ATTORNEYS GENERAL OF CALIFORNIA, NEW YORK, MASSACHUSETTS, WASHINGTON, COLORADO, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, OREGON, VERMONT, AND THE DISTRICT OF COLUMBIA

November 9, 2026

VIA EMAIL

The Honorable John Thune
Majority Leader, U.S. Senate
511 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader, U.S. Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Shelley Capito
Chair, U.S. Senate Committee on Environment and Public Works
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Mike Lee
Chair, U.S. Senate Committee on Energy and Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Sheldon Whitehouse
Ranking Member, U.S. Senate Committee on Environment and Public Works
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Martin Heinrich
Ranking Member, U.S. Senate Committee on Energy and Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

Re: S. 5653, "Bipartisan American Affordability and Jobs Act"

Dear Esteemed Congressional Leaders:

On October 21, 2026, several of the undersigned State Attorneys General sent a letter expressing substantial concerns about aspects of the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA). Since then, many of our staffs have engaged with congressional staff to discuss and better understand specifics of the bill and offer suggestions for improvement. This process has been constructive. BAAJA's authors have now released a manager's amendment that makes changes to certain parts of the bill, and we understand that the Senate is likely to take initial votes on the bill in the coming days. We ask that Senate leadership delay the upcoming vote to allow for continued discussion and stakeholder engagement to protect our natural resources, historic and tribal sites, and state regulatory prerogatives.

We have reviewed the revised bill and had additional time to analyze the unchanged portions of BAAJA. While some of the amendments improve the bill, they do not go nearly far enough in fixing BAAJA's flaws. And although we appreciate the constructive engagement over the past few weeks, we continue to have substantial concerns. As detailed below, and among other defects, BAAJA would harm states' and tribes' abilities to protect water, historic, cultural, and

natural resources under the Clean Water Act, the National Historic Preservation Act, the National Environmental Policy Act, and the Endangered Species Act, and would impinge on state and tribal sovereignty. Although we share the goals of improving clean energy permitting to reduce energy costs, create jobs, and promote environmentally responsible growth, the bill would deliver insufficient benefits for the significant tradeoffs it makes. These tradeoffs are poised to cause significant damage to critical areas of state authority. Finally, while the manager's amendment includes significant improvements to the project certainty provisions, we believe that additional changes are necessary to resolve ambiguities and avoid unintended consequences.

Clean Water Act

The bill's proposed revisions to Section 401 of the Clean Water Act will unreasonably curtail traditional state authority and lead to dirtier, more polluted waters in our states. The Clean Water Act preserves states' longstanding authority to regulate water quality, and interfering with this authority disrupts the cooperative federalism structure on which the Act was founded. Under current law, states assessing water quality impacts can consider impacts from the activity as a whole, not just impacts from the activity's discharge alone. These include federal effluent limitations and standards but also any other appropriate requirements of state law. That scope is essential to ensuring that the quality of waters within state borders—and the wellbeing of the people, fish, and wildlife that rely on them—are adequately protected. BAAJA narrows the scope of what states can consider, such that states could arguably no longer address many significant impacts from proposed projects—ranging from erosion of riverbeds and streambanks, to increased temperatures causing toxic algae blooms, to impacts to wetlands that provide vital animal habitat. That narrowed scope works in conjunction with other provisions requiring certifying authorities to ensure that any permit conditions or certification denials are based on clear and convincing evidence (a heightened judicial review standard typically reserved for violations of individual rights, and rarely if ever applied in environmental law), that no modification or reasonable condition could address the water quality issue, and that any condition is necessary and the "least burdensome" approach to avoid violations of water quality requirements. States and tribes rely on permit conditions to protect water quality, and these provisions will likely result in increased litigation, inefficient use of state and applicant resources, and less protection for state waters. States and their natural resources will be harmed by these changes.

National Historic Preservation Act and National Environmental Policy Act

Although the manager's amendment improves the bill, it falls short of addressing critical flaws in the bill's changes to the NHPA. The bill remains inconsistent with the NHPA's longstanding cooperative federal scheme, it undermines the very purpose of the statute, and it ultimately will cause the destruction of state and tribal historic and cultural resources. The NHPA has never bestowed upon states the power to prevent development. It does, however, require consultation with states and tribes that are most familiar with historic and cultural resources and their

significance. And while the manager's amendment restores mandatory consultation, the bill still provides federal agencies with nearly unfettered discretion to make key determinations with no input from states or tribes and allows federal agencies "sole discretion" to determine, without explanation, that adverse effects can be ignored because they are outweighed by "other considerations." Additionally, the bill substantially narrows the scope of projects to which Section 106 of the NHPA applies. Section 106 would no longer apply to most financial-assistance-only projects or any project an agency itself decides is not under substantial federal control. These changes alone would exempt entire programs that are fully funded by and administered on behalf of federal agencies, including most Department of Housing and Urban Development programs, and risk agency abuse of discretion. Together, these changes threaten significant and irreparable harm to historic and cultural resources that could easily be avoided through early consultation without forestalling development.

Moreover, the proposed changes to the NHPA would increase the workload of state and tribal historic preservation programs by adding new requirements and shortening deadlines while simultaneously eliminating any guaranteed funding. These changes counter the purpose of the bill because they fail to address the real causes of delay and will ultimately slow permitting. State and tribal historic preservation programs are already chronically underfunded and understaffed, and the bill compounds these problems by threatening to suspend the funding of state and tribal programs that lack resources to meet the bill's new, heightened requirements. Rather than provide adequate resources, the bill sets states and tribes up to fail, and it still requires federal takeover of state programs unable meet new requirements fast enough, which undermines state sovereignty and will only slow permitting by increasing the federal workload.

Finally, the changed judicial review provisions for the NHPA greatly restrict the opportunity for meaningful judicial review, leaving courts unable to prevent or correct legal violations that will have real world consequences and effectively eliminating any opportunity for judicial recourse for harm to state and tribal property. For example, a court could not issue a preliminary injunction for a violation of the NHPA despite the imminent destruction of an historic property. The bill similarly changes the National Environmental Policy Act judicial review provisions, allowing no preliminary injunction to issue for only a NEPA violation, even if it would cause imminent and irreparable harm. Instead, remand without vacatur would be the only remedy—interim or final—available to courts under the proposed revisions to the NHPA and NEPA, allowing agencies to proceed with their plans without first following required procedures. The bill risks turning review under both laws into wasteful box-checking exercises rather than meaningful safeguards for environmental, historic, and cultural resources.

Endangered Species Act

The revised bill still does not address provisions consistently identified as problematic by states and other stakeholders. The definition of the terms "best scientific and commercial data available" and "best scientific data available" continues to exclude narrative and qualitative

sources of data, institutionalizing a bias against non-quantifiable input and potentially excluding tribal and other sources of traditional ecological knowledge. Moreover, the continued inclusion of Section 1301(2)(B)(iii) allows sound scientific evidence to be disqualified as not being "impartially gathered" or "objectively applied," or as improperly based on "policy prescriptions," based on what would themselves constitute partial, subjective and/or policy judgments. This subsection does not implement *Maine Lobstermen's Association v. National Marine Fisheries Service* (D.C. Circuit, 2023): it goes further, potentially enabling subjective regulation of data, rather than regulating how data is used and applied. The potential for partisan misuse of this authority should not be underestimated or ignored. In addition, while the bill includes a new safeguard to prevent states from neglecting their consultation responsibilities, the revisions to Section 1304(f)(2) further codify a project applicant's capacity to simply elect out of a robust state program. This provision should be updated to allow applicants to "request" to consult with the Secretary, rather than establishing an applicant's right to "elect" to consult with the Secretary regardless of state input.

Project Certainty

While the manager's amendment includes significant improvements to the project certainty provisions, it also creates new ambiguities that warrant further amendment. In particular, the new paragraph at Section 1401(b)(1)(F) should be amended to explicitly specify that Section 1401's prohibition on revocation of permits does not apply to "the adoption or implementation of generally applicable laws or regulations." Furthermore, in the interest of transparency, and to avoid locking future administrations into maintaining unlawful authorizations that were never subject to challenge or judicial review, the definition of "federal authorization" in Section 1401(a)(2) should be explicitly limited to those that are "final" and "publicly disclosed."

* * *

Our staffs remain available to further discuss specific amendments that would improve BAAJA, protect state and tribal sovereignty, and further the bill's intent. We appreciate your attention to our concerns and believe that through continued collaboration, we can achieve meaningful permitting reform that will reduce energy costs, create jobs, and promote environmentally responsible growth, while preserving our nation's most cherished resources.

Thank you,



ROB BONTA
Attorney General of California



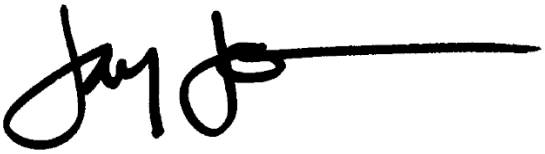
LETITIA JAMES
Attorney General of New York



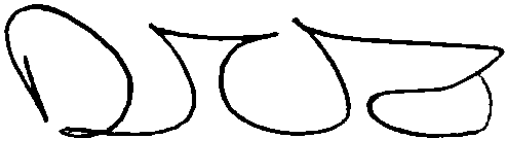
ANDREA JOY CAMPBELL
Attorney General of Massachusetts



NICHOLAS BROWN
Attorney General of Washington



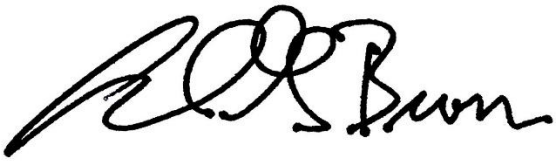
JAY JONES
Attorney General of Virginia



DAN RAYFIELD
Attorney General of Oregon



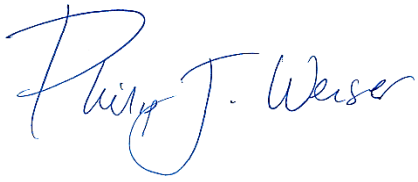
KWAME RAOUL
Attorney General of Illinois



ANTHONY BROWN
Attorney General of Maryland



AARON D. FORD
Attorney General of Nevada



PHILIP J. WEISER
Attorney General of Colorado



ANNE E. LOPEZ
Attorney General of Hawaii



DANA NESSEL
Attorney General of Michigan



CHARITY R. CLARK
Attorney General of Vermont



BRIAN L. SCHWALB
Attorney General of the District of Columbia



AARON M. FREY
Attorney General of Maine



KEITH ELLISON
Attorney General of Minnesota



KATHLEEN JENNINGS
Attorney General of Delaware