Someone asked me how the new bill defines what kinds of projects have enough federal involvement to require an environmental assessment. I thought I knew the answer. But when I looked carefully at the bill's language, I realized that it actually can't mean what I thought it did. In fact, it's so badly written that it may not actually mean anything at all.

Here's what I thought was the answer to the question about federal involvement. Under previous guidelines interpreting NEPA, something is a "major federal action" if "it has effects that may be major and which are potentially subject to Federal control and responsibility." Thus, if a company wants to build a pipeline, the question would be whether building the pipeline is an action that has major effects that the agency can potentially control or be responsible for.

I thought that the language in debt ceiling bill took out the word "potentially", which would narrow the category of major federal actions at least somewhat. In fact, the Center for Biological Diversity says that the narrowing would be so great that oil and gas pipelines would no longer be covered by NEPA.

But the new language doesn't just delete the term "potentially." Instead, it scrambles the definition entirely, making its meaning completely obscure. Here's what the new language actually says:

> "The term 'major Federal action' means an action *that the agency carrying out such action* determines is subject to substantial Federal control and responsibility."

Two things have gone wrong here. First, the word "major" doesn't appear in the definition at all. It defines a category of actions but doesn't distinguish between major and minor ones. In other words, what's supposed to be a definition of a "major federal action" has written the term "major" out entirely. The word "effects"is also gone, so we're no longer talking about federal control or responsibility regarding the impacts of the action.

Second, the action in question is now described as something that the agency is carrying out, so we're now talking about control over the agency's own actions. That makes a hash of the definition. It seems to be asking us to decide whether an agency has "control or responsibility" for an action that the agency itself is carrying out. You would think that an agency virtually always has control and responsibility for its very own actions.

The one exception might be a case where what the agency does is the equivalent of an

involuntary reflect in a person, meaning that the agency has no discretion over taking the action. And in fact, one of the seven "exclusions" from being a major federal action is for "activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority." You shouldn't need that to be an exclusion, however, if it were simply repeating what the definition itself says.

Some of the other exclusions involve actions by a third party that are mostly outside the agency's control. Those exclusions don't seem consistent with the definition, which identifies the "action" as what the agency does rather than what some third-party does.

For example, one of the exclusions is for actions "with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project." But remember, the definition of a "major Federal action" involves an action by the agency itself. An action "carried out" *by a federal agency* but "with no or minimal Federal involvement" doesn't make any sense, does it?

One option for a court or agency interpreting the statute is to rewrite to say the same thing as the earlier guideline but without the word "potentially." That would require editing out the phrase "that the agency is carrying out" and adding the phrase "with major effects." That seems like too much rewriting for a court to undertake, especially in an era where we're supposed to be governed by statutory text above all else.

In addition, given the rest of the garbled language, it's not clear whether dropping the word "potential" was just another glitch, or was done to make the definition more concise, or was really intended to change the meaning. It's equally unhelpful to compare the rule to the current, post-Trump version, which is much simpler, does drop potential, but also revamped the rule in other ways different from the new bill.

I suppose the bill might be amended somewhere along the way to fix the problem. But given the lack of time, and the dangers of opening up the bill to changes, I'm not sure whether that's at all feasible. A later "technical corrections" bill would also be possible, but I think Democrats would oppose any effort to redraft the section in a way that limited the application of NEPA, while Republicans might oppose any fix that restored the current status quo as a back step,

In the absence of a quick legislative fix. I predict lots of fun litigation. Maybe the upshot will be to ignore the definition entirely and only give effect to the exclusions. In the meantime, however, all that litigation is only going to increase delays, which is ironic given that the whole purpose the NEPA changes is supposed to be speeding up the process.

A final thought: I stumbled into this drafting disaster by chance. How many similar glitches are lurking in the bill? The moral may turn out to be: “Draft in haste. Repent at leisure.”