The manager's amendments for BAAJA – the changes to the bill that the primary drafters support – came out Saturday morning. Given the short time frame (the first procedural vote is tomorrow morning), this will have to be a quick overview of those changes and their implications. I'll cover the extent to which those changes address the major concerns I had with the bill, summarize what I think the main changes of the bill will be overall, and address why I I'm still undecided about the bill, in part because I keep discovering major issues in the text. As before, I will limit my discussion to Titles I through IV of the bill.

Title I (NEPA):

There are very few significant changes to the NEPA provisions, and almost none of the issues I flagged are addressed with the amendments.

The most concerning provision outside of judicial review that I flagged in the NEPA section was a provision that allowed CEQ to override consultation or other "procedural requirements" for any NEPA process, without any judicial review. I flagged the potential power of this provision – giving CEQ unreviewable power to (for instance) eliminate ESA review for agency decisions. The questions I noted were whether the provision allowed overriding substantive requirements and consultation with non-federal entities or public comment requirements.

The bill as amended adds "interagency" to all of the specific forms of consultation that can be overridden by CEQ, and retains language indicating that the provision only applies to procedural requirements:

[CEQ decisions] 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, interagency coordination, interagency concurrence, interagency authorization, or other interagency procedural obligation under Federal law that is the subject of the dispute or delay.

(p. 55-56 of the draft bill). I think this reduces (but does not fully eliminate) the risk of this provision turning into a deus ex machina to exempt federal agency actions from any other legal requirement.

None of the other major issues I flagged have been addressed. Title I still applies to any "proposed agency action" which means any federal action. That includes rulemaking (such as the Roadless Rule) – and indeed, that is confirmed by a change

to the judicial review provisions on pp. 73-74 of the draft bill, which gives the DC Circuit venue over rulemakings that are challenged for NEPA compliance. That also means that – contra this quote from supporters –the NEPA streamlining does apply to (for instance) ICE detention facilities. When you write a bill to cover all projects, it will cover all projects!

The bill would still essentially eliminate supplemental NEPA for new information – only "publicly available information" at the time the notice of intent for the NEPA process (or when the NEPA process otherwise begins) can count towards NEPA review.

After additional review, I think this provision could have sweeping implications. Does it mean, for instance, that information from ESA consultation that is necessarily developed after the NEPA process starts can be excluded from the NEPA review? That would be … bizarre but appears to be required by the bill. Indeed, depending on how the provision is read (on page 46), it might even be broader:

> 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 for a proposed agency action.

Read broadly, this would mean that for purposes of *any law* the agency cannot consider any information after the start of the NEPA process. Since the ESA biological opinion would generally not be prepared until after the NEPA process starts, does that mean the biological opinion cannot be considered in making decisions under the EPA?

On the one hand, read this way the provision creates a broad implicit repeal of all other laws. Courts disfavor that. And maybe the biological opinion is not "scientific or technical research," though that would be a real stretch. On the other hand, the bill also has a carveout from the provision ("Applicability to Other Law") that exempts public comments required under the APA from the provision – that would imply that other laws are covered. Moreover, the section it is part is titled "Timely and Unified Federal Reviews" and involves coordinating across all other statutes. As a result, there is a good argument that this provision covers all other informational requirements under all other laws. (For a nice assessment of the

statutory interpretation arguments that could against a broad reading, see this Twitter thread, and my responses as to why I am not fully convinced.)

(I do think that even broadly interpreted, this provision does not mean an agency avoids the substantive standard of jeopardy or adverse modification in the ESA, just that it can ignore the BiOp in making its decision. Of course, that might leave the agency vulnerable in litigation, and it would not have an incidental take statement either, which would leave it vulnerable to subsequent citizen suits under the ESA. So that would cut against a broad impact of this provision. Still, the uncertainty here is too much to my mind.)

There is still a risk of stale environmental reviews (perhaps many years old) being used by agencies to try and avoid NEPA review for a repurposed project. (Though stale info would probably make an APA challenge to the project easier.)

It still has exemptions from NEPA when an agency determines a state/Tribal environmental review is adequate, or when an agency determines another federal statutory process accomplishes the same functions as NEPA. Those determinations are probably subject to judicial review, but one question is how deferential courts will be for those determinations.

The NEPA provisions will still narrow the range of alternatives to be considered to those that achieve the goals of the project sponsor (pp. 40-41).

The judicial review provisions remain the same, with all of the issues I flagged before. I want to elaborate a little more on those issues, why I think the bill will have less impact on judicial review than perhaps the drafters want, and some new issues I have discovered.

The key question is whether the bill allows plaintiffs to obtain a preliminary injunction against a project based on a NEPA violation. Again, the current bill text provides that such an injunction may be issued only when:

> (I) there is a substantial likelihood the authorization violates a Federal law other than— (aa) this Act; or (bb) division A of subtitle III of title 54, United States Code; (II) necessary to prevent irreparable harm to the plaintiff; (III) the balance of equities favors the plaintiff; and (IV) a preliminary injunction is in the public interest.

The question is whether the plaintiff has to show "substantial likelihood" of success on a separate claim raised by the plaintiff as to violation of another law, or whether the plaintiff can just demonstrate (presumably in the p.i. motion) that there is a substantial likelihood that there is some other law that has been violated (even if the plaintiff isn't suing under the law, or the claim is not even justiciable). I think the better reading is the latter one. Here's why.

First, I think the better reading of the statute is that the overall provision, including limiting remedies, only applies to NEPA claims, not claims under other statutes. The section on judicial review defines a "claim" as one raised for failure to comply with NEPA. "Other claims" can be heard by the courts of appeal through supplemental jurisdiction. The remedy provision also only applies to a court determination that "an authorization does not comply with the requirements of this Act," which again would foreclose other kinds of claims being covered by the remedy limits.

That in turn means that other claims proceed normally, with standard remedies, including preliminary injunctions under standard law – importantly, including a "likelihood" of success on the merits, not "substantial likelihood". But that in turn would mean that if the remedies provision only allowed a preliminary injunction for a NEPA violation because the plaintiff would have a "substantial likelihood" of success on a non-NEPA claim, that would make the NEPA remedies provision redundant. The plaintiff would already be able to win an injunction on that other claim under the lesser "likelihood" of success on the merits. They would always be able to meet the higher standard for "substantial likelihood" for a NEPA claim. And thus that provision would never apply.

I therefore think that the better reading is that the plaintiff just needs to identify a "substantial likelihood" of some violation of some other provision of law, without having that as an element of their complaint. And as I noted before, the bill does not seem to require that the violation relates to the NEPA challenge, or to the irreparable harm. Perhaps courts will read a requirement that the violation relate to the irreparable harm into the language here, since that is traditionally required in p.i. caselaw. But neither this text (nor indeed, the text of the provision requiring lifting the p.i. when the violation and the separate irreparable harm have been addressed) do so.

The bill also does not explicitly give courts authority to enforce remand orders. Imagine an extreme example (but one quite plausible with this Administration) that an agency just refuses to do any NEPA analysis. The court concludes there is no

need for a preliminary injunction, and remands for a 180 day period for the agency to comply. The agency in the interim starts the project (as allowed under the bill, page 76-77) and again refuses to do any NEPA. The case ping pongs back and forth in remand, while the project proceeds, and ultimately is completed without any NEPA analysis whatsoever. Can a court do anything about that situation? It is . . . not clear.

Title II: CWA

The bill eliminates the requirement that Section 401 conditions proposed by an applicant must be consistent with the Federal permit. I flagged before how that provision was vague, could eliminate any utility for Section 401, and also was in tension with a savings clause. It's beneficial it was removed.

The limits on remedies for violations of Section 404 permits remain, and I continue to think those are overbroad.

Title III: ESA

I've noted before that I do not see major issues in the ESA components (other than the possibility that Title I might wipe out ESA consultation, as I've noted above). One potential irony of the provision that allows states to take over consultation for Section 7 – imagine a future where California has delegated consultation power, and thus reviews the federal water projects in California for compliance with the ESA. That would be a dramatic change of power against water interests…

(One quick update. I argued before that the text of the provision that moves judicial review for Section 7 consultation to the DC Circuit was only a permissive venue provision, not jurisdictional or mandatory venue. However, the Supreme Court traditionally has interpreted petition for review provisions such as these as displacing district court venue/jurisdiction, see Axon Enterprise v. FTC, 598 US 175 (2023), though the court does note that the analysis is specific to particularly provisions, and appears to be more skeptical of displacing district court venue/jurisdiction. Gorsuch is not a fan of such an approach, and would appear to emphasize the text more, which would make this provision more of a permissive venue provision. For more discussion, see this recent and helpful article. Even if it is only a permissive venue provision, I think it still has meaning and utility – some actors (such as regulated parties who wish to challenge a BiOp) might want a quick resolution and so file in the DC Circuit, and the government or others could also

move for a transfer of venue from a district court to the DC Circuit.)

Title IV: Permit Certainty

This is where most of the major changes occurred. I'll start with Section 1401.

Section 1401 still applies to any type of project, it just requires a non-federal sponsor. Project remains undefined. The scope issues I flagged before remain, and should be fixed by narrowing the scope to the kind of projects covered in Section 1402. In addition, others have noted the possibility that a project might not be a final decision or publicly disclosed, allowing secret deals from an outgoing Administration to lock in permit terms.

The provision prohibits agency action that revokes permits or interferes with "operation at normal capacity" of a project, unless certain conditions are met. The prior language was "full capacity." This change is perhaps marginally better, but it still creates the risk that (if the conditions are not met) private actors have locked in their ability to operate without any interference from the federal government.

That being said, the amendments do dramatically increase the scope of conditions that can justify a federal agency revoking or altering a permit or interfering with "operation at normal capacity."

- An agency can do so "in response to an order" by a Federal court. Before this condition only allowed an agency to take adverse action where required by a court. This gives significantly more leeway to agencies. Importantly, it also means agencies, if a court holds a NEPA analysis is inadequate under Title I, can revoke the permit issued pursuant to that inadequate NEPA analysis. That in turn means that plaintiffs still have the ability to redress harms through a NEPA lawsuit. (The prior language might have meant that such an outcome could not occur, making all NEPA lawsuits non-justiciable.)
- An agency can do so "to prevent immediate, specific, urgent, substantial, and proximate harm or damage to life, property, human health, the environment, national security, or defense that is based on new information." Human health and the environment were added to this list, which is progress. But the "immediate, specific, urgent, substantial, and proximate" requirements are still fairly narrow and will limit how much this provision is used.

- An agency can do so “pursuant to any applicable law or regulation.” This is by far the biggest change in this section. It may reduce the risk of “lock-in” in which agencies cannot alter permits because regulatory standards are updated, or because an agency reinterprets a law to require higher standards. (It would be helpful however to make this explicit by stating agencies can update regulatory standards.) I think this probably also addresses the concern that Section 1401 would require agencies to automatically renew permits without changing their terms – an agency can point to this provision to indicate that it is required to do renewals, and do so without any presumption of renewal (if the law so requires or allows). I’d also note that this provision means that if the agency can point to another provision with more specific terms for permit revocation or alteration (including terms that are friendlier to the agency) then the agency can do so. It basically turns Section 1401 into a default rule (like the APA) that is overridden by more specific standards.

The amendments also eliminate the requirement that the agency, if sued by a permit holder, must show these conditions are met by “clear and convincing evidence,” though the burden remains on the agency to show these requirements are met. Punitive damages are now only available with a showing of bad faith (though I imagine there will be district court judges who would be eager to find such a showing, so that does not fully solve this problem).

Finally, the provision has a broad savings clause: “Nothing in this section limits or modifies any authority under any applicable law, compact, or treaty.” It is not entirely clear to me what this means. I think it means that agencies still have powers to revoke or amend permits under more specific provisions of other laws (as noted above). And it also may mean that agencies retain power to regulate and act under other laws. If interpreted broadly, this savings clause dramatically narrows the scope of Section 1401. That being said, even if the clause has broad scope, I do think Section 1401 has an important impact – it allows permit holders to get injunctive relief, as opposed to merely damages, for agency permit revocation. That is not something that would always be true (as I’ve noted in the context of fossil fuel leasing.).

I think these changes address most of the examples I flagged earlier of how this provision could be problematic. Though the scope of what kinds of projects are covered could lead to real mischief in other areas of law and permitting that the drafters may not intend.

Section 1402 was the disparate impact section, which I flagged as also having significant issues. There are two main changes to this provision, one of which I am ambivalent about, and another which is very beneficial.

First, the amendments extend the "look back" period to determine the baseline rate of permit approvals and delays (which is what is used to determine if there is a substantial increase in denials or delays which in turn is used to determine whether there is disparate impact) to ten years. On the one hand, this means the Trump Administration cannot lock in high permitting rates with its actions now. On the other hand, the longer a time period a moving average covers, the more slowly that average changes. That means that the baseline denial or delay rates will move change very slowly over time, which runs the risk of locking in permitting rates, even if a new Administration has legitimate policy changes to implement. Thus, I am ambivalent about this change.

Second, the bill now requires that for a plaintiff to succeed with a Section 1402 claim, they must show that the denials were the result of "bad faith", which is a higher standard than before. In addition, the government can now rebut the plaintiff's prima facie evidence with its own "evidence of a lawful basis for the pattern of disparate treatment" – in other words, that the increase in denial rates is based on an appropriate application of the relevant law. Notably, the court then only decides the case based on the plaintiff's prima facie evidence, the government's own evidence, and denial and delay rates. The plaintiff does not appear to be able to rebut the government's evidence of lawful denials or delays with their own evidence. That should make these cases much easier for the government to win. As a result, I think Section 1402 has much less impact after these amendments, and should constrain legitimate changes in policy by future Administrations much less. (Though again, one can imagine an ideological district court coming to its own conclusions, and that risk weighs heavily in my assessment of this bill.)