Shortly after Biden signed the new NEPA rewrite as part of the debt ceiling law, I wrote a blog post about a major drafting glitch at the heart of the new provisions. Today, I'd like to follow up with more examples.

This poor drafting could really hobble implementation of the new provisions. We live in the era of textualism, meaning that courts focus intensely on the details of statutory language, rather than trying to implement congressional intent. As a result, bad drafting is all the more problematic.

The Mystery of the Dual "Non-discretionary" Exceptions

Existing law makes it clear that if the government is performing some non-discretionary action like accepting a document for filing, it doesn't need to worry about the environmental consequences. After all, the government doesn't have any control over them anyway.

The drafters of NEPA 2.0 apparently thought that was such a wonderful, important point that they repeated it twice. And they botched the drafting of the first and more important one.

Section 321(11) excludes from the category of federal actions "activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority." Section 106(a)(4) sets out when a federal action requires an environmental document. It provide that no EA or EIS is required if "the proposed agency action is a non-discretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action."

The second of these provisions seems redundant given the first one. It's also phrased more cogently. The first one, however, seems nonsensical. It excludes non-discretionary actions from NEPA only if they are in accord with the agency's statutory authority. Non-discretionary actions that are *not* in accord with statutory authority are left subject to NEPA. But if an action isn't in accordance with statutory authority, the action is illegal — so an impact statement would be a waste of time. What vague thought was the drafter struggling unsuccessfully to express here?

The Curious Case of the Absent Environmental Document.

Section 107(a)(2))A) says that the lead agency is supposed to supervise the

preparation of environmental documents. Section 321(5) defines an environmental document as "an environmental impact statement, an environmental assessment, or a finding of no significant impact." There's something missing from the list: the notice of intent to issue an environmental impact statement, which section 107 refers to repeatedly. The clear implication is that the lead agency does *not* supervise any notices of intent. Did Congress actually mean that? And if so, what would happens if the lead agency decided there's no significant impact, but one of the participating agencies disagreed and issued a notice of intent to prepare an impact statement?

The Enigma of the Non-Agency "Agency Action'

I pointed out in my earlier post that the definition of the term "major federal action" is hopelessly confused, since it asks the federal agency "undertaking the action" to decide whether its *own* action "is subject to substantial federal control or responsibility." One would assume, for instance, that if the Defense Department is undertaking an action, that action is subject to substantial federal responsibility or control. If not, I for one would be very worried.

The same subsection follows up by stating the circumstances in which the term "major federal action" excludes "a non-Federal action" — which is apparently true sometimes but not always.

The same issue pops up elsewhere. Section 107(g) covers the two-year deadline for completing an EIS. Here's part of what it says:

"[W]ith respect to a *proposed agency action*, a lead agency shall complete . . . (A) the environmental impact statement not later than the date that is 2 years after the sooner of . . . (ii) the date on which such agency notifies the applicant that the application to establish *a* right-of way for *such action* is complete."

You might have to read that a couple of times to sort out the language. Notice that "such action" in the final clause refers to the "proposed agency action" in the opening line. In other words, we're talking about an application for right of way for the agency's action. That implies that the agency proposes to build a road or something that needs a right of way.

I'm pretty sure that's not what Congress meant. The problem is that Congress apparently insisted used the term "agency action" to refer to the agency's own

action (like issuing a permit) but somehow expected that it to sometimes refer to something quite different — a private action requiring agency approval or support. It's as if someone kept saying "my car" when sometimes they meant their own car and sometimes any car parked in their driveway.

That's not what the statute actually says. So the only way to make sense of the whole thing is to rewrite it, doing the work that Congress should have done itself. Curiously, the Trump Administration's NEPA regulations, which you would have thought Republicans in Congress might have known about, is much better drafted.

The drafting of this law is so bad that it suggests nobody really cared what the law said, so long as it could be called permitting reform. I'm sure that Biden's Council of Environmental Quality, which issues NEPA guidelines, will somehow figure out a way to give agencies some sensible marching orders. If the Congressional Republicans who pushed these provisions don't like the results, they will have only their own careless drafting to blame.