

I've already written some about the Senate permitting reform bill, including the provisions on [NEPA remedies](#). In the next few posts I'm going to take deep dives on Titles I through IV of the bill, which are the primary changes to environmental law. First, I'll cover the changes to NEPA in Title I besides NEPA remedies (roughly in order as they appear in the bill) and what I think their importance is.

NEPA as Procedural

First, there is a provision in Section 1101 that emphasizes that NEPA is procedural:

This Act prescribes a procedure by which Federal agencies shall consider and inform the public about the reasonably foreseeable environmental effects of major Federal actions on the human environment of the United States, the result of which shall be an informational document for the purposes of consideration in Federal decisionmaking.

I [criticized a similar provision](#) in the House SPEED Act on the grounds that it might undermine a key (but often underappreciated) point of NEPA – it authorizes and requires agencies to consider environmental effects when making decisions (unless contrary to other law). That is important because before NEPA, agencies would often claim environmental issues were not their problem to consider. This provision states that the procedure is intended to ensure agencies have information that they use for making decisions. That is consistent with a broader mandate that agencies must consider environmental effects when making decisions. (Another change in Section 1101 states that NEPA does not “mandate a particular outcome” as a result of NEPA procedures. That also is consistent with a mandate that agencies must consider environmental effects, even if they are left with the choice as to how to weight those effects in decisionmaking.)

Scope of streamlining

Section 1102 is the definitions section (always important!). The bill applies its judicial review provisions to “authorizations” under NEPA. Those appear to cover any NEPA action (it is defined broadly as a laundry list of various approvals, and “other administrative decision . . . that is required or authorized under Federal law to implement a proposed agency action.”

New exclusions

Section 1102 also defines “major federal action” – which is what would trigger NEPA’s environmental review requirements. Here the bill creates a range of new exemptions. Perhaps most significant are exemptions for geothermal projects, electric transmission projects, natural gas pipelines, and water development projects with a federal share of cost less than \$50 million.

Section 1105 covers “procedure for determination of level of review”. It exempts from environmental review a project that has been subject to prior review under a state or tribal environmental review law if the agency “determines . . . [the state/tribal review] serves a similar function.” I noted [before](#) the potential risks of this provision, if it allows agencies to just use a patently inadequate state review document to avoid environmental review under NEPA. On the other hand, the provision does not exclude judicial review, so the agency’s determination of compliance may well be subject to arbitrary and capricious review under the APA (which would reduce, but not eliminate, the risk of abuse).

Also in Section 1105 is a provision that exempts an action from judicial review if it is an action “for which compliance by the agency with the requirements of another Federal law serves a similar function as compliance by the agency” with NEPA. Again, the scope of this provision is unclear. On the one hand, this might just replicate language in other federal environmental laws (such as the Clean Water Act) that exempt EPA permitting from NEPA, and caselaw that has done the same for EPA decisionmaking under the Clean Air Act. (A similar issue is pending in the Supreme Court for the Resource Conservation and Recovery Act, which covers hazardous waste disposal.) On the other hand, could agencies just start claiming all sorts of other statutes are equivalent to NEPA and avoid judicial review? Courts have been skeptical of those claims in the past, but perhaps this changes the dynamic. Again, my guess is that the agency determination on this point will be subject to judicial review, though it is unclear what level of deference would apply (since this perhaps is more a question of law).

CEQ power to override statutory consultation requirements

Perhaps most significant is Section 1106, with the innocuous title of “timely and unified federal reviews.” Here there are several potentially important provisions.

One provision that an initial review might not flag as significant is a provision that reinforces and expands the Council on Environmental Quality’s (CEQ’s) power to resolve disputes between agencies over how to implement NEPA for a particular

review process. CEQ now has the power not just to resolve disputes among agencies over who has “lead agency” status and thus has overall control over the NEPA review for a project. A project sponsor can complain to CEQ that there is a dispute or delay in a NEPA review process. CEQ can resolve that dispute, which is binding on the agencies and is not subject to judicial review. But more than that, the CEQ’s determination of how to resolve that dispute

shall, for purposes of judicial review of the ultimate agency action and all other Federal law, constitute full compliance with and satisfaction of any requirement for interagency consultation, coordination, concurrence, authorization, or other procedural obligation under Federal law that is the subject of the dispute or delay.

Note that this is not limited to NEPA, and it forecloses any judicial challenge to the CEQ resolution. So could a project sponsor object to an agency’s implementation of ESA consultation, get an appeal to CEQ, and then have CEQ conclude that there is no further consultation under ESA required, and wipe out ESA protections for a species under Section 7 of the ESA?

I don’t *think* the provision is quite that broad. The provision appears aimed at interagency procedures for cooperation – note that the provision includes “other procedural obligation” implying that the other elements of the list are procedural as well. So for Section 7 of the ESA, I do think a project sponsor and CEQ could use this provision to short-circuit ESA consultation – but the underlying substantive standard of jeopardy and adverse modification would remain. And in fact, such an approach may leave the sponsor worse off, since there might be an inadequate record or analysis to justify the agency’s decision with respect to the ESA. In addition, I don’t think this provision can override statutory requirements for public comments or consultation with non-Federal agencies such as states, local governments, or tribes. The provision is about disputes between Federal agencies, not with outside parties.

This provision has one of the more bizarre elements of the overall bill. Agencies that do not comply with CEQ’s resolution of the dispute are mandated to require certain senior staff to spend a majority of their workweek on the project, and cannot take work travel outside of their duty station. (I’m not sure how enforceable this is. I doubt a court wants to be litigating the work responsibilities of individual federal

agency officials.)

Supplemental NEPA

Section 1106 has some other sweeping provisions (again, probably some of the most important ones outside of the judicial review provision). One provision (again blandly named “Consideration of Timing”) states that

No Federal agency shall be required to consider any scientific or technical research that becomes publicly available after the date of publication of a notice of intent or decision to prepare an environmental document.

I’ve criticized this provision before [as well](#), since a similar version was in the SPEED Act. It basically freezes the information base for the agency at the time the NEPA process starts. As I’ve noted, that might be a problem when there is a fast-emerging area of harm or a new type of technology. But it also might well foreclose many kinds of supplemental NEPA claims. Supplemental NEPA claims are claims that the agency needs to update its previous NEPA review because of new information or because the project has changed. Change in project probably still is viable. But claims that there is new information might be rejected because any new information after the notice of intent is too late.

One question is how broadly does this provision sweep. Could an agency rely on a ten-year old stale NEPA document that is clearly no longer adequate to describe the world, as long as it didn’t change the project? Perhaps so (and that is a real problem – there should be some time limit on this restriction on new information). I think the main constraint on such an outcome would be that other statutory requirements (for permitting, or judicial review under the APA) might require the use of updated information. And indeed, the bill exempts APA processes from this new information ban. (I’ve [noted before](#) that this could create some interesting litigation fights about what information can be considered for which part of an agency decision.) Also I think if the agency restarts NEPA for a project, then the information would have to be updated as of the date that that NEPA process begins. Finally, this provision is in tension with a change made in the 2023 NEPA amendments (which remains in the bill) which requires agencies to conduct “new scientific or technical research” when “essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable.” 16 USC 4336(b)(1)(B).

Narrowing of alternatives

Section 1106 also requires the lead agency to restrict alternatives to be considered to those that advance the goals of the project sponsor. That would significantly narrow the kinds of analysis required under NEPA, since alternatives are a key part of the analytic component of NEPA (and also a frequent issue in litigation).

Public comment

Section 1106 only requires public comment for EIS's when the agency issues a notice of intent in the Federal Register. That public comment is supposed to consider issues like alternatives, what information is relevant for the analysis and more. That in turn is supposed to be the basis for exhaustion requirements (only parties who participated in public comment and raised issues that they want to litigate on can sue).

I'm skeptical about how this will work. Historically notices of intent have been brief. They mostly started the scoping process (what impacts should be analyzed and what is the scope of the project and plausible alternatives to consider). If notices of intent remain general and short, it's hard to see how the public can provide meaningful comment – which in turn means it is hard to see how the exhaustion requirements will have any teeth (if the analysis you are challenging as inadequate was not available in the notice of intent, how could you raise the issue). On the other hand, I could see notices of intent ballooning (becoming mini-draft EISs) as agencies try to build arguments for exhaustion later on. For instance, this [recent Notice of Intent](#) has supplemental online information with a 160+ page document analyzing potential alternatives. Then we've just replicated the process we have now, but with a different name. . .

Timeframes

Section 1106 also sets stringent timeframes for completing NEPA process is set at 90-120 days after an environmental assessment to finish all remaining authorizations or permits, and one year for completion of the environmental assessment itself. Timeframes for two years for environmental impact statements, and also 90-120 days after that for all remaining authorizations.

As enforcement, there is a petition for review process for the project sponsor to sue in court if the deadlines have been missed. The agency can only avoid a finding of

unreasonable delay (and a court order to complete its process within 120 days) if it shows, with “clear and convincing evidence” that there is violation of another law, or withholding of information by applicant, or a natural disaster or Act of God or similar extenuating circumstances.

Programmatic EISs

Section 1107 extends the validity of programmatic environmental impact statements to ten years.

Assessment of complete applications

Section 1109 adds a process by which agencies are required to determine whether an application for permits that are part of the NEPA process are complete within 60 days, and then within 60 days after that determine what level of environmental review should apply.

Additional judicial review provisions (especially tribal exemption)

Section 1110 adds a new judicial review section (including the limitations of remedies I discussed in the prior post). The most important other provision in this section besides that limitation on remedy is a provision that only allows a tribe to seek judicial review for NEPA for actions on tribal trust lands. All other parties are prevented from obtaining judicial review. (The exclusion does not apply if the impacts of the action extend beyond tribal trust lands.) Because tribal trust lands are owned by the United States in trust for the tribe, actions by tribes on those lands have required NEPA review – much to the frustration of some tribes who argue that this requirement creates obstacles to almost any development project on tribal lands. (Tribal trust lands are the principal way tribes own lands that they have sovereignty and control over.)

Section 1110 also requires “substantial deference” by a court in reviewing agency compliance with NEPA. Plaintiffs must have exhausted administrative remedies to file NEPA lawsuits (a requirement already present under existing caselaw), must file claims within a 150 day statute of limitation, and must allege “actual or imminent injury in fact amounting to a direct harm.” It’s not clear what that last requirement adds on top of existing standing doctrine.

