To: Interested parties
From: David Bookbinder
Date: October 30, 2026
Re: Bipartisan American Affordability and Jobs Act of 2026

Introduction

The Bipartisan American Affordability and Jobs Act of 2026 (the "Bill") would significantly reshape federal environmental law and policy and is also a serious threat to American democracy.

On the one hand, it makes renewable energy permitting easier and significantly improves federal transmission policy. On the other hand, it makes fossil fuel infrastructure permitting even easier than it has already become, binds future administrations to the energy permitting policies of the Trump administration, seriously weakens the Clean Water Act, and effectively repeals the National Environmental Policy Act (NEPA) and the Endangered Species Act.

Remarkably, even collectively those are not the biggest problem with the Bill; the biggest problem is Title IV, "Project Certainty." Under this rubric, the Bill permanently locks in place the terms of *all* a project's federal permits; none of them can ever be made more protective, regardless of any change in circumstances. Title IV goes even further, by then making it virtually impossible for the federal government to enforce even those permits – *or any other federal environmental statute* – against the project. In fact, Title IV *limits the enforcement of all federal laws against any project with any federal permit*.

By placing corporations with any such federal permit not above the law so much as completely beyond its reach, these "project certainty" provisions seriously threaten to American democracy.

This memo analyzes the specific changes the Bill makes to NEPA, the Clean Water Act, the Endangered Species Act, the National Historic Preservation Act and, most importantly, to the entire structure of federal permitting (meaning not only those laws, but every federal environmental statute from the Clean Air Act to the Federal Insecticide, Fungicide, and Rodenticide Act.)

Amendments to the Environmental Statutes (Division A)[1]

<u>NEPA (Title I, Subtitle A, §§ 1101-1110)</u>

[1] I've included the amendments to the National Historic Preservation Act here, even though they are part of Division B of the Bill (which has all the transmission provisions.)

The Bill's first 70 pages deal with NEPA, and accomplish the goal of eliminating NEPA as a source of delay by (1) reducing the number of projects subject to NEPA (*e.g.*, increasing categorical exclusions and restricting what qualifies as a "major Federal action" triggering NEPA); (2) allowing other reviews to replace NEPA (*e.g.,* using state or tribal environmental review - with no requirements as to the adequacy of that review - to replace NEPA); and (3) imposing stringent (and enforceable) internal agency deadlines. These measures will make NEPA review largely meaningless, but ultimately that won't matter because the Bill adds a new judicial review provision making whatever is left of NEPA unenforceable.

Under current law, judicial review of NEPA actions takes place via the Administrative Procedure Act (APA); § 1110 replaces APA review with a new NEPA 111[2]:

> - Time to challenge agency NEPA action: a 150-day statute of limitations replaces the 6-year period in 28 USC 2401(a)) applicable to APA cases. This is not as much of a problem as it may seem. First, if you've been involved in the NEPA process, 150 days is more than enough time to decide whether to sue over the result, and plaintiffs always try to get these filed as quickly as possible. Second, § 1110 requires NEPA cases to be filed in the federal Court of Appeals where the project is located instead of district court, which means filing a 1-page petition for review (with months before substantive briefing) instead of a full-blown district court complaint.
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> - Standing to challenge a NEPA action: Under the APA, anyone "adversely affected or aggrieved" by the agency action (and meeting the standing requirements of Article III of the Constitution) can sue over any issue anyone raised in comments. However, § 1110 changes this so that plaintiffs must not only have submitted comments but can only sue over an issue they raised.
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> This provision's only purpose is to restrict judicial review. Suing over an issue that someone else has raised is the norm under federal law because, regardless of who raised it, the agency has had the opportunity to respond, which is the purpose of the public notice and comment requirement. The only federal statutes I'm aware of that contain a similar requirement are the Federal Power Act and the Natural Gas Act. This provision has been an enormously problematic "gotcha" under both; Person 1 raised an issue that Person 2 did not (whether because they missed it, did not consider it worth raising, etc.) and, no matter how serious an issue it becomes in light of the agency response, Person 2 is out of luck if Person 1 doesn't sue over this.

[2] References to parts of the Bill are given as "Section __" or "§ __"; references to current statutory provisions are given as CWA 303, ESA 7, etc. References to "Article III" are to the Constitution.

- "Actual or imminent injury in fact amounting to direct harm": Article III already requires "actual or imminent injury-in-fact," but "direct harm" is a new and undefined requirement that has no purpose but to allow Trump judges (and no doubt this Supreme Court) to define "direct harm" in a way that will further restrict standing to challenge agency actions. (NB: A majority of sitting federal appellate judges have been appointed by Republican Presidents.)

- Remedy: This is what makes NEPA documents completely meaningless; no matter how bad they are, a court can no longer vacate a permit based on inadequate NEPA review. Section 1110 provides that a court can only remand a deficient NEPA document to the agency to fix any shortcomings, during which time the project authorization, "shall remain in effect while the Federal agency corrects any errors or deficiencies found by the reviewing court." Moreover, the "permit certainty" provisions in Title IV (discussed below) would presumably prevent the agency from making any substantive changes to the permit based on the amended analysis. Nor can courts issue preliminary injunctions for NEPA violations. (A court may still issue a preliminary injunction for violation of a statute other than NEPA, but even then, a plaintiff must show a "substantial likelihood" of success, a more demanding standard than the current "likelihood" of success.)

Two practical issues to consider. Most importantly, constricting judicial review creates a huge incentive for agencies to put absolutely minimal effort into NEPA review; it will be even less likely they'll get sued over these, but even if they are, it truly doesn't matter because there is zero risk to the project. At worst, the agency will have to do some more work on remand. And even if they mail that in as well, it would be a plaintiff truly dedicated to tilting at windmills to drag the agency back to court for another go-round.[3]

As noted above, the purpose of the Bill's other NEPA provisions is to speed the NEPA process by slashing substantive requirements and agency timelines. (Apparently the 2023 NEPA amendments, bad as they were, didn't go far enough.) The Bill not only makes every agency action leading up to both the final NEPA document and the decision on the requested federal permit subject to stringent deadlines that can be judicially enforced by the applicant, but imposes novel (and somewhat bizarre) penalties on the agency for missed deadlines to encourage compliance, *e.g.*, every "career employee of the key permitting agency within the Senior

[3] This does not alter the status quo as much as you'd think, because courts understand that, no matter what they tell the agency it needs to do with the remanded NEPA document, the agency will probably still reach the same result. Thus, they have become far more reluctant to stay or vacate permits based on inadequate NEPA review, because all that usually does is delay the inevitable (and make it more expensive.) This is especially true after the Supreme Court's 2025 decision in *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168, which held that an EIS for a railway project to carry oil (1) did not need to consider upstream and downstream effects (from oil drilling and refining, respectively), thus eliminating consideration of a project's "indirect effects"; and (2) told courts to give "substantial deference" to agency decisions as to both what impacts the NEPA review covers and how well it describes them. (Apropos of *Seven Counties*, § 1110 also codifies this substantial deference standard.)

Executive Service... that has supervisory authority over personnel in [that] agency and that has a substantive role or responsibility in reviewing" the NEPA document or the requested federal permit "shall spend not less than 50 percent of the workweek... to remedy the failure" and "the head of the relevant . . . agency shall not travel more than 25 miles from their official duty station for the purposes of official business" until that agency has published the NEPA review and "all outstanding authorizations" for the project. (Only the secretary of defense is excluded from this.) Whether, as a Constitutional matter, these provisions are enforceable is another question.

While the judicial review scheme makes the substantive changes irrelevant, cutting the timelines *will* have an impact on environmental advocacy around a project. NEPA created a window allowing environmental groups time to organize and educate the public. The faster the NEPA process, the less time these groups will have to do the things that can lead to a successful environmental outcome.

One final note about the substantive provisions. Section 1106 amends NEPA 107 to provide, "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."

This is disturbing; the normal deadline for material the agency must consider is the comment deadline, although it may consider anything submitted later. (In practice, it means project developers get to submit post-deadline responses to environmental comments, which the agency is happy to use, while then ignoring environmental replies to said responses.) This provision allows agencies to ignore "scientific or technical research" published after the agency announces it will be preparing a NEPA document, even if submitted before the comment deadline, which, for an EIS, will be months or years later. Allowing agencies to ignore scientific evidence while making decisions makes no sense whatsoever, and there is no imaginable rationale for this except as a means of limiting the amount of information an agency must consider.

Council on Environmental Quality (Title I, Subtitle B, § 1121)

Section 1121 is 20-plus pages of requirements to standardize NEPA review, allow agencies to share relevant information, create public dashboards, etc. This is a commendable goal but buried within it is the requirement that within 60 days, CEQ must establish "data standards" (i.e., "agreed-on specifications for data formats, structures, and definitions to ensure consistency and vendor-neutral interoperability") to be used "for the collection and curation of authorization data by Federal agencies" used to prepare "environmental reviews and authorizations." This is a massive task, and the 60-day timeline means that the Trump CEQ has probably already prepared it. It is highly concerning that this CEQ will establish "data quality standards" that will be used to exclude information this administration doesn't like.

Federal Permitting Improvement (Title I, Subtitle C, §§ 1131-1133)

Section 1132 mandates a public online NEPA project database, with the basic information about the project, who is requesting a federal permit/authorization, where each agency stands with respect to meeting its NEPA deadlines, litigation information, etc. Since NEPA would no longer mean much, this would be primarily useful to project applicants and agencies.

Clean Water Act (Title II §§ 1201-1205)

The Bill has four provisions amending specific CWA sections (304, 401, 402 and 404) plus one amending judicial review of 404 permits:

> CWA 304(a): This provision requires EPA to establish water quality criteria "accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water[.]" Section 1201 of the Bill requires this be done via notice and comment rulemaking. This does not seem problematic; although notice and comment rulemaking is not currently required for water quality criteria, it is frequently used by EPA. *See, e.g.*, *Center for Biological Diversity v. EPA*, 168 F.4th 1164 (9th Cir. 2026) at 1172 (noting EPA's notice and comment process for cadmium water quality standards) and at 1180 ("[t]he promulgation of § 304(a) recommendations is a congressionally mandated activity that follows notice and comment procedures.") Section 1201 also places judicial review of EPA promulgation of 304(a) criteria in the relevant court of appeals (as opposed to district court.) This makes sense, since such litigation almost invariably goes up on appeal.
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> NB: Section 1201 similarly places review of EPA actions "defining the scope of the term 'waters of the United States'" in the court of appeals. This makes sense since these cases also inevitably wind up on appeal.
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> CWA 401 provides:
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> (a) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections [301], [302], [303], [306], and [307] of this title. . . .

In short, applicants for federal permits need State certification that the project will not violate those CWA provisions, most importantly state water quality standards under section 303. States have used this to stop a variety of fossil fuel projects (*e.g.,* Jordan Cove LNG export terminal; PennEast natural gas pipeline; the Northeast Supply Enhancement (NESE) Pipeline, although the governors of both New York and New Jersey reversed course on this, apparently due to pressure from President Trump) and industry has been gunning for 401 for some time.[4]

Section 1202 extensively modifies CWA 401. Substantively, it clarifies that a state 401 determination is "limited to ensuring water quality compliance," which means all other environmental considerations that are dependent on the affected waterway (*e.g.,* effects on fish and wildlife) may no longer be considered. And a state may not deny a 401 certificate unless it shows by "clear and convincing evidence" that no modification or "reasonable condition" (which must be "the least burdensome condition") could be imposed on the project that would allow it to meet water quality standards. If a state denies a 401 certificate or imposes conditions in it, this both shifts the burden of proof from the applicant to the state and significantly raises the evidentiary standard.

Further, for interstate natural gas pipelines and transmission projects, 401 certification is limited to determining whether "direct point source discharges" from those facilities will comply with state water quality standards. "Point source" is a defined term in the CWA – imagine a pipe discharging into a waterway. "Direct point source" is a new and undefined term, and meant to further limit "point source."

In other words, impacts to waterways and wetlands from construction or operation of pipelines or transmission towers are no longer relevant to a 401 determination, thus eliminating state authority to deny or condition these projects' 401 certificates. Transmission lines have no point source discharges ("direct" or otherwise), and pipeline projects only have point source discharges from the handful of compressor stations located along the route.

Section 1202 imposes extensive procedural requirements, mostly concerning deadlines for states to request additional information from an applicant, to determine when a 401 application is complete, make a final determination, etc., and allowing applicants to go to federal court to order the state to comply with those deadlines.

> CWA 402: This section governs "point source" discharge permits, and Section 1203 doubles the term of these (NPDES) permits from 5 to 10 years. NPDES permits mandate

[4] For a good overview of the controversy over 401, EPA's implementing regulations and guidance, and how states have used it, see CRS report R46615, *Clean Water Act Section 401: Overview and Recent Developments* (February 7, 2025.)

compliance with both technology-based and water quality-based effluent limits (TBELs and QBELs, respectively.) In other words, renewed permits may mandate tighter effluent limits resulting either from new technologies (for TBELs) and required by new (or stricter) QBELs. Extending the term of NPDES permits from 5 to 10 years will dramatically slow progress in reducing water pollution in states that take NPDES permitting seriously.

For the many states that do not have a rigorous 402 program, it will have a limited effect, because 402 allows for "administratively continued" permits. So long as a renewal is requested more than 180 days before an NPDES permit expires, the permit remains in force indefinitely. Many states use this tactic to simply never update permits. Since it is not uncommon for permits to be administratively extended for longer than the additional five years, a 10-year NPDES term could only make sense *if* the Bill were to include a strict 1-year administrative continuance, which would mean updated permits at least every 11 years.

CWA 404: is the Act's provision governing everything that gets put into waters of the U.S. that does not come from a "point source," and includes everything from dredge spoils to bridge supports. (As noted above, point source discharges are governed by CWA 402.)

Section 1204 makes major revisions to 404, starting with severely curtailing EPA's window to use its authority under 404(c) to exempt certain areas from being used for "disposal" of dredged material. EPA has done this very rarely, and only to prevent disposal in highly-sensitive areas; it would now be able to exercise that authority only in the window of time between submission of the permit application to the Corps of Engineers (which issues 404 permits) and when the Corps grants it.[5] Barring EPA from doing this *before* an application is unhelpful for permit applicants, since they may apply for a permit in an area EPA would make off-limits, but applicants won't discover this until after the fact, wasting time and resources. (Barring EPA from doing this after a permit is granted – even if EPA discovers that such disposal is environmentally disastrous – is the same sort of "permit certainty" problem discussed in the Title IV section, below.)

However, the most significant element is about "general permits," which are designed to eliminate the need to obtain a project-specific 404 permit. Each general permit imposes uniform mitigation requirements on all projects in a specific category of activity (in a state, region, or nationally) so long as they share certain characteristics (such as having impacts limited to ½ acre or less.) The Corps issues national general permits (currently 60

[5] The Corps has delegated its 404 permitting responsibilities only to Michigan and New Jersey.

of them), covering standardized projects and activities from "Aids to Navigation" (Nationwide Permit ("NWP") 1) and "Mooring Buoys" (NWP 10) to "Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities" (NWP 27), "Cranberry Production Activities" (NWP 34), and "Land-Based Renewable Energy Generation Facilities" (NWP 51).

404 general permits for large infrastructure projects (e.g., "Oil and Natural Gas Pipelines") which may have impacts across hundreds of miles, have always been controversial. Section 1204 increases the term for general permits from 5 to 10 years and, more importantly, codifies several general permits that were revised by the Trump administration earlier this year: Nos. 12 (Oil and Natural Gas Pipelines)[6]; 14 (Linear Transportation Projects, e.g., road, highways, railways); 43 (Stormwater Management); 57 (Electric Utility Line and Telecommunications Activities); and 58 (Utility Line Activities for Water and Other Substances.) The Bill also narrows the impacts that the Corps should consider in drafting general permits, and will allow general permits to cover up to 2 acres of impacts, up from the current ½ acre limit.[7]

Finally, as with the other statutes, the Bill curtails judicial remedies against the Corps (or a state) when it issues individual or general 404 permits; most importantly, § 1205 provides that a court may only order the Corps to fix a permit so that it complies with the CWA if the defect presents an "imminent and substantial danger to human health or the environment." This means that the Corps can simply ignore any adverse impact from such a permit short of what a court considers "imminent and substantial endangerment."

Endangered Species Act (Title III, §§ 1301-1308)

The Bill seriously weakens the ESA.

ESA 4 and 7 use the terms "best scientific and commercial data available" and "best scientific data available" (with no further definition) to determine species' status and habitat under ESA 4, and evaluating impacts from federally-permitted projects under ESA 7.

Section 1301 defines both of these terms as:

[6] NWP 12 is being challenged in DC federal district court: *Center for Biological Diversity v. Corps of Engineers,* No. 1:26-cv-02571.

[7] Unfortunately, the Bill does not address the most serious problem with general permits, which is that there is no public notice that someone has applied for coverage under a general permit; the public becomes aware of the project only when the bulldozers show up.

(A) all relevant and objective scientific and commercial information available at the time of the agency action; and (B) include credible and reliable data, quantitative analyses, conceptual and numerical models, and model results that—

(i) account for known or potential sources of error;

(ii) are applied using prevailing principles, methods, tools, and professional standards of practice; and

(iii) are impartially gathered and objectively applied without presumptions or policy prescriptions that bias the application.

At first glance, these appear unobjectionable. However, the Center for Biological Diversity is the ESA expert, and their position is that this definition "would significantly raise the evidentiary burden for protecting imperiled animals and plants by limiting the Services' ability to account for uncertainty and reasonably foreseeable risks . . . The reality is that the Services often must evaluate incomplete scientific information, assess future threats and extinction risk, and make judgments . . . in the face of uncertainty."

ESA 7(a) requires federal agencies to ensure their activities are not likely to jeopardize endangered or threatened species or harm critical habitat, and applies to all actions federal agencies fund, authorize, permit, or carry out; subsections 7(b) and 7(c) contain the mechanisms to keep the Fish & Wildlife Service and National Marine Fisheries Service (the agencies with ESA responsibility) in the loop and allow them to make this determination. This "consultation" requirement is the linchpin of the ESA, and the centerpiece of ESA litigation.

Section 1302 cuts multiple ESA 7 timelines, and § 1303 exempts any project that is covered by a NEPA "categorical exemption" from ESA 7. But the really big problem is § 1304, which allows Interior to transfer all of the FWS/NMFS responsibilities under ESA 7(a)-(c) to the states. As anyone with experience with such delegated programs under the CAA or CWA knows, unless the state has a proven commitment to endangered species, that's the end of the story. Moreover, Interior can delegate these responsibilities to a state based on the "current *or future* . . . capability to assume" them.

Section 1305 replaces the APA's 6-year limitations period with 150 days (as § 1110 did with NEPA cases), and moves challenges to federal ESA decisions – but not state ones – from the district courts solely to the D.C. Circuit.

National Historic Preservation Act (Subdivision B, Title III, §§ 2301-2302)

Section 106 of the NHPA requires federal agencies:

> prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

Section 2301 substantially narrows both what is an "effect" and what qualifies as a "historic property," gives state and tribal historic preservation offices only 30 days to respond to federal agency inquiries, and allows federal agencies to omit taking steps "to avoid, minimize, or mitigate the adverse effects" of a project on historic property if

> in the sole discretion of the applicable Federal official and as otherwise allowed by law, other considerations outweigh the consideration of historic preservation as to any or all adverse effects of the undertaking.

In other words, the agency can wave a magic wand and decide to exempt any project from the NHPA and that decision is not reviewable in court. Apropos of judicial review, § 2301 then makes judicial review not only comparable to the NEPA judicial review provisions above (including requiring a court to give "substantial deference" to the agency determination, limiting remedies to remand without vacatur, etc.) but goes one step further: like the NEPA amendments, in order to sue over an issue you must have submitted "substantive comments" on it, but here you must have submitted "a substantive ***and unique*** comment." In other words, you have to be *the only person to have raised that issue* in order to sue; this would impose two wildly unreasonable requirements: knowing everyone who will be submitting comments, and every issue each party will be raising. (Whether this would survive a constitutional challenge is another matter.)

"Project Certainty" (Title IV)

This title beggars belief.

Section 1401. As Jeremy Symons aptly describes this provision, "Under 1401, the government's role shifts from protecting the public interest against corporations, to protecting corporations against the government."[8] 1401(b)(1) provides:

> [A] Federal department or agency shall not take any new action that would revoke, rescind, withdraw, terminate, suspend, amend, or alter a Federal authorization or permit in effect on or after September 16, 2026, or take any other action to interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits[.]

[8] https://jeremysymons.substack.com/p/this-is-not-the-permit-reform-deal

This effectively insulates not only the construction, but "the operation at full capacity" of *all* existing fossil fuel infrastructure from *any* future regulatory action of any sort. That means, for example, ***no increased stringency in federal environmental regulatory requirements under any statute – the Clean Air Act, the Clean Water Act, etc. can ever be applied to such projects.*** But it goes well beyond that – the clause barring the federal government from "tak[ing] any other action to interfere with or prevent" construction or operation means these facilities are immune from ***enforcement of any federal law that would "interfere with" the construction or "operation at full capacity" of any such infrastructure.*** (Nor is this provision limited to fossil fuel infrastructure; it applies just as well to steel mills, highways, etc.) **In other words, a single federal permit or authorization under any one federal law effectively immunizes that project from adverse effects from changes in (1) that federal law; (2) any other federal environmental law; and (3) any federal law at all.**[9]

There are four narrow exceptions to the general prohibition on agency action: (1) a court order; (2) the permittee has "materially breached" the federal permit; (3) "such action is necessary to prevent specific, urgent, substantial, and proximate harm or damage to life, property, national security, or defense" that the agency did not consider in its process; and (4) the permittee asks for it. And any action an agency takes under these exceptions "shall be reasonably limited only to so much as is necessary to remedy the specific issue."

But these exceptions are completely illusory, because **the judicial review provisions *guarantee* that no federal agency will ever even think about doing anything that would affect these facilities.** The burden is on the agency to prove by "clear and convincing evidence" that any action it takes that may affect any project comes within one of these exceptions and, if a court finds that it doesn't, then the agency is on the hook for not only attorney fees and costs, but:

> any costs associated with the applicable delay in the construction or operation of the project, as the court determines appropriate; [and] costs in an amount equal to not less than 25 percent and not more than 50 percent of the total of all costs incurred by [the permit holder] in connection with the project as of the date of the action and not otherwise recovered, . . . including costs of development, permitting, land acquisition, financing, engineering, procurement, and construction of the project, which amount shall be determined by the court by taking into consideration—(I) the degree to which the Federal interference in the project occurred due to bad faith; (II) the degree to which there exists a pattern of similar Federal interference in other projects; and (III) the actual degree of economic harm to the project sponsor or operator.

[9] I have to believe that courts would not read this as affecting federal criminal law, but we can be certain permit holders will argue that it does.

For many projects (*e.g.,* liquefied natural gas (LNG) terminals, pipelines, data centers, nuclear reactors) these costs are in the billions of dollars, meaning no agency would ever dare do *anything* that might "interfere with or prevent the construction or operation at full capacity of a project." And, to add insult to injury, even if a project that wins such an award is subsequently cancelled, the applicant gets to keep this windfall.

Section 1402. Section 1401 prevents an agency from ever changing any federal permit requirement (or, as noted, doing anything to a permitted project that would delay construction or prevent operation at full capacity.)

Section 1402 locks in the Trump administration's energy policies, by allowing any applicant for a federal permit related in any way to any type of energy-related project to sue the agency for (1) not issuing a final decision on a permit that does not require NEPA analysis within one year and, (2) more importantly, any permit denial if the denial was "due to a pattern of disparate treatment by the Federal Government against the specific type of covered project at issue."

A "pattern of disparate treatment" means, for each type of energy project, a "an empirically demonstrated statistical pattern" showing "a substantial increase, compared against the 5 most recent calendar years of empirical data" in denials of such permits. In other words, any energy permitting decisions of the next administration will be measured against those of the Trump administration, and woe to the agency that, for example, denies coal mining permits at a "substantially increased" rate from the Trump baseline. And a project developer who shows such a statistical pattern gets, as in § 1401, its attorney fees, "economic damages, including any costs associated with the applicable denial or delay," and damages of between 50 and 100% of the "total reasonably expected cost of construction costs of the project to date." (To be fair, unlike awards under 1401, awards under 1402 must be repaid if the project is never completed.)