Bipartisan American Affordability and Jobs Act of 2026

Top-level Takeaways from Earthjustice's Analysis of Manager's Amendment

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In an effort to help inform the Senate cloture vote that is scheduled for Monday, November 9, Earthjustice is providing our initial analysis of the manager's amendment to the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA). Because it is not possible to fully analyze the changes to the bill in the relevant time frame, we are focusing on ways in which they address—or fail to address—our highest priority concerns. Our analysis of the original text is available in our online guide.

At the outset, it is crucial to underscore that BAAJA would fundamentally overhaul federal law, with profound impacts that extend even beyond the expansive areas of energy and environmental law. There has been no opportunity for even a single hearing. There are no committee reports and no other legislative history to help clarify the bill's very substantial ambiguities. In advance of the vote scheduled on November 9, there has been insufficient time to consider the original bill text, much less analyze the effects of all the changes in the manager's amendment. While the manager's amendment provides some meaningful improvements, it fails to address very serious concerns.

Project Certainty

The manager's amendment makes several changes to Title IV, which deals with project certainty. While there are some meaningful improvements, none solves the core problem Title IV creates: Section 1401 gives the Trump administration very broad authority to fast-track harmful projects, and it constrains a future administration from reconsidering them, even in situations where they were authorized illegally.

More specifically, Section 1401 still provides that federal permits and authorizations of *any* kind, for projects of *all* kinds (not only energy projects), cannot be revoked or altered except under very limited circumstances. The addition of extremely vague language in a catch-all exception and a savings clause has the perverse effect of *increasing* uncertainty about how courts would interpret Section 1401's novel provisions, while leaving the "forever permits" issue unfixed.

The amendments add a new and *extraordinarily* broad provision that appears to impose a one-year deadline for decisions on all kinds of federal authorizations or permit requests if they do not require an EIS or EA. This could apply far beyond energy or environmental and energy laws and projects.

The amendment makes two significant improvements to Section 1402, the provision that allows developers to sue the government for disparate treatment of their type of projects. First, with respect to the empirical showing that fewer permits are being issued relative to past permitting trends, the manager's amendment extends the look-back period from five to ten years, helping to ensure that permitting trends under the Trump administration do not define the permitting baseline. Second, the amendment clarifies that recoveries from the Judgment Fund can only be

paid pursuant to court orders or court-approved settlements. This would help to prevent collusion between the Trump administration and developers advancing pretextual litigation.

Those and other notable changes include the following:

Section 1401

- A positive addition of "human health, the environment" to exception (b)(1)(D), which would allow for alteration of federal authorizations to prevent "*immediate*, specific, urgent, substantial, and proximate harm or damage" (emphasis added). However, other changes make the onerous showing required to invoke this exception even more onerous by adding the word "immediate," which would exclude, for example, authorizations for projects that elevate cancer risks. 1401(b)(1)(D), p. 69. The amendments also limit the value of exception 1401(b)(1)(D) through 1401(b)(2), which provides that the agency's response must be "narrowly tailored" to address only the specific issue creating the "immediate" harm. P. 69.

- Addition of 1401(b)(1)(F), a new and exceptionally vague exception for actions "taken pursuant to any applicable law or regulation." It is impossible to know how various courts would interpret this seemingly very broad phrase in the context of the other much narrower exceptions. Confronted with such ambiguity, judges would have to use their own discretion and conflicting interpretive canons to decide what (F) means and how it should operate in practice. This decreases certainty, promises extensive litigation, and fails to address the "forever permit" problem that the original text created. 1401(b)(2)(F), p. 69.

- Similarly, the amendment provides a savings clause stating that "[n]othing in this section limits or modifies any authority under any applicable law, compact, or treaty." 1401(c), p. 73. Again, courts would almost certainly reject a broad reading of this language that might nullify the rest of the permit certainty provisions in Section 1401. Once again, individual courts would be left to guess at the meaning of the language, and it would require extensive litigation to settle that meaning.

- A positive clarification that the federal government can act in response to court decisions, not just in response to specific and direct orders. 1401(b)(2)(A), p. 69. However, it is essential to recognize that any such court decision will come via litigation by third parties, as the federal government will not be able to sue itself. Further, Section 1401 prohibits alteration of many federal authorizations that may not qualify as final agency actions subject to judicial review, so it would lock in decisions that cannot be challenged in court.

Section 1402

- An important change to the look-back period for disparate treatment claims, extending it from 5 to 10 years. This would help ensure that the Trump administration's permitting agenda does not define the baseline against which future Section 1402 claims are judged. 1402(b)(3)(A), p. 73. However, in a scenario in which a future administration

continues the Trump administration's policies to permit fossil fuels projects and stall permitting for clean energy projects, the resulting eight-year trend would have an enduring impact, potentially constraining future administrations from shifting policy.

- Positive additions requiring that a developer claiming disparate treatment show that the government acted in bad faith with respect to a permit denial or delay. Sections 1402(c)(1)(A)(i), 1402(c)(1)(B)(i)(III), 1402(c)(1)(B)(ii)(I)(aa)(BB),p. 76-77.

- A positive addition that premises relief on a court ruling or court-approved settlement, reducing the risk of pretextual and collusive litigation between developers and the government. 1402(c)(4)(B), (p.79). Given the history of project buy-outs in the Trump administration, this is a real concern that warrants an express prohibition on using the Judgement Fund to deploy funds for compromise settlements.

Section 1403

- An amendment to Section 1403 appears to introduce a judicially-enforceable one-year deadline for a potentially enormous range of government decisions. The deadline applies to any decision regarding the construction *or operation* of a project that does not require an EIS or EA under NEPA. Given that "project" remains an undefined term, this language would sweep in any federal decision *to which NEPA does not apply at all* because the decision does not relate to a federal action "significantly affecting the quality of the human environment." The new provision therefore could potentially impose a new one-year deadline for decisions on things ranging from FCC licensing decisions to OSHA approvals and DoD security clearances for facilities. P.80. Given the range of possible impacts and the limited time available to us, we have not been able to fully evaluate this issue.

Tribal Sovereignty and the National Historic Preservation Act

BAAJA would severely undermine tribal sovereignty. Across titles, there are many provisions that erode or eliminate the essential role of Tribes in decision-making that directly impacts the interests of sovereign nations. Collectively, these provisions reverse federal commitments to government-to-government relationships and federal trust responsibility. The manager's amendment does not fix the fundamental problem that permeates the bill. And it could be read to limit consultation as much or more than the original text.

The amendment eliminates two provisions in the original bill text that would have narrowed eligibility for protection under the NHPA and allowed for federal takeover of Tribal Historic Preservation Offices. Pp. 181, 183. But the core problems remain including: (1) definitions of "undertaking" and "adverse effects" that diminish or even preclude protection of history and culture; (2) changes to the consultation process that give federal officials unfettered discretion to determine when and how NHPA protections will apply without engaging Tribes; (3) unrealistically compressed timelines and increased scrutiny of THPOs that could result in program disapprovals and loss of grants based on failure to meet unworkable deadlines; and (4) withdrawal of effective court remedies to prevent irreparable damage to culturally important places.

Changes in the manager's amendment include:

Section 2301

- Deletion of the section declaring that agencies "may consult" with Tribal Nations and other consulting parties. P. 188. While this explicit weakening of Tribal consultation was removed, the bill could still be read in its entirety to significantly diminish requirements for Tribal consultation.
  - Section 302706 of the NHPA currently requires that agencies "*shall* consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to a property during the Section 106 process (emphasis added). However, BAAJA could be construed to limit when Tribal consultation is required by specifying that agencies need only "seek, discuss, as appropriate, and incorporate, as applicable, information" from SHPOs, THPOs, Tribal Nations, Native Hawaiian Organizations, and local governments during the initial development of a Section 106 report. P. 188. This standard falls far short of the genuine two-way exchange of information necessary to inform an agency's decision-making process in a way that is consistent with the purpose of the NHPA and meaningful Tribal consultation.
  - In addition, BAAJA later specifies that a 60-day "consultation period" shall take place if there is no agreement reached between the agency and consulting parties on the Section 106 report.
  - Altogether, these provisions could result in agencies determining that the only consultation required going forward is the new "consultation period" created through BAAJA, since the bill only requires agencies to "seek, discuss, [] and incorporate" information during the development of the Section 106 report.
- Elimination of a provision that limited the types of sites and landscapes that could be considered for protection under the NHPA by redefining what qualifies as "property of traditional religious or cultural importance." P. 181.
- Changes to provisions bearing on "program evaluation." The amendment still allows the Secretary of Interior to disapprove a tribal program, including for missed deadlines, with very serious consequences including suspension of contracts and cooperative agreements. It adds additional process steps to govern how and when such disapprovals can occur, and it removes the provision allowing for Secretarial assumption of a THPO program. Pp 182-83.
- A change that makes otherwise sweeping exclusions from NHPA review inapplicable to transportation projects with greater than $10 million in federal funding. P. 186.
- Concerning changes to the remedies available for project developers bringing deadline suits to enforce aggressive new deadlines, which in many instances may be impossible to meet. Specifically, amended text provides that courts *shall "*set a schedule and deadline for the Federal agency to act as soon as practicable with respect to the injunctive relief, which shall not exceed 90 days from the date on which the applicable

order of the court is issued." The amendment further mandates that decisions must issue 120 days after the filing of a complaint. P. 193. These provisions will prove unworkable for judges and agencies. It is important to underscore the stark contrast between these provisions and other provisions stripping Tribes of any ability to secure injunctions or vacatur and stop projects from moving forward when they prevail on their NHPA and NEPA claims.

Section 2302

- A change providing that information submitted to the proposed database of properties of traditional religious or cultural importance will be exempt from disclosure under the Freedom of Information Act. (P. 199). However, access to competitive grant funding is still premised on giving federal and state agencies access to that information without the right to approve whether and how that data is shared.

National Environmental Policy Act

The manager's amendment makes only minor technical fixes that clarify gray areas and address isolated conflicts. They do nothing to address one of the biggest problems with BAAJA: the bill effectively nullifies NEPA by prohibiting courts from issuing any meaningful relief to address violations of that law.

Under BAAJA, a federal agency could file a one-sentence long "Environmental Impact Statement" for a project and a court would not have any power to vacate a permit or halt the project until a proper NEPA analysis is complete. The court could only order the agency to prepare a better NEPA analysis while the project continues, and the project would *still* continue even if *subsequent* NEPA reviews were also defective. Moreover, the project proponent would be able to enforce the provisions of Section 1401 against the agency if the agency attempted to change the terms of the project authorization in response to a proper NEPA analysis.

In addition:

- The amendments exempt additional types of projects from NEPA review, such as certain broadband related projects and replacement of fiber optic cables. 1102(a)(18)(B)(iv), p.11
- In the provision exempting "extraterritorial activities or decisions" from NEPA, the amendments preserve the requirements of the Federal Deep Seabed Hard Mineral Resources Act. 1102(a)(18)(B)(vii), p.12

In short, the changes to the NEPA provision do not solve the problems of the original bill.

Clean Water Act

The manager's amendment makes no substantial improvements to the Clean Water Act provisions of BAAJA. The major problems therefore remain:

BAAJA still greatly reduces the protections of the Section 404 dredge-and-fill permitting program, making it easier for industry and developers to fill wetlands and other waters rather than pursuing other available alternatives.

BAAJA also still seriously limits states' and Tribes' authority to protect their waters from harmful federal projects through the section 401 water quality certification process. The state or Tribe (1) still cannot deny certification unless it proves by 'clear and convincing evidence' that lesser steps might not suffice; (2) must still prove that any conditions it attaches are the least burdensome possible, and (3) still cannot deny certification if it identifies a problem after its designated window for review. These requirements make it extremely challenging for most states and tribes to use Section 401 to protect their waters and wetlands and all the benefits they provide including for wildlife and flood control.

Finally, BAAJA still doubles the duration of NPDES permits. Even if scientists developed new techniques for treating hazardous water pollutants like PFAS (e.g. supercritical water oxidation), it could be up to ten years before permitting authorities were allowed to mandate them at previously permitted facilities.

Endangered Species Act

The manager's amendment makes no substantial improvements to the Endangered Species Act provisions of BAAJA. The major problems therefore remain.

The bill still allows individual states to take over the process of conducting endangered species reviews of federal actions under Section 7 of the ESA. This process greatly complicates ESA compliance and greatly compromises protections: most states lack the resources and expertise to evaluate or address species threats, and all have strong economic incentives to "race to the bottom" by greenlighting projects that harm species.

The changes to § 1304 that make revocation of state delegation mandatory rather than discretionary in the face of inadequate state performance (§ 1304, p. 159) is unlikely to solve these problems. The federal government would still face major political disincentives to revoke a given delegation, and the state could still challenge the revocation and litigate the adequacy of its performance.

The bill still changes the ESA's long-standing definition of best available science in a way that could overturn the well-established legal principle that agencies can and must act to protect endangered species even in the face of scientific uncertainty.

Changes in the manager's amendment even further complicate the judicial review provisions of BAAJA. The original bill invited inter-court conflict by dividing judicial review of BiOps between the DC Circuit and a host of district courts, depending on whether a state or federal government issued it. Sec. 1305, p.65. The manager's amendment 1305 adds another layer of complexity to this balkanized system by assigning venue for certain types of projects based on NEPA's separate venue provisions. P.65-66.

Transmission and Grid Reform

The bill's transmission and grid provisions are well-designed to speed up approval of new transmission lines, modernize the grid, and maximize existing grid capacity. The manager's amendment strengthens certain provisions and weakens others.

Significant changes include the following:

- Elimination of provisions that would speed up permitting with parallel state and federal review. In an effort to accelerate permitting of large transmission lines, the original text of Section 2101 established a parallel review process for large transmission lines (at least 345 kilovolts) that would have allowed FERC review project applications during the state review process, instead of the current sequential framework. The amendment eliminates this "simultaneous processing" of applications for large projects, which could have delivered efficiencies and time savings. P 97.

- Eliminating application of planning requirements in the Southeast and other areas outside of RTOs. Section 2106 is designed to help speed up interconnection queues by consolidating generator and transmission planning processes and establishing a straightforward fee-based structure for interconnection costs. Currently, interconnection and transmission planning are on separate tracks, which makes it difficult for grid operators to account for the transmission needs of generators in the queues when making transmission expansion decisions, leading to an inefficient and costly process. The manager's amendment limits the application of this section to RTOs, as compared to transmission planning areas in the original bill. P. 112 (substituting "each Transmission Organization" for "transmission planning region"). This means that certain areas that do not have RTOs, like the Southeast, would not be covered.

- Changes to provisions related to market participation of distributed energy resources (DERs). Section 2108, which allows aggregated DERs to participate in wholesale power markets, is amended to include a capacity cap on qualifying DER facilities. Opening up markets to DERs is essential, but the original text appeared to codify a pathway to wholesale markets for behind-the-meter (BTM) gas installations, which are surging across the country to serve onsite data center demand. The amendment caps qualifying BTM DER facilities at 5 megawatts, which can help narrow the path for large BTM gas facilities to participate. P. 121. However, while the 5 MW cap eliminates large combustion turbines (CTs), it would not eliminate aggregations of small CTs or Reciprocating Internal Combustion Engine (RICE) units generators. To cap groups of smaller gas generators at 5 MW, language would need to be amended to provide not more than 5 MW in the aggregate at any retail customer's site. The section's dispatchability requirements, which could exclude certain clean energy DERs from participating, also remain.

Nuclear Energy

The manager's amendment includes an entire new and novel title for nuclear fuel cycle licensing, which includes provisions with very serious environmental, health and safety implications. Title V, Sections 1501-04, pp. 202-212. Among other things, it would authorize construction of uranium enrichment facilities in parallel to an NRC licensing regime that has already been substantially weakened. And, this activity will allow certain projects to proceed without public hearing. These changes deserve meaningful analysis and deliberation, before being written into law.