The House of Representatives recently held a hearing on the SPEED Act, a proposal for NEPA reform advanced by Representatives Westerman (R-Arkansas) and Golden (D-Maine). While the public announcement by the majority for the bill is that it is simply "commonsense upgrades," a close review indicates that it would produce potentially dramatic changes to NEPA, effectively wipe out agency incentives to comply with NEPA, eliminate judicial review of NEPA, and (if it doesn't have those effects) might increase uncertainty around NEPA's application in ways that would undermine the goals of the sponsors to facilitate NEPA reviews. There are better ways to go about NEPA reform than this.

The SPEED Act makes a bunch of specific amendments to the provisions of NEPA, many of which do not seem significant on first glance. For purposes of brevity, I will only pull out a few of the most significant examples here to make the point.

The first provision of the bill would change the purpose of NEPA to state that:

> Nothing in this Act shall be construed to mandate any specific environmental outcome or result, nor shall this Act be interpreted to confer substantive rights or impose substantive duties beyond procedural requirements.'

This provision seems to follow from the truism that NEPA is "only procedural." But it could be interpreted to override a key purpose of enacting the original NEPA in 1969 – agencies argued that because their mandates did not specifically include the environment, they did not need to consider environmental impacts in making decisions. A core goal of NEPA was changing that default principle so that agencies were required to consider environmental impacts, unless there was a specific conflict with other agency duties imposed on them by statute. The SPEED Act might wipe this out, and could send us back to the days when agencies blithely ignored environmental impacts because they could argue they had no duty to consider them.

Or consider a provision that appears to be quite reasonable: It allows agencies to evade NEPA review if the agency concludes that its "compliance with another statute's requirements serve a similar function as the requirements" of NEPA, or where a state or tribal environmental review process has already applied to the proposal and the agency concludes that review "meets the requirements" of NEPA.

But this allows agencies to simply point to another statutory provision, or a possibly perfunctory state or tribal environmental review provision, as a “get out of jail free” card for NEPA. Unless the agency determination would be reviewed by a court, in which case we simply have added yet another issue for agencies and litigants to dispute in lawsuits.

Or take provisions that absolve an agency of any responsibility to conduct any “new scientific and technical research” related to environmental impacts after an application for a project has been submitted to the agency. One problem with this approach is that in many cases, the possible impacts of a proposal won’t be known until after the application is submitted – and so the provision allows agencies to proceed with decisions on applications without specific information relevant to the proposal. And note that this also means that agencies would be prohibited from undertaking any new research related to public comments for an environmental review document. Depending on how broad the concept of “new scientific and technical research” is interpreted, this might make public comment periods meaningless, as agencies respond, in a blanket way, that any additional work to respond to the comments is not required. Moreover, the proposal creates some real potential tension with the Administrative Procedure Act, where agencies might have a general responsibility to gather or develop information in response to public comments. The bill tries to avoid that tension by not applying its broad exemption for new research to the APA – but that in turn produces a complicated new distinction between agency research for a project for NEPA purposes versus for APA purposes, which … will not help in terms of reducing the complexity of litigation.

Finally, the bill has some very sweeping provisions related to judicial review. First, it prohibits agencies from holding NEPA analysis to be inadequate unless the court concludes that “the agency would have reached a different result with respect to the” proposed action but for the flaw in the NEPA analysis. But note that, if NEPA is purely procedural, the agency can *always* claim that it would have reached the same decision regardless of what the NEPA review said. The position makes it impossible for a court to ever overturn a NEPA analysis by an agency – indeed, it is a position so radical that Justice Scalia rejected it in the context of whether plaintiffs have standing to challenge flaws in environmental review. And second, the bill appears to allow agencies to proceed with the underlying action even if the court finds a flaw with the NEPA analysis – which of course means that agencies face little or no consequence for flawed, perfunctory NEPA reviews, which means that is all we will likely get going forward.

There are a lot of better ways to improve NEPA than this bill. The sponsors assert that they are open to engaging in developing improvements. I encourage the sponsors to do some broader consultation and develop a NEPA reform effort that is really about making NEPA work better, rather than effectively repealing it while not appearing to do so.