To: Interested Parties
From: David Bookbinder
Date: November 9, 2026
Re: The Managers' Amendment to the Bipartisan American Affordability and Jobs Act of 2026 ("BAAJA")

The Managers' Amendment (the "Substitute") to the original The Bipartisan American Affordability and Jobs Act of 2026 does not change the conclusion that BAAJA would fundamentally reshape both federal law in general and federal environmental law in particular. BAAJA reforms regulation of the U.S. transmission grid, and its sponsors believe that the resulting greenhouse gas emissions reductions justify its other provisions. But the minimal GHG reductions those transmission reforms will produce are not worth the damage this bill would cause not only to our environmental statutes but to American democracy.[1]

BAAJA still does violence to multiple legislative norms. It repeals two statutes while pretending only to amend them; severely weakens two others; openly instructs agencies to ignore scientific data; narrows standing to challenge agency actions; and creates the novel legal presumption that agency permit denials are unlawful . . . while keeping the presumption that issuance of permits are correct. But those are not the worst parts. BAAJA effectively immunizes *any* project with a federal permit from changes in *any* federal law, and then ensures that no agency would even attempt to apply such changes because the agency would be liable for billions of dollars in penalties if it failed to prove its action fell within one of the exceptions to this immunity. Finally, BAAJA locks in place the federal energy permitting policies of the last ten years, which will make it even more difficult for future administrations to effectively reduce GHG emissions.

National Environmental Policy Act (NEPA)

Repeal. The Substitute does not change how BAAJA effectively repeals NEPA by making it unenforceable, erasing the principle that agencies should know the environmental consequences of a project before authorizing it. Courts may no longer vacate federal permits based on a flawed NEPA review, no matter how inadequate; they may only remand deficient analysis back to the agency to fix shortcomings, during which time project authorization "shall remain in effect."

Eliminating judicial review creates an irresistible incentive for agencies to put minimal effort into NEPA review; it is extremely unlikely they'd even get sued over a 2-page Environmental Impact Statement saying there were no significant environmental impacts from building a coal-fired power plant in the middle of an EJ neighborhood. At worst, a court can order the agency to do some more work, with zero consequences for the project.

Ignore evidence. The Substitute does not change the BAAJA provision that, "No Federal agency shall be required to consider any scientific or technical research that becomes publicly available

[1] BAAJA's sponsors rely on a Rhodium Group analysis of the bill for its GHG impacts; the "middle case" analysis has annual power sector GHG reductions of 3% (Fig. 6, p. 11) in 2040 (and does *not* include the effects of Title IV; see p. 14.)

after the date of publication of a notice of intent or decision to prepare an environmental document for a proposed agency action."

It is a bedrock principle of administrative law that an agency must consider everything submitted to it before the comment deadline. But BAAJA allows agencies to ignore "scientific or technical research" published after the agency announces it will be preparing a NEPA document, even if that information is submitted before the comment deadline (which, for an EIS, will be years later.) There is no rationale for this except to limit the amount of adverse information about a project an agency must consider. Telling agencies they are free to ignore valid information is an extremely dangerous precedent.

Timing. BAAJA significantly speeds the NEPA process by slashing substantive requirements and agency timelines. While the new judicial review scheme makes any substantive change irrelevant, cutting timelines will significantly impact environmental advocacy. NEPA creates a window allowing environmental groups time to organize; the faster the NEPA process, the less time these groups will have to do the things that can lead to a successful environmental outcome.

Endangered Species Act (ESA)

Repeal. The Substitute does not change BAAJA's effective repeal of the ESA in any state that does not believe in species protection.

ESA section 7 requires federal agencies to ensure their activities are not likely to jeopardize endangered species. To do so, agencies are required to consult with the Fish & Wildlife Service and/or National Marine Fisheries Service, who make endangered species determinations.

The Bill eviscerates this by allowing the Department of the Interior to transfer all FWS/NMFS Section 7 responsibilities to states. In fact, Interior can transfer these based on a state's "current *or future* . . . capability to assume" them. Experience with such delegated state programs under the CAA and CWA promise the ESA will become a dead letter in such states.

National Historic Preservation Act (NHPA)

The NHPA requires agencies to "take into account the effect of [a project] on any historic property" and "afford . . . a reasonable opportunity to comment" with regard to it. The Substitute backpedals on most of BAAJA's proposed procedural changes to the NHPA at the expense of state and tribal historic preservation agencies. However, BAAJA still seriously weakens the NHPA by allowing federal agencies to simply ignore whatever such state and tribal agencies say if "other considerations outweigh the consideration of historic preservation as to any or all adverse effects." BAJAA does not define "other considerations" and it wouldn't matter if it did, since BAAJA makes such a decision presumptively not judicially reviewable.

Clean Water Act (CWA)

BAAJA weakens several key sections of the CWA.

Section 401 requires states to certify that a project will not violate various CWA provisions, most importantly state water quality standards. States have used this to stop a variety of fossil fuel projects, and industry has long been gunning for 401. The most concerning changes to 401 are:

1. A state denying 401 certification must show by "clear and convincing evidence" that no modification or "reasonable condition" would allow the project to meet water quality standards.

This fundamentally changes administrative law principles applicable to *all* federal agencies: the burden is on the party challenging an agency decision to show that the agency erred. BAAJA reverses that by creating a presumption that the agency decision is wrong, and the agency must prove to a court ("by clear and convincing evidence," a considerably heightened evidentiary standard) that it was right. Moreover, this applies only to challenges to a state *denial* of a 401 certification; it does not apply to challenges to a *grant* of 401 certification.

2. BAAJA exempts natural gas pipelines and transmission lines from 401; they can plow through hundreds of miles of rivers, streams and wetlands without considering water quality impacts beyond the minor discharges from pipeline compressor stations.

Section 402 governs "point source" discharge permits (think pipes discharging into a river), and the Bill doubles the term of these permits from 5 to 10 years, which will dramatically slow progress in reducing water pollution in states that take this permitting seriously.[2]

Section 404 governs everything (from dredge spoils to bridge supports) put into waters of the U.S. that does not come from a "point source." BAAJA's most significant changes are to 404 "general permits," which eliminate the need to obtain project-specific permits by imposing uniform mitigation requirements on all projects in a specific category. The Corps of Engineers issues general permits (currently 60 of them), covering standardized projects and activities from "Aids to Navigation" and "Mooring Buoys" to "Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities" and "Cranberry Production Activities."

General permits for large infrastructure projects which have impacts across hundreds of miles (*e.g.*, pipelines) have always been controversial. BAAJA substantially narrows the impacts that the Corps must consider in drafting general permits, doubles their term from 5 to 10 years, and codifies several general permits significantly loosened by the Trump administration, including those for Oil and Natural Gas Pipelines; Linear Transportation Projects (highways, railways); and Stormwater Management. (The Substitute added "Aquatic System Restoration" to this list.)

BAAJA also curtails judicial remedies for flawed 404 permits; most importantly, in reviewing a 404 permit for compliance with the CWA, courts may only order the Corps to remedy a defect if it presents an "imminent and substantial danger to human health or the environment." Thus the Corps is free to issue 404 permits that simply ignore any adverse impacts short of those criteria.

[2] It will have limited effect in other states, because 402 allows for "administratively continued" permits; by filing for renewal more than 180 days before expiration, the permit remains in force *indefinitely*. Many states use this tactic to simply never update permits.

BAAJA Title IV ("Permit Certainty")

This title is the most controversial part of BAAJA, and the Substitute actually makes it even worse. Section 1401(b)(1) provides:

> [A] Federal department or agency shall not take any new action that would revoke, rescind, withdraw, terminate, suspend, vacate, remand, reopen, materially amend, or materially alter a Federal authorization or permit in effect on or after November 6, 2026, or take any other action to interfere with or prevent the construction or operation at normal capacity of a project that has secured all necessary Federal authorizations and permits[.]

This effectively insulates both construction and operation *of all infrastructure from any type of future regulatory action*; this immunity requires only that it is a fully-permitted "project," a term which BAAJA does not define and so includes anything that needs any sort of federal permit. No requirements under any environmental statute – the Clean Air Act, the Clean Water Act, etc., can ever be made more stringent. But BAAJA goes well beyond that – barring the federal government from "tak[ing] any other action to interfere with or prevent" construction or operation means these facilities are immune from changes in *any federal law* that would "interfere with" their construction or operation. In short, a single permit under any one federal law immunizes that project from adverse effects from changes in *any* federal law.[3]

There has been enormous controversy over this provision, and the Substitute addresses it with what may be the greatest punt in American legislative history.

There were four narrow exceptions to this prohibition and the Substitute adds a fifth, 1401(b)(1)(F), providing that federal agencies may not "revoke, rescind, withdraw, terminate, suspend, vacate, remand, reopen, materially amend, or materially alter" a permit, or "take any other action" that would interfere with or prevent construction or operation of a project "*unless such action is taken pursuant to any applicable law or regulation*."

But that has always been the case; the law has *always* provided that agencies cannot "revoke, rescind, withdraw, terminate, suspend, vacate, remand, reopen, materially amend, or materially alter" a permit, or "take any other action," etc., "unless such action is taken pursuant to any applicable law or regulation." In other words, the Substitute rewrites 1401(b)(1) to simply say that "Agencies cannot do these things unless they have the authority to do so." This is compounded by another new provision (1401(c)), similarly stating that "Nothing in this section limits or modifies any authority under any applicable law, compact, or treaty."

Thus, on the one hand, 1401(b)(1) lists all the things agencies now cannot do. On the other hand, 1401(b)(1)(F) says agencies *can* do any of those things if they have the authority to do so, and 1401(c) says that nothing in 1401 limits agency authority under "any applicable law."

[3] I have to believe that courts would not read this as applying to either civil or criminal enforcement, but we can be certain permit holders will argue it does.

And therein lies chaos, because there is an extremely strong judicial presumption that every statutory provision is there for a reason. What are courts supposed to do with 1401(b)(1)'s list of things agencies may not do unless they have the authority to do them? Congress must intend these words to mean *something* if they enact BAAJA. But what? Who knows? Your guess is as good as mine, and if enacted we'll have federal courts all over the country joining this guessing game. Ultimately, of course, the Roberts Court will have the last word on this.

Remarkably, all of this may be irrelevant, because BAAJA's judicial review provisions still *guarantee that no federal agency will even think about trying to invoke any of these exceptions.* Not only is the burden on the agency – again – to prove that its action comes within one of these exceptions[4] but, if a court finds that it doesn't, the agency is on the hook for all costs "associated with the applicable delay in the construction or operation of the project" *plus* a penalty of between 25 and 50% of the "costs of development, permitting, land acquisition, financing, engineering, procurement, and construction of the project" if the agency acted "in bad faith."[5]

Many projects (liquefied natural gas (LNG) terminals, pipelines, data centers, nuclear reactors, etc.) cost billions of dollars, *thus no agency would ever dare do anything* that might "interfere with or prevent" its construction or operation. (The Substitute did fix the provision allowing an applicant to keep such an award if the project is later cancelled, and requires a court to approve any settlement, presumably to avoid the problem of collusion if an agency brought an action in order to lose and provide the applicant or permit holder with a taxpayer-funded windfall.)

BAAJA section 1402 then permanently locks in place the federal government's last decade of energy policies, by allowing applicants for any federal permit related to an energy project to sue an agency for denying a permit if the denial was "due to a pattern of disparate treatment by the Federal Government against this specific type of covered project."

A "pattern of disparate treatment" means "a substantial increase, compared against the 10 most recent calendar years of empirical data" in denials of such permits. In other words, all future energy permitting decisions will be measured against the collective decisions of six years of the Trump administrations and four of the Biden administration, and woe to the agency that, for example, denies coal mining permits at a "substantially increased" rate from this baseline. A project developer who shows such a statistical pattern gets both "costs associated with the applicable denial or delay," and damages of between 50 and 100% of the project's costs. The result of making these energy permitting policies permanent is that future administrations will be unable to effectively reduce GHG emissions.

Conclusion

BAAJA wreaks havoc with environmental laws, legislative norms and, by insulating countless projects from the reach of all federal laws, our democracy. It must be stopped.

[4] The Substitute removed the requirement that the agency prove this by "clear and convincing evidence."
[5] The Substitute added this "bad faith" requirement.