



# **POLICY** **ANALYSIS**

**BIPARTISAN AFFORDABILITY  
AND JOBS ACT OF 2026**

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**S. 5653**



**Western  
Environmental  
Law Center**

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# INTRODUCTION

The “permitting reform” bill introduced by Sens. Lee, Capito, Heinrich, and Whitehouse (known as BAAJA) is a great deal for AI data center corporations; the fossil fuel, mining, and logging industries—and an awful deal for clean water, imperiled species, public lands, science, historic preservation for Tribes and other groups, and public participation.

Here is how the bill’s sweeping changes would affect our environmental and community protection laws. The fossil fuel, AI data center, logging, and mining industries would be the overwhelming “winners” in this permitting reform package, shifting power away from the public and handing it to industry.

## NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

BAAJA would ***codify into law and expand Trump administration executive actions that undermine NEPA’s purposes*** to require we “look before we leap” and provide the public a voice in decision making for large, federally permitted projects.

***Section 1101 would render environmental reviews powerless in decision making.*** It characterizes NEPA as a procedure to prepare a document, eliminating its action-forcing value to shape decisions to meet the law’s purpose to “prevent or eliminate” environmental impacts. ***Combined with the limits on judicial review and remedy, it reduces NEPA to a toothless paper exercise.***

***Section 1110 would sharply limit judicial review of agency decisions.***

BAAJA would deprive courts of the power to vacate permits or approvals found to violate NEPA, or to impose an injunction to prevent irreparable harm. Instead, courts could only direct the agency to correct the deficiencies, even as the authorized action continues to move forward. ***This renders judicial review a hollow exercise.*** Challenges would also have to be brought in the circuit courts of appeal, not district courts, which must provide agency decisions with heightened “substantial deference.”

***Sections 1106 and 1107 would undermine science.*** If new scientific

# NEPA CONTINUED

information becomes available during the environmental review process, including information submitted by the public, **BAAJA would allow agencies to ignore that information.** It would also prohibit agencies from extending the timeline of an environmental assessment (EA) or environmental impact statement (EIS) to consider new research. Further, the bill would extend the life of programmatic EISs from five to 10 years, shutting out the integration of new science into agency decision making for an additional five years.

**Sections 1102, 1105, and 1108 would completely eliminate NEPA for many projects.** BAAJA would exclude an array of activities from NEPA review, including those receiving federal grants or loans unless there is “predominant” federal control, energy projects in current or previously used locations, expansions or modifications of gas pipelines and transmission lines, geothermal exploration, and water development projects with less than \$50 million in federal funding. The bill would redefine “extraterritorial” activities to **exclude NEPA review for deep seabed mining.** It would **codify the Trump administration’s expansion of categorical exclusions** (CEs), allowing agencies to adopt those of other agencies, use multiple CEs to avoid NEPA, and would allow an agency to rely on a state or Tribal review it determines to be merely “similar” to NEPA.

## **Section 1106 would give project sponsors control of NEPA review.**

Under BAAJA, the project sponsor’s goals define the scope of alternatives that can be considered in the NEPA review and, under 2023 NEPA amendments, the project sponsor itself can write the EA or EIS. This would empower the agency to ignore alternatives proposed by the public that are geared to serve public interest, rather than project sponsor, goals. Under a One Big, Beautiful Bill Act (OBBBA) amendment, the project sponsor can also pay a fee to expedite the completion of an EA or EIS relative to NEPA review timelines established in 2023. In other words, a project sponsor can pay to get EA-level NEPA approvals within 180 days and EIS-level approvals within one year. If deadlines elapse, the project sponsor can seek judicial review in federal district court and obtain, within 120 days, an injunction directing the agency to issue a decision.

## **Section 1106 would silence the public by codifying if not expanding the Trump administration’s limits on public participation.**

The public could be excluded entirely from EA-level environmental review processes. With EIS-level processes, the public would still be offered an opportunity to comment on the proposed action at the scoping stage, before project details are known, but could be denied the ability to review and provide comment on the draft EIS.

# CLEAN WATER ACT (CWA)

***Section 1202 would severely undercut state and Tribal authority to protect water quality.*** CWA Section 401 grants states and Tribes authority to reject projects that violate state or Tribal clean water protection laws. BAAJA would sharply limit the scope of CWA Section 401 certification to compliance with water quality, barring consideration of the entire project's impact, including riparian and watershed-level impacts. BAAJA would demand that states and Tribes prove by "clear and convincing" evidence that permit conditions would be the "least burdensome," and "consistent with the requirements of the federal license or permit for which the certification application was made," ***effectively eliminating state and Tribal authority to impose conditions on federal licenses and permits in accord with CWA Section 401. Notably, CWA Section 401 has never been used to block a transmission project.***

***Section 1203 would weaken***

***the Clean Water Act's ability to reduce point source pollution*** by increasing National Pollutant Discharge Elimination System permit length from five to 10 years—a change long sought by industry. This would double the amount of time corporations can rely on older/weaker science and technology.

***Section 1204 would weaken Clean Water Act Section 404*** to include only water quality impacts, would double permit terms from five to 10 years and weaken EPA's rarely used veto authority by requiring it to be issued before a permit is approved.

Section 1204 would expand nationwide permits. It would codify CWA Section 404 nationwide permits for oil and gas, linear transport, transmission, and stormwater and water utilities.

***This section would also waive Endangered Species Act and National Historic Preservation Act compliance for reissued nationwide permits.***

# NATIONAL HISTORIC PRESERVATION ACT (NHPA)

Section 106 of NHPA provides Tribal Nations with opportunities to participate in project permitting to ensure protection of sacred resources. The bill would amend the law similarly to how it changes NEPA by limiting the scope of activities that trigger Section 106 review. It would ***allow federal agencies to determine whether a historic property exists***

***and empower the U.S. government to dictate that other considerations outweigh adverse effects on sacred places.*** BAAJA would penalize Tribes for missing a deadline by stripping Tribes of their status and funding to engage in future reviews and add the same judicial review restrictions as those embedded within its NEPA provisions.

# ENDANGERED SPECIES ACT (ESA)

*Section 1304 would lead to an inconsistent state patchwork of protections for listed species by allowing states to assume ESA Section 7 consultation responsibility* from the U.S. Fish and Wildlife Service, *rendering endangered species protection susceptible to state politics*. This provision would also undermine Tribal sovereignty, depriving Tribes of sovereign-to-sovereign engagement with the federal government and compelling them to engage, instead, with state governments and agencies.

*Section 1301 contains vague, uncertain language likely to cause litigation*. BAAJA would redefine “best available science,” the standard required for many ESA decisions, to mean “all relevant and objective scientific and commercial

information available at the time of the agency action.” This originates in a single circuit decision holding that when faced with uncertainty, the Fish and Wildlife Service may not give the benefit of the doubt to endangered species in developing a biological opinion. Because Section 7 jeopardy determinations must be based on “best available science” and consultations can now be assumed by states, *there is an increased likelihood of litigation over disparate applications of the standard*.

*Section 1302 would shorten consultation timelines by one-third*, requiring rushed, 60-day consultations between agencies—a recipe for errors and oversights. Some consultations could be extended to 100 days, but only if authorized.

## PROJECT CERTAINTY

*Section 1401 was intended to stop the Trump administration from blocking approved clean energy projects as it has repeatedly done, but will instead lock in environmental harm*.

BAAJA would bar the federal government from rescinding, revoking, amending, or altering (with very limited exceptions) all permits in effect after 9/16/26 or constraining in any way a project that has secured all authorizations and permits. This sweeping language

would *deprive federal agencies of the ability to apply updated and strengthened pollution control or species protection measures to existing authorizations and permits otherwise provided for by the Clean Air Act, Clean Water Act, Endangered Species Act*, or other laws based on new scientific or technical information. If a project is revoked or altered, the project sponsor could bring a challenge in a district court where a project is only partially located, *allowing forum shopping* especially for sprawling projects such

# PROJECT CERTAINTY CONTINUED

as pipelines. It would also **reverse the normal burden of proof from the developer to the government to prove, by a heightened clear and convincing evidence standard**, that one of the limited exceptions applies.

If a project sponsor wins a court case **it could get the permit reinstated, an injunction preventing the government from taking any new action to revoke or amend a permit or taking “any other action” that would pause construction or operation of a project** without first getting a court order from the same judge allowing it. **Project sponsors could also recover costs and attorney fees, plus costs of delay and an additional amount of 25-50% (depending on court’s determination of degree of bad governmental faith and extent of economic harm) of the total project costs** including development, permitting, land acquisition, financing, and engineering in addition to construction. Cost awards would come from the Judgment Fund of the U.S. Treasury—which is guaranteed.

**Section 1402 would create a cause of action for alleged “disparate treatment” in permitting of specific types of energy projects.**

Under this provision, a project in any category of energy development or distribution (wind, solar, coal, natural gas, pipelines, etc.) could sue the government in a district court in

which the project is partially located if it shows a “pattern of disparate treatment.” “Disparate treatment” could be demonstrated if the project shows a “substantial” increase in permit delays (even with the bill’s shortened environmental reviews and permit issuance) or “improper” denials over the prior five years as a result of an “intentional course of action” by the government. **Evidence of disparate treatment includes statements or policies by the executive branch, effectively barring and at least chilling the power of future presidents to adopt and implement a robust climate and conservation agenda that actively phases out fossil fuels.** If a project permit is delayed or denied, **the applicant can seek judicial review in the district court in which the project is partially located and would be entitled to injunctive relief, attorney fees and costs, plus economic damages relating to denial or delay, and enhanced damages of 50-100% of the project’s total cost of construction** (considering bad faith, disparate treatment of similar types of projects and degree of economic harm). Monetary awards would be paid from the Judgment Fund of the U.S. Treasury—which is guaranteed.

**The operative effect of the five-year look-back would be to lock in swift approvals for fossil fuel projects without any marked benefit, for the reasonably foreseeable future, to renewables.**

# MINING

*Section 2215 turns public lands into mining companies' dumping grounds* by authorizing storage of waste and tailings on these lands.

# TRANSMISSION

*Sections 2101-2106 would make needed changes to improve planning, construction, and access to transmission lines.* They would require interregional planning, increasing speed and efficiency for reaching decisions. It would also accelerate timelines to approve transmission lines and smooths the process for helping energy sources access the nation's grids.

*Section 107 would fall short on protecting the public from AI data centers.* BAAJA would force data center developers to pay the full cost of connecting to the grid. However, *this provision does nothing to address (and may even incentivize) the expanding practice of AI data centers using behind-the-meter electric generation, overwhelmingly powered by fossil fuels.*

# CONCLUSION

BAAJA is a deeply flawed bill. It would radically transform how the U.S. protects public lands, waters and wildlife, and communities from the harms caused by infrastructure development.

*It would erode the public's ability to have a voice in federal decision making processes, hobble the power of future presidents to unwind the Trump administration's transgressions, and arm corporations and developers with new legal tools to constrain the ability of future presidents to safeguard the public interest.* Even under its most generous interpretation, *BAAJA would enable the build*

*out of long-haul transmission at the expense of people and place across the West, while further entrenching fossil fuel and other extractive industries.*

The harms of BAAJA, notably, cannot be understood in isolation. It would, put simply, compound the harms caused by the Trump administration's deregulatory agenda and the Supreme Court's years-long effort to wither the strength of bedrock environmental protections. Ultimately, we conclude that *BAAJA would imperil efforts to decarbonize the U.S. economy at the pace and scale demanded by the climate crisis in a fashion that respects people and place.*