In the recent debt ceiling law, Congress extensively revamped NEPA, the law governing environmental impact statements. An obscure White House agency, the Council on Environmental Quality (CEQ), will have the first opportunity to shape the interpretation of the new language. Much of the language in the new law is poorly drafted or vague, making CEQ's role all the more important. This gives CEQ the opportunity to reform permitting for infrastructure projects while retaining the virtues of the existing process.

Interpreting the new law is going to be a challenge for agencies and courts. I've posted repeatedly, most recently last week, about the poor drafting of the statute. Courts are going to be looking for help in making sense of the statute despite the drafting glitches. Even apart from the glitches, the new provisions are often vague, as I'll explain below. Simply by virtue of its unique ability to offer a comprehensive interpretation of the new provisions, CEQ's regulations can provide a focal point for courts.

Moreover, since the *Andrus decision* in 1979, the Supreme Court has made it clear that CEQ's regulations are entitled to "substantial deference" by courts. *Andrus* was decided well before *Chevron*, so this deference rule should be unaffected even if the now-controversial *Chevron* rule is overturned. Under deference principles that long-preceded *Chevron*, an agency's initial interpretation of a new statute is entitled to particular deference. That principle applies to the new language added to NEPA this year.

As I said earlier, much of the new language is vague. Here are a few important examples:

- In complying with the statute, an agency must "ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document."
- An agency is "not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable."
- The amendments allow the agency to delegate preparation of the impact statement to a company that is applying for a permit. However, "such agency may provide such sponsor with appropriate guidance and assist in the preparation. The lead agency shall independently evaluate the environmental document and shall take responsibility for the contents."

- A programmatic impact statement can be applied to new government actions for five years “without additional review of the analysis in the programmatic environmental document, unless there are substantial new circumstances or information about the significance of adverse effects that bear on the analysis.”

Agencies may need help in deciding what is needed to guarantee “scientific integrity,” when new research should be considered “necessary to make a reasoned choice”, what an “independent evaluation” of an applicant’s impact statement requires, and when new information should be considered “substantial.”

Another key issue that is not addressed by the new amendments at all is public input, which is mentioned only in general terms by the amendments. This will be especially important in cases where responsibility has been delegated to a company seeking a permit. Moreover, the amendments call for a lead agency to manage the process when multiple agencies are involved. But unless this is done well, it may simply add a layer of bureaucracy and foment conflict between agencies. I have my doubts about how effective the new deadlines created by the amendment will be in speeding up the process. Even if they do work, there’s a risk that rushing to meet deadlines will simply result in a shoddier output that will be overturned by the courts.

In interpreting the statute, CEQ will need to balance the need to speed up permitting, especially for clean energy infrastructure, versus the quality of the environmental review and the need for public input. CEQ is far more expert on the realities of the process than any court. With CEQ’s help, the 2023 amendments may yet be a success. Otherwise, they may simply muddy the waters, impairing environmental reviews without doing much to achieve their goal of a more efficient permitting process.