New Mexico Department of Justice

November 6, 2026

The Honorable John Thune
Majority Leader
United States Senate
511 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Re: S. 5653, the "Bipartisan American Affordability and Jobs Act of 2026": Request That BAAJA Not Advance Without Significant Amendment

Dear Leader Thune and Leader Schumer:

We, the undersigned Attorneys General, as chief legal officers of our states, write regarding S. 5653, the "Bipartisan American Affordability and Jobs Act of 2026" (BAAJA). We respectfully request that BAAJA not advance to the Senate floor, or be included in any package, unless it is significantly amended as described below and in the enclosed Appendix. We are sending copies to the chairs and ranking members of the Committee on Environment and Public Works and the Committee on Energy and Natural Resources, which share jurisdiction over BAAJA.

We agree that our country needs a more reliable grid to bring green energy to market, and we believe that BAAJA's transmission planning and interconnection provisions deserve serious consideration. We also commend efforts to ensure that our country's energy needs can be met. Long range models are necessary to unlock our country's wind and solar potential, and the bill could be helpful in creating a cleaner grid, transitioning away from fossil fuels, and ensuring that energy is abundant, accessible, and affordable for all. We also appreciate that more expedient, streamlined energy projects can help spur job growth and provide opportunities for local economies and working families, and we want to promote policies that help working people tackle the current affordability crisis.

To that end, we are encouraged by the intent of BAAJA. Among other positives, BAAJA facilitates interregional transmission by requiring planning and establishing a cost allocation framework, which can help increase transmission capacity and make the grid more resilient. It also requires data center sponsors to be more accountable for transmission and infrastructure

costs at a time when ratepayers are especially concerned about how growing expansion of data centers will impact their monthly bills.

Despite these benefits, however, we are concerned that BAAJA is not narrowly tailored enough and trades too many protections for speed. BAAJA would fundamentally change how federal agencies make permitting decisions across a wide range of industries, how much review projects receive, and who can challenge those decisions in court. The changes raise five specific areas of concern.

First, BAAJA gives federal officials broad discretion without safeguards for ethics, scientific integrity, or independence from the industries they regulate. Second, it weakens tribal consultation and permits agencies to unilaterally decide whether sacred places will be harmed. Third, it shortens and narrows environmental review and limits the remedies available when review is inadequate. Fourth, its permitting changes reach well beyond transmission, into mining, oil and gas, geothermal, hydropower, and offshore leasing. And finally, it gives project sponsors enforceable remedies while substantially limiting the ability of the public, states, and tribes to stop unlawful approvals.

We recognize that the nation must address the cost, delay, and uncertainty of building critical infrastructure; but, in its current form, BAAJA is not narrowly tailored to address the primary issues impacting the permitting of such projects, such as inadequate agency staffing, poorly sequenced approval processes, and misaligned regulatory structures. We urge Congress to address those longstanding issues rather than unsettling the legal bulwark that has protected the environment and tribal communities for the better part of fifty years. We also believe Congress can maintain this balance while creating jobs and making energy more affordable.

Our states have direct interests in permitting reform. States own and manage fish and wildlife for the benefit of their residents, and Congress has directed federal wildlife agencies to cooperate with states in carrying out the Endangered Species Act (ESA).[1] Congress has also recognized "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" in the waters within their borders, and Section 401 of the Clean Water Act (CWA) gives states a defined role in federal permitting for activities that may discharge into those waters.[2] States administer historic preservation programs and work with tribal governments to protect historic and sacred places under the National Historic Preservation Act (NHPA). And the National Environmental Policy Act (NEPA) works with these statutes to ensure that the government considers more reasonable alternatives before rushing to judgment. When these laws are narrowed or weakened, the burden of responding to harm falls on state agencies, state courts, and state budgets, not to mention environmental, aesthetic, and cultural harms that in many cases cannot be undone.

Why These Laws Exist

In enacting the laws BAAJA seeks to amend, Congress answered a question: who should decide what happens to the rivers, historic places, and wildlife that belong to everyone? In the late 1960s and early 1970s, Congress decided that federal agencies should not have sole discretion to make permitting decisions without community and scientific input. The laws BAAJA would narrow were built to promote inclusive, not rushed or industry-dominated, decision making.

NEPA rests on a simple idea: when government does not think through its actions, those actions may not be in the best interest of the people or the environment. NEPA requires agencies to study and disclose the environmental effects of major federal actions before they act.[3] Congress wrote NEPA in the wake of the 1969 Santa Barbara oil blowout and the Cuyahoga River fire, with hopes of never repeating those disasters. NEPA must remain strong because government decisions are only as legitimate as the reasoning behind them, and the public is entitled to see such reasoning before it is too late.

In addition to focusing on environmental effects, Congress also acted to preserve our shared history. Particularly when considering historic locales, some losses simply cannot be repaired. Congress enacted the NHPA with that in mind. The NHPA followed years of federally funded highway and urban renewal projects that erased neighborhoods and landmarks no one could rebuild.[4] Section 106 thus requires agencies to weigh a project's effects on historic places before approving it.[5] Congress recognized the importance of giving tribes a seat at the table in 1992 when it gave tribes a formal role through Tribal Historic Preservation Officers (THPO). That choice recognized something agencies often overlook: tribes hold knowledge of sacred places that federal inventories often fail to capture, and a government that does not ask for valuable tribal knowledge will not receive it.

Wildlife and water belong to all of us, and Congress enacted the ESA to ensure that a single project's convenience does not outweigh the permanent loss of a species. Indeed, the ESA has been integral in protecting ecosystems and wildlife of profound cultural significance to our nation. For example, as a result of the ESA, the bald eagle—a symbol of our nation—was pulled back from the brink of extinction and removed from the endangered species list in 2007.[6] The California condor, also once nearly extinct, has seen a significant comeback through a federal-state captive breeding program administered under the ESA.[7] Researchers estimate that the ESA has prevented the extinction of more than 99 percent of the species under its protection since 1973.[8]

Likewise for water, Congress enacted the CWA in 1972, over President Nixon's veto, to ensure that states and communities were able to protect their waters. Section 401 gives states a voice in federal permitting, and Section 404(c) allows EPA to block a disposal site that would cause unacceptable harm.[9]

Taken together, these laws form a bulwark against the kind of unregulated development that led to the wholesale destruction and displacement of tribal communities and the eradication of ecosystems and species that were once commonplace. Relying on these legal safeguards, the public, states, and tribes can require the government to think before acting, and courts can stop decisions that were inadequately considered.

I. BAAJA Makes Permitting Decisions Too Susceptible to Industry Capture Without Safeguards for Ethics, Science, or Independence

BAAJA gives federal officials broad discretion over permitting decisions but adds no safeguards to ensure that those decisions rest on a developed record, community input, and sound science. It also contains no safeguards against conflicts of interest, or against the risk that the regulated industry, rather than the record, will shape a decision.[10] Federal ethics laws generally restrict an individual official who holds a financial interest in a matter from making decisions over that matter. They do not, however, require an agency to verify the record a sponsor prepares, to log sponsor contacts during review, or to subject discretionary decisions to outside scrutiny. The CEQ regulations once required contractors preparing environmental documents to disclose financial interests in the outcome, but CEQ rescinded those regulations in 2025.[11] BAAJA would not restore that protection.

The bill also gives the project sponsor a central role that current law does not. At application, the sponsor must submit a record of its own pre-application engagement with local, tribal, and community entities, capped at twenty pages, along with a brief statement of purpose and need and the known alternatives (§ 1102).[12] The bill then limits the alternatives an agency must study to those that meet the goals of a non-federal sponsor (§ 1105). The practical result is that the sponsor frames the question the agency answers, and the agency has no statutory duty to test that framing against the record of affected tribes and communities.

One of the most consequential provisions in BAAJA is Section 1401, which bars an agency from revoking, amending, or altering an authorization for a project already in operation. The bar on revoking, altering, or amending an authorization is subject to five exceptions: a court order, a material breach or violation of law by the holder, fraud or material misrepresentation, a narrow emergency based on new information, and a request from the holder or the non-federal sponsor "to take such action" (§ 1401(b)(1)(A)-(E)).[13] The first four require a showing of some kind. We are concerned that the holder-request exception requires nothing beyond the request. The text contains no finding requirement, no showing of harm or violation, no notice to the public or to affected tribes, and it provides no opportunity to comment.

In practical terms, a permit holder could ask an agency to remove a condition that protects a burial area discovered after approval, to loosen a limit on water withdrawals, or to alter the mitigation terms that neighboring communities relied on. The agency would be permitted to comply, and no one outside the agency-holder relationship would have a right to know the request was made. The holder-request exception, therefore, could potentially allow permit holder to waive the protections attached to its own authorization, which is a different and broader power than those created by the other four exceptions.

Section 1401 also does not allow enough judicial recourse to prevent unlawful action. The court-order exception would be the only route for reversal on a showing of unlawfulness, and the remand-only remedy largely forecloses meaningful recourse for NEPA and NHPA claims.[14] The holder-request exception adds a route that does not depend on the public's ability to litigate at all.

Cases from the past year suggest why safeguards against secretive actions are important. In December 2025, federal officials issued a stop-work order on offshore wind projects that already held federal permits, citing classified reports that were not made public. Courts set those orders aside.[15] A decision to halt or approve a project is only as reliable as the analysis behind it, and when that analysis cannot be examined, the decision is difficult to test.

Among other changes to Sections 1401 and 1402 in this letter, we ask Congress to adopt the safeguards described here and in the Appendix. Those safeguards include recusal and disclosure of financial interests, a public log of sponsor communications, agency verification of sponsor-prepared material before reliance, and a scientific-integrity standard with independent peer review of sponsor-funded analyses. They also include written, reviewable findings for discretionary overrides, reviewable CEQ dispute rulings, and inspector-general oversight of approvals, with a sunset for BAAJA's most significant changes. As to the holder-request exception, we ask that it be deleted[16] or, at a minimum, that any such request be made public, be supported by a written determination, and be unavailable where it would reduce protections for historic, cultural, or listed resources.

II. BAAJA's Changes to the NHPA Undermine Tribal Sovereignty and the Protection of Sacred Places

Tribal nations hold knowledge of sacred places that federal agencies cannot reconstruct from the administrative record, and harm to a sacred place cannot be undone once it occurs. That is why current law requires consultation with tribes that attach religious and cultural significance to a site. Section 106 is a process rather than a veto, and its value depends on bringing tribal knowledge into the decision before the decision is locked in.

The consequences of setting these protections aside are not abstract for tribal communities, as exemplified by former Cochiti Pueblo Governor Regis Pecos' scholarship. Before the Corps of Engineers built Cochiti Lake on the Rio Grande under a 1960 flood-control authorization, the Cochiti Pueblo had cultivated essentially every acre of its available farmland, a way of life passed down from time immemorial.[17] The reservoir impounded water in 1973.[18] During construction, bulldozers ran through the night, and the earth was ravaged in full view of children walking to school.[19] Traditional summer homes were destroyed.[20] Places of worship were dynamited, destroyed, and desecrated. Ancestors were torn from their resting places during excavation.[21] When the water rose, seepage crept over the fields that remained. Livestock rotted in the rising water, and farm machinery rusted where it stood.[22] The elders who had spent their lives protecting that land could not protect the one sacred place they asked to keep.[23] A 99-year lease then placed about half of the reservation under a planned community proposed for as many as 40,000 non-Cochiti residents.[24]

The Pueblo spent decades in litigation, congressional hearings, and bankruptcy proceedings to win back its land, and it reduced the leased area to less than 1,000 acres.[25] A hydroelectric proposal at the same site was stopped only when Congress acted minutes before adjournment, after federal officials told the Pueblo that its religion would not receive the protections available to other faiths and that the Pueblo would have to prove the site's importance, even though its faith forbids divulging the very knowledge that proof required.[26] Cochiti's history shows what

happens when federal decisions are made quickly, on incomplete information, and at the expense of the people least able to resist.

It is against this historical backdrop, and countless other examples of the United States government's disregard for tribal communities, that BAAJA proposes to weaken the NHPA's Section 106 process as follows:[27]

> 1. Consultation becomes discretionary where it matters most. Agencies "may consult" tribes when establishing the area of potential effects and identifying historic properties (§ 306108(c)(2)(B)(iii)). If the agency finds no adverse effect, it "shall have no further obligations" (§ 306108(c)(2)(D)(ii)). If a tribe objects to a report, the agency's written response alone fulfills its duty to consult (§ 306108(c)(5)(C)(v)).
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> 2. Tribes and states would have only 30 days to respond to information requests and agency reports. After that, an agency must proceed, need not reconsider any report or finding if the tribe later re-enters, and may consult or sign agreements with the Advisory Council on Historic Preservation in place of the tribe (§ 306108(c)(2)(B)(iv), § 306108(c)(5)(C)(i)-(ii), (vi)).
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> 3. A tribe that misses a deadline and re-enters later does not reopen the process. The agency "shall not be required to reconsider any previous report or finding" (§ 306108(c)(5)(C)(ii)(I)).
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> 4. A no-adverse-effect finding ends the agency's Section 106 obligations (§ 306108(c)(2)(D)(ii)). When considered in the context of the optional consultation provisions, this means an agency could unilaterally decide there are no adverse effects caused by a project and then cease considerations regarding a site, even where new effects may be discovered after the fact.
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> 5. Agencies would decide adverse effects on their own and could set aside the adverse effects they do find whenever, "in the sole discretion" of the agency official, other considerations outweigh historic preservation. Visual, atmospheric, and audible effects would drop out of review unless they have a direct impact that would significantly diminish the characteristics that make a property eligible for the National Register (§ 306108(a)(1)(B); § 306108(c)(2)(D); § 306108(c)(3)(A)(i)(II)).[28] Only effects that "directly alter" a property count, "feeling" drops out of the integrity factors, a specific affront to tribes and review covers only the part of a property inside the area of potential effects (§ 306108(a)(1)(A)(ii); § 306108(c)(2)(D)(iii)(II)(cc)).
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> 6. A tribe that did not sign a programmatic agreement may not bring a civil action challenging its implementation, and courts lack jurisdiction over such claims (§ 306108(c)(10)).
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> 7. A traditional cultural property would have to be "an identifiable geographic location or feature at which an event of continuing religious or cultural significance to a living community occurred" (§ 302706(a)(1)). This narrows the current definition and could lead to arguments that sites sacred to tribes should not qualify as a

traditional cultural property under the NHPA. The definition could also exclude natural landscapes near tribal cultural sites that are significant to and part of a site's cultural and historic value.

8. The Secretary of the Interior could take over THPO functions after two years of noncompliance and could suspend grants before the deficiency is resolved (§ 302707). THPO programs would also face fiscal audits at least every four years (§ 302707(d)).

9. New grants would be conditioned on logging tribal site information into a database accessible to federal and state officials, and the bill's new confidentiality language addresses only disclosure by the grant recipient to the public (§ 302703(b)(2)-(3)). It does nothing to limit what the federal agencies and State Historic Preservation Officers who hold the data must release, leaving tribal site information dependent on case-by-case withholding determinations under 54 U.S.C. § 307103, and exposed to state public-records requests.

10. The bill also narrows what counts as an "undertaking," excluding any project whose only federal involvement is a grant, loan, or other financial assistance (§ 306108(a)(7)(B)(ii)). Many federally funded state and local projects would be outside the scope of Section 106 review altogether, and the new definition conflicts with the existing definition in 54 U.S.C. § 300320, which the bill does not amend.

The SunZia transmission line project, which proponents have championed as demonstrating the need for BAAJA, shows what many of these provisions would mean in practice. BLM was told in 2009 that the San Pedro Valley was culturally significant to tribes. Its 2015 record of decision deferred identification of historic properties until after the decision, and its 2018 draft inventory omitted the Valley. In 2023 BLM issued limited notices to proceed, and the tribes sued in January 2024, after construction had been authorized. The Ninth Circuit held that the tribes' claim was reviewable and plausibly stated a violation of the programmatic agreement.[29] Under BAAJA, those notices would be protected from revocation, vacatur would likely be unavailable for an NHPA violation, and the remedy would likely be remand while the approval stayed in effect. BAAJA's sequencing rule would also support an agency argument that the 2015 decision completed NHPA review, an argument the Ninth Circuit rejected.[30] The defect would become permanent, and BAAJA would not require the identification that BLM skipped.

SunZia also undercuts the claim that litigation is the main driver of delay. The application was filed in 2008, and the record of decision was issued in January 2015. The tribal suit came nearly nine years later and challenged only post-decision implementation. Construction continued while the case was pending. Thus, agency process, including the deferred identification of historically significant sites, accounted for the largest share of the seventeen-year schedule.

At bottom, BAAJA's changes to Section 106 of the NHPA function to diminish tribal input in the permitting process. As written, BAAJA could create results that are irreconcilable with the core intent of the NHPA and our duty of stewardship to tribal nations.

We ask for amendments to make tribal consultation mandatory by changing the "may" consult language to "shall" consult language throughout; that tribal and state response periods be at least 90 days; that adverse-effect determinations, including findings of no adverse effect, involve consultation; that the bill's THPO and SHPO takeover and grant suspension provisions be removed; that the 50-percent workweek mandate be struck; that tribal site data be protected from public-records disclosure, including under state law, by making 54 U.S.C. § 307103 apply to the database on a mandatory basis; and that the Historic Preservation Fund be funded through appropriation, not just authorization, and at a meaningful level. Indeed, the $200 million BAAJA authorizes is about one-third more than the $150 million annual deposit it would replace, and an authorization is not a firm commitment. Appropriating a more significant amount would make improvements to the Historic Preservation Fund real instead of symbolic.

III. BAAJA Sharply Reduces Environmental Protection

BAAJA changes several statutes in ways that together reduce the information agencies must consider before approving projects and the remedies available after approval. Seven sets of changes deserve special attention:

1. Under the ESA, consultation clocks would shorten from 90 to 60 days and from 150 to 100 days (§ 1302). Projects in operational rights-of-way that receive a categorical exclusion would be exempt from core consultation duties, including the duty to ensure that an action is not likely to jeopardize listed species (§ 1303). These changes overlook the complexity of evaluating the evolving needs of fish and wildlife populations in the changing climate, as well as the importance of considering tribal and state expertise. For example, a project that may qualify for a NEPA categorical exclusion may nevertheless significantly and adversely affect listed species or critical habitats. Rushing or skipping these assessments will result in overlooking significant harm to species and natural resources and thus defeat the intended purpose to avoid conflicts and permitting uncertainty.

2. BAAJA would define "best available science" to exclude data shaped by "presumptions or policy prescriptions" (§ 1301). This could invite legal challenges by creating a subjective basis for excluding data or information and, as defined and in practice, will reduce agencies' ability to account for scientifically supported uncertainty and reasonably foreseeable risks when making decisions. In addition, providing exclusive jurisdiction for biological opinion review in the DC Circuit Court of Appeals has the potential to complicate and slow litigation. Only biological opinions issued by agencies may be challenged in the DC Circuit, while ESA citizen suits challenging the agencies' compliance with the ESA could only proceed in federal district court. As such, there could be parallel cases in different forums challenging essentially the same action or project. The likely result of these changes is that more species will face increased risk of extinction and there will be more litigation uncertainty.

3. Under the CWA, Section 401 certification would be limited to water quality requirements, potentially foreclosing the ability to regulate under more restrictive state law. States wishing to deny or condition certification would have to support

their claims by clear and convincing evidence—an unrealistically burdensome standard (§ 1202). For "certain interstate linear infrastructure" the scope of review would be further limited to consideration of only the "direct point source discharge" (§ 1202). Any conditions must not only meet this unsuitable evidentiary standard but must also be the "least burdensome" possible. Requiring the certifying authority to achieve a standard of the "least burdensome conditions" could result in the reviewer trying to prove a negative, which is unworkable, among other problems.

4. States that do not act within one year would have their certification requirements waived, with no judicial review of the waiver (§ 1202). The amendment to Section 404(c) is ambiguous, and under a broad reading, EPA could not revisit a permit after issuance (§ 1204(a)). NPDES discharge permits would move from five-year to ten-year terms (§ 1203), which delays any ability to revise permit conditions to account for information about pollution or health effect of the project. These changes narrow the CWA's protections for state, community, and tribal input and make it difficult or impossible to remedy unanticipated consequences of projects.

5. Under NEPA, sponsors could define the alternatives an agency must consider, and deadlines would run without tolling for tribal consultation or incomplete applications (§§ 1105–1106).

6. Courts could not issue permanent injunctions for NEPA or NHPA violations, and the remedy for a NEPA violation would be remand without vacatur, leaving a flawed approval in effect while the agency cures the defect (§ 1110(c)). In practice, this remedy is inadequate to protect sites or species from irreversible damage.

7. Critically, Section 1401(a)'s proposed definition of a "Federal Authorization or Permit" combines with other provisions to prohibit revocation or modification of "any other approval or order that is necessary, including any determination by a Federal department or agency that additional authorizations or permits are not necessary, for the construction or operation at full capacity of a project." This language is overbroad and could lead to unjust and undemocratic results. For example, if Congress enacted more stringent environmental regulations after BAAJA's effective date, sponsors could argue that Section 1401(a) prohibits those new regulations from applying to an already-permitted project. Congress could fix this problem by clarifying that Section 1401(a) does not prevent agencies from applying new regulatory standards, including greenhouse gas standards. Generally, a narrower definition should include only final agency actions that are made public, which would help avoid unreviewable or secret decisions by an outgoing administration.

The justification offered for the ESA changes is that consultation blocks projects. Studies suggest otherwise. One such study of Section 7 ESA informal and formal consultations from 2008 through 2015 found that no project was stopped or extensively altered as a result of Fish and Wildlife Service's conclusions that a project would jeopardize or adversely modify critical habitat.[31] If BAAJA's goal is faster decisions, more targeted amendments would instead extend

consultation clocks while making tolling available and deadlines more predictable. Reducing substantive requirements that protect species and water does little more than lead to uninformed and potentially harmful decisions. We ask Congress to keep the existing ESA floors, among other existing protections set out here and in the Appendix.

IV. BAAJA Reaches Well Beyond Electric Transmission

BAAJA's transmission provisions, in Division B, Title I, address planning, interconnection, and cost allocation. Its permitting changes, however, are not limited to transmission. Section 2201 shortens the period for challenging energy, mining, and related authorizations under the Mineral Leasing Act, the General Mining Law of 1872, the Federal Land Policy and Management Act, the Geothermal Steam Act, and the Outer Continental Shelf Lands Act (§ 2201(a)(1)(B)(i), (b)). Section 2215 expands hardrock mill-site rights on public land. Section 2229 exempts certain exploration on federal land from NEPA review as a major federal action. Section 2102 removes NEPA and NHPA review for certain gas pipeline work in existing corridors. Section 2251 changes the Outer Continental Shelf standard from "prevention of interference with reasonable uses" to "prevention of unreasonable interference." Sections 2231 through 2234 limit federal license conditions for hydropower to the effects of the project (§ 2232), which could leave fishway and species protections unable to address cumulative effects. Perhaps most significantly, Sections 1401 and 1402 apply to every project with a non-federal sponsor, not only to transmission.

The Desert Southwest Pipeline project exemplifies why BAAJA's transmission and certainty provisions should not reach beyond electric transmission and renewable interconnection. Energy Transfer, which owns the pipeline, has announced plans to route the pipeline 516 miles through New Mexico toward the Phoenix area.[32] The pipeline route passes through the Chihuahuan and Sonoran Deserts,[33] which are among the most ecologically diverse deserts in the world. The pipeline route also passes through the Otero Mesa region, which is home to thousands of archaeological or sacred sites.[34] By applying transmission reform to oil and gas projects like the Desert Southwest Pipeline, BAAJA could prevent any potential adverse impacts on ecosystems or sacred sites from being adequately considered. And if such impacts were realized, states, tribes, and other stakeholders would have little recourse to prevent irreversible damage. Further, expansion of fossil fuel infrastructure prolongs reliance on fossil fuels, which runs counter to the renewable energy gains BAAJA could bring.

Changing the process for extractive permitting is a legitimate subject for Congress to consider, but it requires separate considerations, hearings, and a public interest debate that BAAJA's transmission provisions do not address. We ask that Titles II and IV, and the corridor provision in § 2102, be limited only to electric transmission and renewable interconnection. Further, if BAAJA's goal is to promote renewable energy expansion, the certainty provisions in Sections 1401 and 1402 should also be limited to transmission infrastructure and renewable energy projects, while keeping in place reasonable environmental and cultural protections as set out in this letter.

V. BAAJA Limits Judicial Review for the Public, States, and Tribes While Bolstering Relief for Sponsors

BAAJA gives project sponsors a private right of action against federal agencies while narrowing or eliminating judicial relief for the public, states, and tribes. As proposed, a sponsor may sue an agency when a permit is altered or delayed (§ 1401(b)(4)(D)). Further, a sponsor may recover 25 to 50 percent of its costs incurred,[35] plus delay costs, if the government intervenes against an approved project (§ 1401(b)(4)(D)).

In authorizing a private right of action, Section 1402(b)(3) creates a disparate treatment theory of liability. Notwithstanding other problems, Section 1402(b)(3)(A)(ii) is especially concerning because it allows sponsors to sue for projects that are "improperly denied." That term is not defined elsewhere and, in plain meaning, could be susceptible to overbroad use. Without narrowing that definition, the disparate treatment cause of action could be abused to chill meaningful agency review.

While favoring sponsors, BAAJA limits or eliminates meaningful judicial recourse for the public, states, and tribes. First, a challenge must be filed within 150 days (§§ 1110, 2201). 150 days is not enough time for stakeholders to triage, retain experts and complete scientific and/or historical review, hire counsel, and prepare for legal action if necessary. A more reasonable approach would shorten the existing six-year window to a two- or three-year window to file suit, which is consistent with most general civil statutes of limitations. Second, the challenger must have filed a substantive comment (§ 1110(b)(2)) and must also show direct injury (§ 1110(b)(3)), arguably imposing a heightened standing requirement. This comment requirement is new as a condition for bringing suit under § 1110(b)(2). Third, review lies exclusively in the court of appeals (§ 1110(c)(1)), the remedy for a NEPA violation is remand without vacatur (§ 1110(c)(5)), and permanent injunctions are unavailable for NEPA and NHPA violations where they previously were. Finally, the trust-resource bar (§ 1110(c)(8)) limits claims concerning trust land, and BAAJA requires courts to defer to agency judgments on the scope of review.

BAAJA also bars agencies from revoking or altering any authorization in effect on or after September 16, 2026. Reversal would be possible only through a court order, and for NHPA and NEPA violations, the only remedy would be remand. This means that permitting conditions for projects that were unlawfully authorized or that cause pollution or other harm often cannot be changed after the fact.

These changes create a problematic asymmetry: A sponsor that is delayed can recover significant damages from the government, while a community harmed by an unlawful approval has little recourse. Thus, we ask for symmetry: provide a more reasonable limitations period than 150 days (e.g., two or three years, aligning with general civil statutes of limitations), maintain court access for states and tribes, allow vacatur as the default remedy for defects, allow federal courts to issue permanent injunctions, and limit BAAJA's certainty provisions (§ 1401) only to lawfully issued authorizations.

VI. Congress Can Help Speed Up Projects by Focusing on True Causes of Delay, Not Diminishing Protections

Congress should prioritize supporting transmission and renewable capacity without reducing protections for sacred places, water, and wildlife, and without limiting the public's ability to enforce the law. We offer a few solutions.

If the goal is faster and more predictable decisions, amendments should target agency capacity, sequencing, and follow-through. A study of more than 41,000 Forest Service decisions from 2004 through 2020 found a median of 2.8 years for an environmental impact statement and 1.2 years for an environmental assessment, and it identified agency staffing capacity as one of the primary causes of delay.[36] The Government Accountability Office (GAO) found in 2024 that BLM and the Forest Service exceeded a statutory 270-day deadline in 36 percent of communications-use applications, citing challenges with staffing and applicant responsiveness, and noting that the agencies lacked reliable data to measure processing times.[37] As written, BAAJA does not address the actual causes of delay.[38]

Three categories of amendments, also identified in the Appendix to this letter, could help address the actual causes of delay:

1. Improve review sequence by requiring impacts to be evaluated before project segments begin. For example, historic properties should be identified, and any impacts evaluated, before a right-of-way decision for linear or landscape-scale projects is made. Any deferred segment should carry binding milestones, public notice, and tribal participation.

2. Increase funding for additional review personnel, including federal archaeologists, biologists, and NEPA reviewers, and for SHPO and THPO review and tribal participation in programmatic agreement reviews. Increased staffing would help speed up impact evaluation prior to segment approval.

3. Require reporting and tracking for project delay causes. Agencies should report each milestone and the cause of any delay, such as agency process, applicant or financing challenges, or litigation. An applicant facing a missed deadline should be able to request a decision from a senior official, who must publish the reason for the delay. Data on delays would also help evaluate when and whether to increase staffing.

VII. Conclusion

Fifty years ago, Congress decided that the country's rivers, historic places, and wildlife belong to everyone, and that no single agency should decide their fate alone, on a sponsor's schedule, out of public view. The laws BAAJA would narrow are the product of that decision. Those laws have given states, tribes, and the public a place at the table ever since. We ask Congress to honor that choice today.

We share the sponsors' goal of affordable and reliable energy, and we want the country to build the transmission and clean energy infrastructure it needs. But speed is not the same as progress. A permit approved on an incomplete record, a sacred place lost before anyone could ask about it, or a species that cannot be brought back, does not become acceptable because the schedule was shorter. Some losses cannot be repaired.

The amendments we request are not a rejection of permitting reform. They are ways to pursue reform without surrendering the safeguards that have protected our country's water, wildlife, and

cultural heritage for the better part of fifty years. They would keep decisions tied to a reviewable record, restore tribes' role in decisions about their sacred places, preserve the environmental floors that Congress set, keep courthouses open to states and tribes, confine the new certainty provisions to the transmission and renewable energy projects that motivate them, and direct attention to the staffing, sequencing, and accountability problems that cause delay in the first place.

We therefore respectfully request that S. 5653 not advance without the significant amendments described in this letter and in the enclosed Appendix. We welcome the opportunity to work with the Senate to build a bill that Congress can be proud of, and that makes permitting faster and more predictable without asking the public, states, and tribes to give up the protections that make the decisions worth trusting.

Respectfully submitted,



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Enclosure: Appendix, Consolidated Requested Amendments

cc: Chairs and Ranking Members, Committee on Environment and Public Works, and Committee on Energy and Natural Resources

APPENDIX: CONSOLIDATED REQUESTED AMENDMENTS TO S. 5653

Section references are to the introduced text of S. 5653. Requests are grouped by subject so the committees can adopt them as a package.

These proposed changes are intended to assist with amendments but are not exhaustive, and all amendments should ensure that meaningful public and tribal input, scientific review, and access to courts are maintained. We ask that the Senate carefully consider additional input from those most affected, including tribes and marginalized communities.

No.	Subject	Requested amendment	BAAJA provision
1	Integrity safeguards	Require recusal and disclosure of financial interests for officials who decide covered authorizations, including former employers within two years. Require a published log of sponsor meetings and communications, and exclude unlogged communications from the record. Require agencies to independently verify any sponsor-prepared stakeholder record or analysis they adopt, and to disclose sponsor-funded contractors.	§1102; §1106
2	Scientific integrity	Require a scientific-integrity policy that prohibits suppression or alteration of findings for non-scientific reasons. Require public release of data, models, and methods. Require independent peer review of biological opinions and environmental impact statements that rely on sponsor-funded analyses. Strike "presumptions or policy prescriptions" from the best-available-science definition.	§1301
3	Reviewable discretion and oversight	Require a published, reasoned, reviewable written finding for any override "in the sole discretion" of an official, any THPO takeover, and any § 1401 emergency exception. Make every CEQ dispute ruling published and reviewable under the APA. Add annual inspector-general audits of a sample of approvals, GAO reporting every two years, and a seven-year sunset for Title IV and the § 1110 changes.	§306108; §1106; §1401(b)(1)(D)
4	Tribal consultation	Replace "may consult" with "shall consult" for tribes and THPOs when establishing the area of potential effects and identifying historic properties. Extend the tribal and state response period to at least 90 days, and require reconsideration of findings when a tribe responds within 180 days. Prohibit the Advisory Council from signing an agreement on tribal land in place of a tribe without the tribe's consent.	§2301; §306108(c)(2)(B)(iii)-(iv); §306108(c)(2)(D); §306108(c)(5)(C)(ii)(II)
5	Adverse effects and eligibility	Require consultation with tribes on adverse-effect determinations, and strike authority to decide adverse effects unilaterally. Carve out tribal and religious sites from the reduced consideration of visual, atmospheric, and audible effects. Restore eligibility language "of traditional, religious, and cultural importance, and strike the event-based requirement and other narrowing language.	§2301; §306108(a)(1)(B); §302706(a)(1); §302707 table
6	Tribal preservation offices and site data	Strike the Secretary's authority to assume THPO functions and to suspend grants before consultation is complete. Exempt tribal site data from federal and state public-records laws. Make federal and state access subject to a written agreement with the tribe, and make listing	§2301; §302707; §302703

		voluntary. Address any tribal non-compliance through technical assistance and a corrective plan agreed with the tribe.	
7	Historic Preservation Fund	Replace "authorized to be appropriated" with a mandatory appropriation at a level well above the current $150 million annual deposit. Preserve the existing deposit in the interim.	§2302(a) (§303102)
8	Environmental floors	Restore 90- and 150-day ESA consultation clocks, with extensions for new information or tribal request, and limit the § 7(q) exemption to projects with no effect on listed species or critical habitat. Restore the § 401 scope, use a preponderance standard for denial or conditions, toll the one-year period while information is outstanding, and make waivers reviewable. Clarify § 404(c) in the text so that EPA's authority over permits issued before enactment and over changed conditions is preserved. Restore five-year NPDES permit terms. Strike the sponsor-goals limit on alternatives. Allow categorical exclusions only by rule issued after notice and comment.	§§1202, 1204(a), 1203, 1105, 1302-1303
9	Judicial remedies	Make vacatur the default remedy for defects that affect the outcome or a cultural or listed resource. Allow remand without vacatur only for minor defects, with a fixed cure period. Allow permanent injunctions for NEPA, NHPA, and CWA violations where irreparable harm to a cultural site, listed species, or water resource is present.	§1110(c)(5); §1401(b)(4)(D)
10	Judicial access and symmetry	Set a limitations period of two to three years rather than 150 days as drafted. Give states and tribes the option of suing in federal district court. Recognize state standing to protect sovereign, regulatory, and tribal interests. Strike sponsor cost recovery under § 1401(b)(4) and the sponsor deadline suit under § 306108(c)(5)(B)(iii). Limit suits under §§ 1401 and 1402 to documented, unexplained discrimination against a project.	§§1110, 2201; §1401(b)(4); §1402; §306108(c)(5)(B)(iii)
11	Limits on certainty	Limit § 1401 to authorizations lawfully issued. Exclude any authorization a court has found unlawful. Require the agency to bear the burden of justifying any modification. Define whether leases, withdrawals, and renewals are covered, and treat non-renewal as a covered action. Narrow the definition of "federal authorization or permit," and clarify the definition to insulate against secret decisions, abuse, or noncompliance with future regulations. Limit §§ 1401 and 1402 to transmission infrastructure and renewable energy projects, while maintaining reasonable environmental and cultural safeguards. With respect to damages available under § 1401 and 1402, limit them to a percentage of costs related only to delay, not to the entire project cost. With respect to the holder-request exception, either delete it (while protecting against abuse as noted in *supra* n. 16) or amend to include transparency requirements noted above.	§1401(a), (b); § 1402
12	Scope	Limit Division B, Title II and Division A, Title IV, and the corridor provision in § 2102, to electric transmission and renewable interconnection. Remove the mining, oil and gas, geothermal, hardrock, OCS, and hydropower	Division B, Title II; §§2102, 2215, 2229, 2231-2234, 2251; Division A, Title IV

		provisions, or move them to a separate bill with its own hearing record.	
13	Sequencing of identification	Require identification of historic properties and evaluation of effects before a right-of-way decision for linear or landscape-scale projects. Permit deferred segments only with binding milestones, public notice, and tribal participation. Provide that a decision is not final for NHPA purposes until identification is complete.	§2212; §306108(c)(5)
14	Agency and review capacity	Authorize and appropriate funds for federal permitting staff (archaeology, biology, NEPA review), SHPO and THPO review, and tribal participation in programmatic-agreement reviews, in amounts set by the appropriations committees.	§2302
15	Delay accountability and escalation	Require agencies to report each milestone and the cause of any delay (agency, applicant, or litigation) on the Tracker. Replace remedy changes aimed at delay with an escalation process: an applicant may request a decision from a senior official within 30 days, and that official must publish the reason for the delay.	§1132; §1403; §1110