

Prior to the release of the [text](#) of the debt ceiling bill Sunday night, press reports had mentioned only a couple of provisions relating to environmental impact statements. It turns out there's a *lot* more. The bill would make numerous changes in the statute governing impact statements, the National Environmental Policy Act of 1969 (NEPA). Since the text of the bill was released, environmental law professors have been scrambling to figure out the significance of the changes. So far, it looks like the changes shouldn't significantly weaken the process of environmental review, but there may be some hidden booby traps we haven't found yet.

The debt ceiling bill is officially called the Fiscal Responsibility Act of 2023 (FRA). The FRA provisions relating to NEPA are labeled as "The Builder Act." That was also the title of the GOP permitting bill that McCarthy wanted to include in the debt-ceiling deal. However, the final debt ceiling deal is, by and large, a defanged version of the GOP bill. It leaves out entirely many of the harmful provisions in the House bill, such as limitations on the power of courts to enforce NEPA. Other provisions of the GOP bill are included but with harmful language removed.

For instance, the GOP [bill](#) required an agency to consider environmental impacts that have "reasonably foreseeable environmental effects with a reasonably close causal relationship to the proposed agency action". In contrast, the FRA version says only "reasonably foreseeable" impacts. Deletion of the requirement of a "reasonable close causal relationship" is important for a variety of reasons. Most importantly, the additional requirement could have been read to exclude consideration of a project's impact on climate change as too indirect and remote.

The original version of NEPA is very brief. It lacks definitions or any indication of the process to be used in deciding whether a project requires an impact statement. Over the years, those gaps have been filled in by a combination of court decisions and guidelines from the Council on Environmental Quality (CEQ) in the White House. In general, the FRA version of the Builder Act writes in the statute the rules worked out by courts and the CEQ.

There are some exceptions, however, where the changes may be more significant. Here are some significant changes that have been identified in discussions by legal scholars:

- Extraterritoriality: No environmental review is required for actions or decisions with impacts entirely outside the U.S., such as funding a dam in another

- country. This appears to be a more rigid standard than courts have applied.
- A somewhat more restrictive rule about how much control a federal agency has to have over a project before an environmental review is required.
 - A government agency considering a project can outsource preparation of the environmental review documents to the project sponsor, though the agency is required to exercise oversight. In practice, this would mean having the project sponsor pay for an independent consulting firm to do the work.
 - Page limits 150 or 300 pages depending on complexity and deadlines (2 years) for environmental impact statements. (Who uses page limits anymore instead of word counts?) One effect could be to discourage the use of graphics and maps that might actually make the statement much more understandable to the public.
 - Providing for appointment of a lead agency to be responsible for the impact statement when multiple agencies have jurisdiction over parts of the project. This is probably a good idea, but probably could have been implemented administratively even without a statute.

There are a couple of non-NEPA provisions that are worth mentioning. One provision of the FRA that will stick in the craw of environmentalists: the Mountain Valley Pipeline is given Congress's blessing regardless of any flaws in the environmental impact statement or consideration of impacts on endangered species. Approval for this gas pipeline is something Joe Manchin has wanted all along. Biden obviously decided to give it to him, satisfying a prior promise and maybe also helping Manchin with a tough reelection campaign.

The other non-NEPA provision worth mentioning is that energy storage projects will qualify for an accelerated permitting process originally designed for transportation projects (the FAST process).

How significant are the NEPA changes?

On the one hand, the NEPA provisions of the FRA seems fairly innocuous, and it may be helpful to have the rules clarified by statute. That provides a clear anchor point for judicial decisions and puts some limits on how much particular presidential administrations can play games with the statute. Thus, putting the rules into statutory form provides a bit of protection against the likes of Trump or Alito trying to gut longstanding practices.

On the other hand, it's not clear how much the NEPA changes will actually speed up

permitting. Deadlines for agencies to act sound good but experience has shown they're very hard to enforce. The page limit is meaningless, since all the extra stuff will just go into the appendices.

In terms of speeding up permitting, the most promising change may be the ability to get applicants to pay for outside experts to draft the impact statement. The environmental review process is often slow simply because agencies don't have the budget or staff to get it done faster. Outsourcing could really speed things up, but it will be crucial for agencies to exercise serious oversight. Otherwise, companies will find friendly consultants to paper over any environmental problems.

Overall, the NEPA provisions don't seem to pose major problems. Or at least, none that we've been able to find so far. From an environmental perspective, that's probably about the best we could expect from the fraught negotiations over the debt ceiling.