The Republican-controlled U.S. House of Representatives is working on reconciliation language – legislation that can pass via a majority-vote in the Senate, but only so long as it relates to fiscal matters. It looks like House Republicans are going to try and use the reconciliation process to effectively repeal the National Environmental Policy Act (NEPA).

Draft language that went through mark-up in the House Natural Resources Committee this week would allow project sponsors – entities that are seeking federal NEPA review – to pay for the cost of the environmental review document, plus an additional 25% of the cost, and in return to guarantee completion of the environmental review process within six months (for an environmental assessment) or a year (for an environmental impact statement), and eliminate judicial review of the NEPA documentation.

This is a fairly transparent effort to try and use the revenue obtained from the 25% additional payment to make this a fiscal provision such that it can proceed through reconciliation. News coverage frames this as permitting reform that would "streamline" NEPA. With due respect to the experts quoted to that effect in the article, I think realistically this will produce the effective repeal of NEPA, not "streamlining". Here's why:

If a project sponsor, and the agency in charge, no longer have to worry about judicial review, what is to stop them from writing a one or two sentence environmental document? The cost of such a short document (or perhaps a few pages of brief analysis) would cost a minimal amount of money. That means that the 25% additional fee would also be a minimal amount of money. Any project sponsor – which is undefined in the legislation, but presumably could cover any private or public entity, including a federal agency, seeking to do NEPA review – could then simply pay that trivial fee, do boilerplate NEPA review, and avoid NEPA altogether. The result would be… no NEPA.

Now it may not exactly play out this way – but that result makes this project perhaps even worse from a permit streamlining perspective. An agency may of course calculate a much higher cost for completing the environmental review documents, and mandate a thorough (perhaps even exceedingly thorough review) for a project it does not want to approve. One need only look at how the current administration has treated renewable energy projects as examples of what an administration could do in applying this provision to projects it does not like. A different administration with a different perspective might flip-flop on the projects it

decides it wants to impose NEPA on.

Thus, the flip-flop problem that I've highlighted will only get worse. This bill effectively allows administrations to waive NEPA for projects they like, and impose as much NEPA as they want on projects they do not like. That is not a recipe for policy stability and investment, and it is not the kind of permitting reform that will be helpful in advancing investment. Finally, what can be enacted through reconciliation can be repealed through reconciliation, which raises questions about how long the provision would stay on the books in any case.

Finally, there is some real irony here. The House Natural Resources Committee quotes an estimate that the provision might produce $1 billion in revenue. If the dynamics play out the way I predict they will, the result will be that almost no revenue will be produced – even though the revenue is the justification for putting this provision in reconciliation.