When the 2023 amendments to NEPA passed as part of the debt ceiling bill, I wrote a series of blog posts about the drafting errors. It turns out that I missed some, as I discovered when working on the new edition of my environmental law casebook. They really aren't all that subtle, and it's hard to see how they got through the legislative process without anyone noticing.

The Strange Case of the Alternative Alternatives

I found the first new set of problems when I was updating a note about what alternatives an agency needs to consider. It turns out that there are three different provisions dealing with this, all of them slightly different. They're all subsections of § 102(2), which makes it all the stranger that no one noticed:

> **Subsection C(iii).** An environmental impact statement for an action with significant environmental impacts must discuss the following: "a reasonable range of alternatives . . . that are technically and economically feasible, and meet the purpose and need of the proposal." [Prior law simply said "alternatives."]
>
> **Subsection F**. An agency must "consistent with the provisions of this Act, study, develop, and describe technically and economically feasible alternatives." Alternatives to what? Subsection F doesn't say. Could this include alternatives to existing programs, not just new ones? [This provision is entirely new].
>
> **Subsection H**. An agency must also "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." [This was already part of the statute.]

Here are some puzzles:

- Subsections F and H seem very similar. What was subsection F supposed to add to subsection H? And why does subsection F say "consistent with the provisions of this Act" while subsection H does not? In working on an article about the the new statute, I discovered some indications that subsection H was actually supposed to be replaced by subsection F but was left in the statute by mistake. But subsection H is still part of the statute, and courts will have to figure out what to do with it.

- Then there's the issue of what alternatives must be discussed. Why is subsection C limited to alternatives consistent with the proposal's goals, while subsection F apparently requires alternatives to be discussed even if they aren't consistent with those goals?
- And how are "appropriate alternatives" in *H* different from alternatives that are "technically and economically feasible, and meet the purpose and need of the proposal" in *C*? Is "appropriate" a broader term or a narrower one?

The Mystery of the Irrelevant Alternatives

Another set of problems involve a provision dealing with scientific information. Here again, the difficulty revolves around the question of alternatives.

Here's how the relevant part of § 106(b)(3) reads: "In making a determination under this subsection, 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 biggest problem again relates to the question of alternatives. New research is required when the research "is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable." But remember, this supposed to relate to a "determination under this subsection." And the subsection (§106(b)) is about what kind of document to prepare — a streamlined environmental assessment or a full environmental impact statement? That choice is dictated by whether an action has a significant environmental impact. The alternatives to an action aren't even relevant at this stage!

That's the most obvious problem but there are also others. It's not clear how this section relates to sections 102(2)(F) and (H), which both put the onus on the agency to "study, develop, and describe" alternatives, and those verbs suggest that some scientific or technical work might be involved. Also, the limit on new research applies only to the initial choice of what kind of document to prepare. That would imply that unreasonable research costs and time frame *are* factors when writing the impact statement, which seems a bit odd in a statute meant to speed up the process.

The Missing 'Major Federal Action' Requirement

NEPA has always limited the requirement of an environmental impact statement to "major Federal actions" Section 111(10) now goes to great (though extremely confusing) lengths to define this term. But someone forgot to carry over the term to section 106, which if read literally would make this requirement irrelevant.

Here's the problem. Section 102(2)(C) sets out the mandate to prepare an environmental impact statement and applies only to "major Federal actions." But section 106(b)(1) says that "[a]n agency shall issue an environmental impact statement with respect to a proposed agency action requiring an environmental document that has a reasonably foreseeable significant effect on the quality of the human environment."

Note that this provision by its own terms applies to all proposed agency actions except those exempted from preparing an agency document under § 106(a), which uses the same framing. In addition, section 106(b)(2) seems to require an environmental assessment for agency actions without regard to whether they qualify as major Federal actions.

I feel positive that this was an oversight. But if you take the text of section 106 at its word, some kind of environmental review could be required even for agency actions that are specifically exempted from being considered major federal actions.

The Upshot

The Supreme Court has adopted "textualism" as its approach to statutory interpretation. This can involve intense focus on statutory word choice and punctuation. That approach just isn't going to work with this statute.

When he was coaching the Mets, Casey Stengel once asked, "Can't anybody here play this game?" It's hard to resist asking the same question about the 2023 NEPA Amendments.

Yet, it's not completely surprising that the statute's drafting is so confused. It was part of the debt ceiling law, thrashed out under intense time pressure during closed door negotiations between Joe Biden and Kevin McCarthy. Let's just say that this wasn't an ideal way to make law.