Earthjustice Analysis of November 17th Manager's Amendments

The November 17th manager's amendments modify a handful of isolated provisions of BAAJA. Most of those changes are very modest, **except for one amendment that may create a very significant and problematic loophole for data centers**.

While there are a few positive amendments, none come close to addressing the substantial problems that Earthjustice identified in our evaluation of the original bill or our evaluation of earlier manager's amendments. Notably, the amendments do not address bill provisions that (1) essentially eliminate nation-to-nation consultation processes and community engagement under the National Historic Preservation Act, and (2) allow administrations to issue locked-in "forever permits."

Data Centers

The manager's amendments could exclude a significant number of data centers (including AI data centers) from paying their full transmission costs.

The amendments modify Section 2107(a) of BAAJA, which was intended to require data centers to pay for their full transmission costs (embedded and incremental) under the Federal Power Act. That, in turn, would protect ratepayers from data center cost impacts to some degree. The amendments narrow the definition of a covered "computational load site" by excluding facilities and equipment primarily used for internet access or cable, information services, telecommunications, VoIP or other wire communications services.

This change could exclude a large portion of data centers from the requirement that they pay for their full transmission costs. As it stands today, these significant costs are being shouldered by households and small businesses, even though they are driven primarily or in large part by data centers.

While the impact of the change is not certain, it is possible that the exclusion for facilities and equipment primarily used for internet access, information services and non-interconnected VoIP services could cover: (i) all cloud services, such as Microsoft Azure, Google Cloud, and Oracle Cloud; (ii) AI service (inference) providers, such as Claude, ChatGPT and CoPilot; and (iii) Starlink (SpaceX) facilities. This would amount to a significant loophole in the ratepayer protection provision that allows numerous data center facilities to avoid new transmission rates designed to account for their full costs.

Project Certainty Provisions

The manager's amendments make two changes to the project certainty provisions. Neither meaningfully addresses the problems we have identified in our prior analyses.

- The first clarifies that Section 1401(a)(1) covers only projects that have received "all necessary *and* final" permits (emphasis added). This prevents Section 1401 from insulating permits that are still in the process of agency consideration and have not become reviewable by a court. This is a modest but positive change.

- The second amendment adds a new subsection (h) to Section 1403 that requires covered federal authorizations or permits to be "made public." This may have been intended to address the concern that an administration could issue an authorization in secret that would then become a 'forever permit.' But it does not solve the problem. The amendment does impose a general disclosure obligation on the government, but it does not limit the applicability of Section 1401(b)(1) to permits that have been disclosed. The government's failure to disclose a permit or authorization therefore would not prevent it from being a protected "forever permit."

Transmission

The manager's amendments modify Section 2101 (transmission permitting) by adding provisions aimed at protecting landowners. The new provisions: (i) define what the term "notification" means; (ii) allow FERC to condition transmission permits on land restoration measures and require FERC to order corrective action at the permit holder's expense if they fail to comply; and (iii) require developers to log communications with landowners and adhere to basic standards of conduct in those communications.

National Historic Preservation Act

The latest manager's amendments make two modest changes to Title III that do not address the primary ways in which BAAJA profoundly reduces NHPA protections.

First, the manager's amendment changes the circumstances under which projects receiving federal financial assistance become exempt from historic preservation review. Previously, the bill exempted such projects from review entirely if the only federal connection was a loan or grant. The amendment narrows the exemption to situations where the funding agency also lacks "predominant control and responsibility" over the subsequent use of funds or adverse impacts of the project on a historic property. The amendments state that the Department of Transportation cannot be found to have such control if it provides less than $10 million in financial assistance. Other agencies can be found to have predominant control and responsibility at any dollar amount. This is a positive change.

Second, the manager's amendment authorizes an increase in appropriations for the Historic Preservation Fund from $200 million to $300 million for fiscal years 2027 through 2036. While this change is modest in light of the damage the bill does to NHPA protections, it is a positive change.