Several weeks ago I wrote about an effort by House Republicans to use reconciliation, a process which avoids the Senate filibuster, for a "pay to play" proposal to gut NEPA. The proposal would have allowed sponsors of projects going through NEPA review to pay an extra fee and avoid judicial review of the NEPA review. My prediction was that, if the provision was enacted, administrations would lowball the fee (which is based on the estimate of the cost for NEPA compliance) for favored projects, and use the lack of judicial review to essentially create an exemption from NEPA for those projects.

However, Senate rules limit what can go through reconciliation. And this week, the Senate parliamentarian (who makes these decisions) concluded that NEPA pay to play provision did not qualify for reconciliation. The likely reason is that reconciliation is supposed to be used for fiscal matters, not to make major policy changes – and the exemption from judicial review was too large a policy change to be justified based on the fiscal consequences of a fee payment. It seems likely that any similar attempt to eliminate judicial review of NEPA through reconciliation would also fail.

That matters because reconciliation also cannot be used to directly change the underlying procedural requirements of NEPA – again because those are not fiscal issues. So if reconciliation cannot be used to directly change the procedures of NEPA, and cannot be used to change the enforcement of NEPA, it seems unlikely that it can be used to significantly alter NEPA's operation for projects. While the parliamentarian did allow a provision to proceed that gives projects sponsors who pay the extra fee an accelerated timeframe for their NEPA review to be completed, that accelerated timeframe is not very helpful if it produces a final document that is inadequate and likely to be struck down in court.

The takeaway is that any major changes to NEPA, and indeed to any of the other major issues in the broad bucket of "permitting reform", will have to be addressed through ordinary legislation subject to the filibuster, and thus bipartisan agreement. I don't think the current administration's efforts to overhaul the regulatory structure that guides agency compliance with NEPA will make a huge difference, in part because the rationale behind that overhaul was that there is no basis under NEPA for overarching regulations to implement the law – in other words, that overhaul just kicks the problem over to the courts, with all of the uncertainty that can produce. And while the Supreme Court can (and recently has) cut back on some of NEPA's scope in its own form of permitting reform, that really only can work on the edges, especially given the very ample caselaw for NEPA that has built up over the years.

There is already some movement on permitting reform in the context of fire management in

this Congress. Bipartisan permitting reform in any case is a vast improvement on partisan alternatives, because partisan efforts risk producing a ping-pong dynamic as administrations shift, a dynamic that does not produce the regulatory stability that is also important for investments in infrastructure such as electricity transmission. We'll see what the next steps are.