 (A) submit to the Secretaries of the Inte-
9 rior, Agriculture, and Energy a declaration that
10 a State leasing, permitting, and regulatory pro-
11 gram has been established or amended; and

12 (B) seek to transfer responsibility for leas-
13 ing, permitting, and regulating oil, natural gas,
14 and other forms of energy development from
15 the Federal Government to the State.

16 (2) STATE ACTION AUTHORIZED.—Notwith-
17 standing any other provision of law, on submission
18 of a declaration under paragraph (1)(A), the State
19 submitting the declaration may lease, permit, and
20 regulate the exploration and development of oil, nat-
21 ural gas, and other forms of energy on Federal land
22 located in the State in lieu of the Federal Govern-
23 ment.

24 (3) EFFECT OF STATE ACTION.—Any action by
25 a State to lease, permit, or regulate the exploration

1 and development of oil, natural gas, and other forms
2 of energy pursuant to paragraph (2) shall not be
3 subject to, or considered a Federal action, Federal
4 permit, or Federal license under—

5 (A) subchapter II of chapter 5, and chap-
6 ter 7, of title 5, United States Code (commonly
7 known as the “Administrative Procedure Act”);

8 (B) division A of subtitle III of title 54,
9 United States Code;

10 (C) the Endangered Species Act of 1973
11 (16 U.S.C. 1531 et seq.); or

12 (D) the National Environmental Policy Act
13 of 1969 (42 U.S.C. 4321 et seq.).

14 (c) NO EFFECT ON FEDERAL REVENUES.—

15 (1) IN GENERAL.—Any lease or permit issued
16 by a State pursuant to subsection (b) shall include
17 provisions for the collection of royalties or other rev-
18 enues in an amount equal to the amount of royalties
19 or revenues that would have been collected if the
20 lease or permit had been issued by the Federal Gov-
21 ernment.

22 (2) DISPOSITION OF REVENUES.—Any revenues
23 collected by a State from leasing or permitting on
24 Federal land pursuant to subsection (b) shall be de-
25 posited in the same Federal account in which the

1 revenues would have been deposited if the lease or
2 permit had been issued by the Federal Government.

3 (3) EFFECT ON STATE PROCESSING FEES.—
4 Nothing in this section prohibits a State from col-
5 lecting and retaining a fee from an applicant to
6 cover the administrative costs of processing an appli-
7 cation for a lease or permit.

8 **SEC. 60607. EXPEDITING COMPLETION OF THE MOUNTAIN**
9 **VALLEY PIPELINE.**

10 (a) DEFINITION OF MOUNTAIN VALLEY PIPELINE.—
11 In this section, the term “Mountain Valley Pipeline”
12 means the Mountain Valley Pipeline project, as generally
13 described and approved in Federal Energy Regulatory
14 Commission Docket Nos. CP16–10 and CP19–477.

15 (b) EXPEDITED APPROVAL.—Notwithstanding any
16 other provision of law, not later than 21 days after the
17 date of enactment of this Act and for the purpose of facili-
18 tating the completion of the Mountain Valley Pipeline—

19 (1) the Secretary of the Army shall issue all
20 permits or verifications necessary—

21 (A) to complete the construction of the
22 Mountain Valley Pipeline across the waters of
23 the United States; and

24 (B) to allow for the operation and mainte-
25 nance of the Mountain Valley Pipeline;

1 (2) the Federal Energy Regulatory Commission
2 shall approve any amendments to the certificate of
3 public convenience and necessity issued by the Fed-
4 eral Energy Regulatory Commission on October 13,
5 2017, and grant any extensions that are necessary—

6 (A) to complete the construction of the
7 Mountain Valley Pipeline; and

8 (B) to allow for the operation and mainte-
9 nance of the Mountain Valley Pipeline;

10 (3) the Secretary of Agriculture shall amend
11 the Land and Resource Management Plan for the
12 Jefferson National Forest in a manner that is sub-
13 stantively identical to the record of decision with re-
14 spect to the Mountain Valley Pipeline issued on Jan-
15 uary 11, 2021; and

16 (4) the Secretary of the Interior shall—

17 (A) reissue the biological opinion and inci-
18 dental take statement for the Mountain Valley
19 Pipeline in a manner that is substantively iden-
20 tical to the biological opinion and incidental
21 take statement previously issued on September
22 4, 2020; and

23 (B) grant all necessary rights-of-way and
24 temporary use permits in a manner that is sub-
25 stantively identical to the those permits ap-

1 proved in the record of decision with respect to
2 the Mountain Valley Pipeline issued on January
3 14, 2021.

4 (c) JUDICIAL REVIEW.—No action taken by the Sec-
5 retary of the Army, the Federal Energy Regulatory Com-
6 mission, the Secretary of Agriculture, or the Secretary of
7 the Interior that grants an authorization, permit,
8 verification, biological opinion, incidental take statement,
9 or any other approval related to the Mountain Valley Pipe-
10 line, including the issuance of any authorization, permit,
11 verification, authorization, biological opinion, incidental
12 take statement, or other approval described in subsection
13 (b), shall be subject to judicial review.

14 (d) EFFECT.—This section preempts any statute (in-
15 cluding any other section of this Act), regulation, judicial
16 decision, or agency guidance that is inconsistent with the
17 issuance of any authorization, permit, verification, author-
18 ization, biological opinion, incidental take statement, or
19 other approval described in subsection (b).

20 **SEC. 60608. FASTER PROJECT CONSULTATION.**

21 Section 7(b)(1) of the Endangered Species Act of
22 1973 (16 U.S.C. 1536(b)(1)) is amended—

23 (1) in subparagraph (A), by striking “90-day”
24 and inserting “60-day”; and

25 (2) in subparagraph (B)—

1 (A) in the matter preceding clause (i)—

2 (i) by striking “90 days” and insert-
3 ing “60 days”; and

4 (ii) by striking “90th day” and insert-
5 ing “60th day”;

6 (B) in clause (i), in the matter preceding
7 subclause (I), by striking “150th day” and in-
8 serting “100th day”; and

9 (C) in clause (ii), by striking “150 or
10 more” and inserting “100 or more”.

11 **SEC. 60609. NEW SOURCE REVIEW PERMITTING.**

12 (a) CLARIFICATION OF DEFINITION OF A MODIFICA-
13 TION FOR EMISSION RATE INCREASES, POLLUTION CON-
14 TROL, EFFICIENCY, SAFETY, AND RELIABILITY
15 PROJECTS.—Paragraph (4) of section 111(a) of the Clean
16 Air Act (42 U.S.C. 7411(a)) is amended—

17 (1) by inserting “(A)” before “The term”;

18 (2) by inserting before the period at the end the
19 following: “. For purposes of the preceding sentence,
20 a change increases the amount of any air pollutant
21 emitted by such source only if the maximum hourly
22 emission rate of an air pollutant that is achievable
23 by such source after the change is higher than the
24 maximum hourly emission rate of such air pollutant
25 that was achievable by such source during any hour

1 in the 10-year period immediately preceding the
2 change”; and

3 (3) by adding at the end the following:

4 “(B) Notwithstanding subparagraph (A), the
5 term ‘modification’ does not include a change at a
6 stationary source that is designed—

7 “(i) to reduce the amount of any air pol-
8 lutant emitted by the source per unit of produc-
9 tion; or

10 “(ii) to restore, maintain, or improve the
11 reliability of operations at, or the safety of, the
12 source,

13 except, with respect to either clause (i) or (ii), when
14 the change would be a modification as defined in
15 subparagraph (A) and the Administrator determines
16 that the increase in the maximum achievable hourly
17 emission rate of a pollutant from such change would
18 cause an adverse effect on human health or the envi-
19 ronment.”.

20 (b) CLARIFICATION OF DEFINITION OF CONSTRUC-
21 TION FOR PREVENTION OF SIGNIFICANT DETERIORA-
22 TION.—Subparagraph (C) of section 169(2) of the Clean
23 Air Act (42 U.S.C. 7479(2)) is amended to read as fol-
24 lows:

1 “(C) The term ‘construction’, when used in
2 connection with a major emitting facility, in-
3 cludes a modification (as defined in section
4 111(a)) at such facility, except that for pur-
5 poses of this subparagraph a modification does
6 not include a change at a major emitting facil-
7 ity that does not result in a significant emis-
8 sions increase, or a significant net emissions in-
9 crease, in annual actual emissions at such facil-
10 ity.”.

11 (c) CLARIFICATION OF DEFINITION OF MODIFICA-
12 TIONS AND MODIFIED FOR NONATTAINMENT AREAS.—
13 Paragraph (4) of section 171 of the Clean Air Act (42
14 U.S.C. 7501) is amended to read as follows:

15 “(4) The terms ‘modifications’ and ‘modified’
16 mean a modification as defined in section 111(a)(4),
17 except that such terms do not include a change at
18 a major emitting facility that does not result in a
19 significant emissions increase, or a significant net
20 emissions increase, in annual actual emissions at
21 such facility.”.

22 (d) RULE OF CONSTRUCTION.—Nothing in this sec-
23 tion or the amendments made by this section shall be con-
24 strued to treat any change as a modification for purposes
25 of any provision of the Clean Air Act (42 U.S.C. 7401

1 et seq.) if such change would not have been so treated
2 as of the day before the date of enactment of this Act.

3 **SEC. 60610. PROHIBITION ON RETROACTIVE PERMIT VE-**
4 **TOES.**

5 Section 404 of the Federal Water Pollution Control
6 Act (33 U.S.C. 1344) is amended by striking subsection
7 (c) and inserting the following:

8 “(c) **AUTHORITY OF EPA ADMINISTRATOR.—**

9 “(1) **POSSIBLE PROHIBITION OF SPECIFICA-**
10 **TION.—**Until such time as the Secretary has issued
11 a permit under this section, the Administrator may
12 prohibit the specification (including the withdrawal
13 of specification) of any defined area as a disposal
14 site, and the Administrator may deny or restrict the
15 use of any defined area for specification (including
16 the withdrawal of specification) as a disposal site,
17 whenever the Administrator determines, after notice
18 and opportunity for public hearings, that the dis-
19 charge of such materials into such area will have an
20 unacceptable adverse effect on municipal water sup-
21 plies, shellfish beds and fishery areas (including
22 spawning and breeding areas), wildlife, or rec-
23 reational areas.

1 “(2) CONSULTATION REQUIRED.—Before mak-
2 ing a determination under paragraph (1), the Ad-
3 ministrators shall consult with the Secretary.

4 “(3) WRITTEN FINDINGS REQUIRED.—The Ad-
5 ministrators shall set forth in writing and make pub-
6 lic the findings and reasons of the Administrator for
7 making any determination under this subsection.”.