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November 6, 2026

To: Senators Shelley Moore Capito, Mike Lee, Sheldon Whitehouse, and Martin Heinrich

Subject: The Bipartisan American Affordability and Jobs Act of 2026

Energy and Infrastructure Development, a More Constructive Approach Suggested

Dear Senators Capito, Lee, Whitehouse, and Heinrich:

On behalf of the Save Long Beach Island Advocacy organization, I am writing to express our concern that provisions of the *Bipartisan American Affordability and Jobs Act of 2026* that restrict judicial review, weaken our environmental protection laws, and curtail environmental reviews and agency discretion to correct errors are excessive and misdirected as to the objective the legislation seeks to advance: the timely, cost-effective, and responsible development of America's energy and other infrastructure.

In a prior role, I managed the National Environmental Policy Act (NEPA) affairs for the U.S. Department of Energy. In that capacity my office also provided detailed guidance to all of the Department's programs on the scheduling and coordination of other permit reviews with the environmental impact statement (EIS) process to condense the overall time for project approval or disapproval, as the case may be. So, I do have some experience with the environmental reviews for major energy projects as to when they work well and when they don't. Based on that experience, I would suggest that this bill is misdirected in its effort to expedite those reviews.

The bill unnecessarily expedites project approvals at the expense of environmental and public legal protections. It:(1) prevents the courts from redressing unlawful project decisions stacking the judicial deck further against plaintiffs, (2) eviscerates fifty years of progress in establishing our environmental statutes, (3) imposes arbitrary deadlines on agency staff and restrictions on necessary analysis forcing permits forward with inadequate information and (4) prevents agencies from reconsidering the environmental effects of those expedited projects and less than informed decisions.

Worse, no evidence has been provided that those drastic changes will address the primary causes of unnecessary project delay. If they were, then all the federal agencies would be having problems with project approvals, but that is not the case. The real causes are very often not with our environmental statutes or the courts, nor the rare situations where an agency seeks to reconsider a prior approval that it considers invalid, all of which the bill focuses on in great detail. Rather, the root causes of most delays are more mundane, and can be found in the trenches with Agency management, staff and applicants and problems in how they interact in implementing current law, which the bill does not address or exacerbates with artificial deadlines on agency staff as discussed below.

(1) Limits on Judicial Review

The most serious concern is the restriction on remedies. Sections 111(c)(5),(6) would require remand without vacatur or an injunction for NEPA violations, leaving authorizations effective and allowing construction and operation to continue during corrective review. The preliminary injunction exception is too onerous, requiring a likely violation of another federal law besides NEPA, along with the specified equitable findings. Significant environmental harm and irreversible resource commitments could therefore occur before the agency corrects a deficiency. As shown below, these instances of vacatur and injunctions are already rare in the courts, so these changes are not necessary.

Over a typical 8-to-10-year period, the federal government approves approximately **350 to 400 major energy and infrastructure projects** that require an EIS[1]. Of those major projects, **28% faced pre-development litigation** [1, 2]. **However, only 1% of all approved major projects received vacatur orders** [1] (20% vacaturs of 20% plaintiff prevails of 28% of cases filed) due to recent Court trends not to issue them, so the bill's restrictions on those are unnecessary.

Preliminary injunctions affected **less than 4%** (14% of 28% of cases filed) of all major energy and infrastructure projects [2]. Additionally, **plaintiffs prevailed** fully or partially prevail only in about 20% [3,4] of cases filed, or on **5 to 6% of all approved major projects** (20% x 28%).

Therefore, **plaintiffs** already face an uphill climb in the courts and ultimately **do not impact a large percentage of major projects.** It does not seem necessary or appropriate for the Congress to make that hill even steeper for some of its constituents with further restrictions on their ability to prevail in court.

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[1] Breakthrough Institute, Understanding NEPA Litigation July 11 2024, https://thebreakthrough.org/issues/energy/understanding-nepa-litigation

[2] Environmental Law Reporter, NEPA Litigation over Large Energy and Transport Infrastructure Projects, October 2023, https://www.elr.info/sites/default/files/files-general/53.10836.pdf

[3] Wilmer-Hale, One year after Seven County: Trends in NEPA Review and Litigation Risk, June 5th 2026, https://www.wilmerhale.com/en/insights/client-alerts/20260604-one-year-after-seven-county-trends-in-nepa-review-and-litigation-risk

[4] NAEP, NEPA Case Law-2020, P.E. Hudson, Esq, https://www.naep.org/assets/webinars/2021_Webinars/NEPA_Cases_Law_Update_2020_Annual_Report.pdf

Fractured Litigation: The bill establishes 150-day deadlines for filing litigation from each individual authorization date for the project, which can vary by 90 to 120 days of each other,

While the Administrative Procedure Act allows 6 years for a plaintiff to file, in practice the great majority of cases are filed promptly because it is in the plaintiff's interest to do so before perceived environmental harm occurs. For example, for renewable energy projects, 81% of complaints have been filed within 120 days of project approval [5] so it is unclear whether this change is necessary at all.

The changes in the bill would force plaintiffs to file multiple fragmented lawsuits on each authorization for the same project. it prevents plaintiffs from filing a single cogent lawsuit because when they file they will not see all of the authorizations which are inter-related, or inconsistencies among those authorizations. In practice, it will not expedite judicial review because the Court, for purposes of judicial efficiency, will likely wait for the last relevant lawsuit to be filed and consolidate all the related complaints for the project into one for one judge to hear. The bill itself should foster that same efficiency of judicial review, and be revised to run a single clock, perhaps a year versus 150 days, from the last relevant authorization.

Judicial review is essential to make sure that all parties are following the rules, ensure that consultation requirements are followed and that wise decisions are made supported by the required analysis. The proposed restrictions on review make it virtually impossible to identify and correct material environment and social harms that can persist for decades.

(2) Evisceration of our Environmental Statutes

Regarding the National Environmental Policy Act (NEPA), the requirement that no alternatives be considered in an EIS except that that "meet the goals of an applicable non-Federal project sponsor" renders the EIS process essentially useless for any federal decision-making purpose, For the EIS process to have any utility in implementing the purpose of the statute, which is to consider environmental impacts in its decision-making to further the Agency's objectives, there must be a choice before the decision-maker of more than one reasonable way to achieve the federal purpose and need of the proposal, which may differ from the applicant's goal.

At the outset, the no action alternative does not do that so it is essentially not a real alternative. Over the last 10 years the federal Bureau of Land Management has prepared about 150 EISs and there is no recorded instance where it selected the "No Action" alternative. Therefore, the restriction in the bill that only the proposal of the applicant can be considered leaves the decision maker with no choice and essentially renders the EIS process useless.

[5] Resources for the Future; Taking Green Energy Projects to Court, https://www.rff.org/publications/reports/taking-green-energy-projects-to-court-nepa-review-and-court-challenges-to-renewable-energy/

Regarding the Outer Continental Shelf Lands Act, the siting and project approval criteria in 43 U.S.C. §1337(p)(4)(I), are not that prescriptive to begin with, and have resulted in offshore wind projects sited in the most inappropriate locations, e.g. in the line of sight of and obstructing onshore military radars, and in the migration paths of critically endangered whales. The injection by the bill of another subjective interpretation by the agency to determine what constitutes unreasonable interference with an ocean use would weaken these criteria even further. To our knowledge, to date, no project has been stopped based on violation of these criteria, so for the purposes of this bill we see no reason to change them.

Regarding the changes to the National Historic Preservation Act, excluding visual, atmospheric, and audible elements from historic reviews severely undermines the core concept of historic integrity, which relies on a property's setting, feeling, and association to convey its historical significance. Allowing heavy industrial infrastructure, excessive noise, or air pollution to encroach upon these sites destroys the context that makes them meaningful, effectively ruining the public's ability to experience or study them as they were meant to be preserved. Other provisions in section 2301 limit the projects that will be subject to Section 106 review, impose strict consultation deadlines, and prevent the courts from imposing remedies to correct damage. No evidence has been provided demonstrating that these draconian changes are necessary to prevent major project delays.

Other examples of weakening the environmental statutes are provided in Enclosure 2.

(3) Arbitrary Deadlines and Restrictions on Necessary Analysis

The root causes of most delays are often not in the courts but are more mundane, and found in the trenches with Agency management, staff and applicants and problems in how they interact in implementing current law, which the bill exacerbates with artificial deadlines on agency staff and restrictions on information, or does not address as discussed below and in the enclosures. Those root causes of delays often involve the following:

(a) The difficulty of securing full, accurate, and transparent environmental impact information.

Applicants and their consultants may not disclose or underestimate impacts fearful they will not meet statutory or regulatory criteria or that such disclosure hurts their project. Agency staff trying to do their job right as regulators can spend months, even years, going back-and-forth trying to secure such data. They can be subject to political pressure to deem applications complete when they are not, forcing them to go to EISs or permit reviews with less than full information, which just invites critical comment, public opposition, further analysis and litigation, all time -consuming.

A case in point, the Outer Continental Shelf air permit for the Atlantic Shores Offshore Wind project impacting the Brigantine, NJ National Wilderness Area, Regulators sought clarity from the applicant on the air quality modeling for years, but then abruptly deemed

the application complete in the waning days of the Biden administration, and moved forward with a permit that had to be and was successfully challenged.

(b) Misguided Agency Policy.

Some agencies seeking to support applicant proposals establish decision-making, and NEPA procedures that avoid consideration of any real alternatives, and will accept less than full disclosure of environmental impact of the proposal. They will fill the document, or now with EIS page limits, the Appendices of the document, with extraneous material which takes considerable time to assemble, all in the mistaken belief that this approach favors the proposal. But in fact, it is the opposite, that full disclosure of only significant impacts and genuine consideration of reasonable alternatives shields them from successful legal NEPA challenge and allows them considerable discretion to select the option they want, which does not have to be the environmentally preferable one.

A case in point: the offshore wind program implemented by the Interior Department. The root cause of much of the litigation you see today stems from a flawed decision-making and environmental review process. The lease area award itself, which is the most critical environmentally impacting decision, is made with virtually no environmental impact information or consideration of alternative sites. Years later, after the developer is locked into a flawed site, the environmental issues are illuminated and public opposition and litigation arises.

All this could be avoided with early preparation of a screening-type EIS supporting approval of the lease area and the contemplated project together, followed by the more detailed area characterization. This would allow for early and informed decision-making, and any litigation could be resolved while the site characterization proceeds and before the applicant expends substantial resources on construction.

(c) Agency Staff Capability.

Some NEPA and permitting factors are technically, mathematically, and scientifically complex, for example, in the case of certain air quality impact and underwater noise exposure modeling. The agencies can lack both the staff numbers and skills to determine whether submissions by applicant consultants are accurate, especially when these involve computer models that are not transparent in their basic assumptions. This also leads to poorly supported EIS and permit approvals that Invite public concern and litigation.

The bill imposes many requirements on agencies and restrictions on the courts, but no comparable requirements for applicants, when it is the applicants that are often the major source of environmental impact data. As suggested in the enclosures, applicant failures to provide timely, full information can be a significant source of delay and/or incomplete environmental permitting reviews ultimately leading to poor decisions, public opposition and litigation, which the bill does not address at all.

(4) Remands to Reconsider Prior Approvals and Correct Mistakes

The criteria in title IV, Project Certainty, in paragraph (D) that an agency can only reconsider a prior approval when " such action is necessary to prevent specific, urgent, substantial, and proximate harm or damage to life, property, national security, or defense" Is far too restrictive, in particular the need for "urgent" and "proximate". It does not include environmental damage. Since the term "life" is not defined in the bill, it is not even clear whether it includes harm or damage to animal or biological life. These and other provisions in Title IV will essentially prevent agencies and the courts from correcting flawed permits and project approvals,

There are legitimate reasons for agencies seeking remands, which after consideration of the developer's interests, may or may not be supported in court. Agencies should not be prevented from reconsidering a prior project approval if it believes that it does not comply with the law, becomes aware of significant new environmental or safety information, or it finds the project inconsistent with new national policy. Regarding the latter, from a policy perspective, the restrictions on agencies seeking remands, and on court review are undemocratic because they elevate the interest of the private developer above the national interest, which, like it or not, can properly change especially following presidential elections.

Certainly, there are equities to be assigned to the developer based on how far they have gotten with the project, and those are properly decided in court. So, a request for a remand of a project approval may be denied in court, but we see no reason why an agency should be precluded from making such, or why the political party in control at the time should be denied the opportunity to pursue its election-won policies.

Real project certainty and continuity could be provided by the Congress in the form of a multi-source energy policy and legislation that supplies essential base load and peaking power from sources that both parties can agree to over the long-term as administrations change. Rather than impose arbitrary restrictions on agencies, the Senate should consider crafting such energy legislation.

Conclusions

Preventing state and federal regulators from conducting thorough, comprehensive environmental evaluations upfront, forces agencies to make poor decisions based on incomplete data. When agencies are rushed and prohibited from examining reasonable alternatives or new science, they are far more likely to issue legally flawed EISs and permits and make poor decisions.

Shortening the statute of limitations to 150 days and restricting judicial remedies to "remand without vacatur" are unnecessary and will not stop litigation; it will result in rushed and fragmented legal filings and prolonged uncertainty and risk for developers as flawed EISs and permits are repeatedly sent back to agencies for correction, and potentially rejected after the developer has expanded considerable resources on project construction.

This bill misses the mark regarding the real sources of delay and unnecessarily weakens a number of our environmental statutes and the substantive environmental protections that they afford. Proponents argue these changes are necessary to eliminate bureaucratic red tape. However, the mechanisms used; limiting judicial remedies and agency reconsideration, weakening the laws, restricting the scope of reviews, and forcing arbitrary deadlines, will achieve the opposite effect.

We respectfully ask you to reconsider the provisions of the *Bipartisan American Affordability and Jobs Act of 2026* that would unnecessarily limit judicial review, weaken our environmental reviews and protections, and curtail environmental reviews and agency discretion to correct errors, and replace those with more constructive direction to the agencies -and to applicants-to better implement existing law.

We would therefore suggest that the bill needs redirection to address those real causes of unnecessary project delay. The broad outlines of that redirection are provided in Enclosure 1 with specific comments and suggestions on the bill's current provisions in Enclosure 2.

We would also suggest that you hold hearings on this bill and secure the testimony of agency management and staff who have been "in the trenches" regarding permit reviews, as mentioned above. Should you do we would also be glad to participate.

Thank you for considering these concerns and suggestions.

Sincerely,

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Senator Brian Schatz
Congressman Jeff Van Drew
Congressman-elect Zack Mullock
Congressman Frank Pallone

Enclosure 1

What Effective Permitting Reform Should Accomplish

The focus and direction of this bill should be changed to pursue reforms that make the overall environmental review effort more effective and efficient without compromising the information and safeguards needed for good decisions. In particular, the Senate should revise the bill to:

Require, to address the current conflicts **regarding offshore wind projects**, that a streamlined EIS be prepared early at the time of the lease area award, that such EISs include a section on alternative methods and potential locations for supplying energy comparable to the proposed project, and that the protections in Section 1337(p) (4) of the OCSLA are clarified to be applied individually.

Require full disclosure of environmental impacts. The Congress can provide broad direction for Agencies to be more prescriptive in their implementing rules as to what is required of an applicant regarding environmental impact information. Where the estimation of impact is complex, agencies should provide direction on what scientific and mathematical formulations are acceptable as is done for various models used for permits under the Clean Air Act, and require transparency in their presentation especially when consultants use computer "models" to estimate impact. Additionally, applicants need to be responsive to agency requests for additional data and analysis, or be penalized.

Require Early Consideration of Project Siting and other Alternatives. The bill should require applicants to identify and Agencies to compare alternative locations, layouts, technologies, construction methods, and transmission routes, including alternatives that avoid sensitive wildlife habitats, or conflict with military or radar operations, and including alternatives that do not match every preference of the project sponsor. To facilitate that, the bill could require agencies to be more prescriptive in their rules as to what is discouraged regarding project siting, and provide exclusionary criteria on what types of sites sites to avoid.

To facilitate public acceptance of a project, agencies need to inject alternatives that may better serve the public interest, to provide for consideration of both those and the applicants. Toward that end, the bill needs to require more information in the notice of intent(NOI) to prepare an EIS than just the general location of the project to allow for meaningful public input and the proper scoping of the EIS, including reasonable alternatives. At a minimum, the NOI should provide a clear description of the purpose and need for the project as this is essential to determining those alternatives.

The bill should require early preparation of an EIS. While recent amendments to the law and the courts allow for late preparation of an EIS, that is simply not smart planning. Early environmental review is an essential tool for identifying the right location,

evaluating alternatives, uncovering conflicts early, and preventing expensive mistakes that can persist for decades.

Require Coordinated Environmental Reviews. The bill should require federal and state permit reviews, including public comment periods to be coordinated and performed in parallel with the EIS review to the maximum extent practical. For example, public comment on rulemakings under the Marine Mammal Protection Act can be coordinated with the public comment on the draft EIS. Early consultation under Section 7 or 10 of the Endangered Species Act can be coordinated with the scoping phase of the EIS. The bill should require agencies to be more prescriptive in their implementing rules as to which of their reviews can be coordinated with others.

Require Individual Review Timeframes, but Preserve Meaningful Scientific and Public Review. Timelines for document preparation can improve accountability, but they should allow for sufficient time and flexibility to resolve significant technical questions, consult affected communities and tribes, and meaningfully consider, and not brush aside, relevant and often valuable stakeholder input and information. Local residents, communities, scientists, tribal governments, and other affected parties often possess information that agencies do not have but need to make sound decisions. A fair process should provide a meaningful opportunity to identify problems while they can still be corrected.

The bill sets time periods for the preparation of environmental assessments and impact statements. But a review deadline cannot make complex environmental questions disappear. This is especially problematic when comments on a draft EIS reveal significant impacts or reasonable alternatives that were not considered at all or not adequately considered in the draft EIS, requiring additional analysis by the agency. The bill should allow agencies to extend those time periods based on such circumstances. In addition, should such circumstances require additional data or analysis from the project sponsor, the bill should set time deadlines on the sponsor for providing such to the agency, or be penalized, including the loss of its ability to challenge the deadlines in court.

Allow for Review of Material New Information. The bill should establish clear standards for when new scientific, technical, environmental, or national-security information requires additional consideration, without reopening a review for immaterial developments. The current bill language restricting the use of new scientific information after the Notice to prepare the EIS is too restrictive in that regard, after the EIS comment period, which seeks to secure such information, seems more logical.

Retain Unfettered Judicial Review to Identify Unlawful Decisions. The applicant and the agency need not fear the courts. If the EIS and the permits have been properly done, lawsuits against the developer will be promptly dismissed. As discussed in the cover letter, litigation is not impacting a significant portion of major energy and infrastructure projects.

Retain Executive Discretion for Permit Modifications, Remands or Revocations based on flawed prior approvals, inconsistency with current national policy, or where new information reveals a serious safety or environmental concern. The courts will consider applicant equities and determine whether such requests are lawful, but agencies should not be precluded from seeking them.

Require Evaluation of Cumulative and Regional Impacts. Agencies should consider the combined effects of multiple projects and associated infrastructure, rather than treating each proposal as if it were the only development affecting a region.

Enclosure 2

Self-Defeating bill provisions

NEPA provisions: Faster review should not come at the expense of eviscerating the statutes.

Section 1101; Purposes; procedure; savings provision. The proposed changes to the Section 2 purpose of NEPA in this section to render it purely procedural goes far beyond what is necessary to achieve permitting improvements. The Act does contain substantive goals in Section 2 and Section 101, as broad as they may be. So those sections should be retained as is.

If it is desired to add a procedural statement, as in paragraph (b) then that statement should be in a separate section from the Act's purpose and policy and reworded to say that: "this Act ~~prescribes~~ includes a procedure by which federal agencies shall consider, and inform the public about the reasonably foreseeable environmental effects of proposed major federal actions and the reasonable alternatives to them on the human environment ~~of the United States~~, the results of which shall be an informational document for the purposes of consideration in federal decision-making". The inclusion of "reasonable alternatives" is necessary logically to give the federal decision-maker something to decide upon.

Section 1102 — Definitions and the scope of review

The definition of a "major Federal action" determines which projects are subject to NEPA review. Section 1102 changes that framework and expands exclusions from the definition.

The definition of an environmental review in paragraph (12)should be revised to mean the agency procedures and processes for preparing and considering an environmental document.

The making of an environmental document public in paragraph (17) should be broader than just placing it on the Agency's website. It should include notice to local, state and federal elected representatives, providing the document to local libraries, and local

newspaper notices.

They bill defines a programmatic environmental document in paragraph (19) but provides no direction on when one should be prepared.

The bill states in paragraph (21) that a record of decision may be issued concurrent with the final EIS. This does not leave any time for the decision-maker to read or be briefed on the contents of the final EIS, including the response to comments, in his/her decision.

The bill in paragraph (22) discusses stakeholder engagement, but it does not define who qualifies as a stakeholder. To ensure fairness, the criteria and a process for determining a stakeholder should be defined.

The requirement for a “brief summary” of the purpose and need for the agency proposal in paragraph (26) suffers from an excess of brevity. In fact, the purpose and need should be fully and clearly explained in the notice of intent to prepare an EIS because it is essential for determining the alternatives to the proposal and properly scoping the entire structure of the document.

Why this is counterproductive:

As discussed further under comments regarding Section 1106 not considering or or narrowing the scope of and reasonable alternatives in an EIS may appear to be protective of the proposal, but it actually places the proposal at greater legal risk.

Section 1104 --- Cooperation of Agencies.

Amending Section 102(2) of NEPA requiring that agency procedures be consistent with eNEPA technologies is premature until those technologies are known. Section 1121(d) of the bill speaks to the development eNEPA tools to accelerate complex environmental reviews which may not be acceptable to all agencies.

Section 1105 — Determining the level of review and relying on other reviews.

Section 1105 changes how agencies determine the appropriate level of environmental review and when certain other reviews can be relied upon in place of a separate NEPA document.

Coordination and avoiding genuinely duplicative studies are sensible objectives. However, categorically excluding an action pursuant to paragraph (5) based on an existing state review, tribal process, or analysis conducted under another statute may not answer every question relevant to a federal decision. Different agencies have different responsibilities, and a review prepared for one purpose may not adequately examine the alternatives or impacts relevant to another.

Similarly, categorically excluding an action from NEPA review because the agency has complied with another federal law serving a similar function is not appropriate. We are unaware of another federal law serving the same function as NEPA, but if the agency wishes to make that case, it should be done on a case-by-case basis, not categorically.

For example, an analysis that concentrates on marine construction impacts may not fully address the visual effects of an offshore wind array on a coastal tourism economy. A review of turbine placement may not fully resolve whether associated transmission infrastructure can reach the grid without unacceptable impacts. A state process may also differ in its treatment of cumulative impacts or alternatives.

Why this is counterproductive: If an agency relies on an earlier review that does not address a material siting question, the missing analysis may never be completed at the stage when it is most useful. Eliminating duplicative paperwork is beneficial; eliminating necessary analysis is not.

An exclusion may save time at the beginning but leave important impacts or conflicts undiscovered until later stages. The developer may then face redesign, new permitting disputes, unexpected mitigation costs, or opposition from affected communities. A project that initially appears easier to approve may ultimately be more difficult and expensive to deliver. Exclusions should be narrowly tailored and that agencies retain the ability to evaluate connected facilities and reasonably foreseeable effects where those effects are relevant to the federal decision.

The bill should require agencies to identify which questions have already been adequately addressed, which remain unresolved, and how the responsible agencies will fill any gaps before a final authorization is issued.

Section 1106 — Timely and unified federal reviews, alternatives, and deadlines

Section 1106 is particularly important because it addresses how federal reviews are coordinated and how alternatives are considered. Among its provisions, the bill directs agencies to eliminate alternatives that do not fulfill the goals of the non-federal project sponsor. It also establishes deadlines and rules governing the review process.

First, limiting alternatives to those that “meet the goals of an applicable non-Federal project sponsor” renders the EIS process essentially useless for any genuine federal decision-making purpose because there is no choice among options to be made, The applicant’s singular “goal” is to construct and operate a specific project, and return a profit, which is much narrower than the Agency’s mission. So, this restriction essentially means that no alternatives to the specific project will be considered at all. This cuts against the basic purpose of the law and its repeated interpretation in case law (where the alternatives have been characterized as the “heart of the EIS”) for the agency to think beyond what is put before it by an applicant and consider other, potentially better options that would better protect the public interest and need, which may differ from what the sponsor wants.

Corresponding to that a cooperating agency under paragraph (2)(B)(ii) should not be limited you just commenting on the environmental effects of the proposed action, but allowed to comment on alternatives as well, including those that are not under the purview of the lead agency.

The requirements for the content of a Notice of Intent (NOI) to to be prepare an EIS under paragraph (e) Public Review, are too limited to allow for an adequate EIS scoping effort. As currently drafted it only requires the agency to include a concise description of the "general location of the proposed agency action". It does not even require a description of the proposed action itself. This makes it virtually impossible for the public to comment on impacts or alternatives to be considered in the EIS or provide relevant information, studies or analysis as called for in subparagraph(1).

To provide for meaningful public comment and an adequate scoping effort, the EIS notice of intent should include the purpose and need for the proposal, a brief description of the proposal and the types of environmental and social impacts that it is expected to cause, and what other environmental statutes it will need to comply with.

These changes could have substantial consequences for siting. Consider an offshore wind developer whose preferred site is close to shore because it reduces cable costs or simplifies construction. A more distant location, a different turbine layout, a different landfall point, or a different transmission connection might reduce visual impacts, avoid a sensitive wildlife area, or not interfere with onshore military radar. Those alternatives may involve additional cost or require a different design. The agency should nevertheless be able to examine reasonable alternatives rather than treating the sponsor's preferred configuration as the practical limit of the inquiry. The same principle applies to a transmission line proposed through a sensitive habitat, a pipeline routed through a vulnerable watershed, or a port expansion that conflicts with existing navigation.

The bill sets time periods for the preparation of environmental assessments and impact statements. But a review deadline cannot make complex environmental questions disappear. This is especially problematic when comments on a draft EIS reveal significant impacts or reasonable alternatives that were not considered at all or not adequately considered in the draft EIS, requiring additional analysis by the agency. The bill should allow agencies to extend those time periods based on such circumstances. In addition, should such circumstances require additional data or analysis from the project sponsor, the bill should set time deadlines on the sponsor for providing such to the Agency, or be penalized, including losing its ability to challenge the deadlines in court.

Therefore, the bill should retain schedules but provide provisions so agencies can extend them when necessary to resolve significant technical issues, evaluate new reasonable alternatives, or consider material new evidence. Agencies should also have the capacity and funding to meet those schedules.

Section 1106(3) Consideration of Timing, The requirement that federal agencies not consider scientific and technical research that becomes available after the EIS Notice of Intent to prepare is self-defeating. In fact, one purpose of requesting comment on the draft EIS is to secure such research so that agencies can make up-to-date informed decisions. Therefore, this deadline should be extended to the close of the comment period on the draft EIS.

Restrictions on considering new information can reduce the responsiveness of the process**.** The bill limits the circumstances in which new information arising after specified stages of review can require additional analysis or delay publication. For projects involving changing wildlife conditions, evolving technical information, or newly identified conflicts with other infrastructure, the ability to address material new information can be essential to sound decision-making.

A process should not be endlessly reopened for immaterial developments. But it should allow agencies to address genuinely significant information that could affect the choice of site, the adequacy of mitigation, or the safety and feasibility of the project.

Why this is counterproductive: The combined effect of this section is to favor a rapid decision over a well-informed decision, narrow the set of alternatives, and make it harder to adjust the analysis when new facts emerge. The resulting authorization may be less defensible, less responsive to real conditions, and more vulnerable to practical problems after construction begins.

Additionally, as mentioned above, limiting the scope and alternatives in the EIS may appear to foster the proposal, but it actually make it more vulnerable to legal challenge. This section should be fostering the full disclosure of impacts and full consideration of alternatives, not trying to limit it.

Section 1110 — Judicial Review.

Section 1110 would restrict NEPA litigation through a generally applicable 150-day filing deadline, prior comment requirements where a comment opportunity was provided, a direct harm requirement, exclusive federal appellate jurisdiction and limitation on judicial remedies.

<u>Limits on Remedies</u>

The most serious concern is the restriction on remedies. Sections 111(c)(5),(6) would require remand without vacatur or an injunction for NEPA violations, leaving authorizations effective and allowing construction to continue during corrective review. The preliminary injunction exception requires a likely violation of another federal law besides NEPA, along with the specified equitable findings. Environmental harm and irreversible commitments could therefore occur before the agency corrects a deficiency. As presented in the cover letter, preliminary injunctions already affect less than 4% and

vacatur orders about 1% of all major energy and infrastructure projects, so these restrictions are unnecessary.

The restrictions on remedies raise a separate concern. If a court finds that an environmental review was legally deficient but cannot provide an effective remedy to prevent the project from proceeding while the defect is corrected, the opportunity for meaningful correction may be lost. By the time the review is completed again, construction may be underway or the most consequential decisions may already be irreversible.

The limits on judicial review in the bill are unnecessary and prejudicial to plaintiff interests. For example, the bills restrictions on courts in issuing vacatur orders and preliminary injunctions.

Over a typical 8-to-10-year period, the federal government approves approximately **350 to 400 major energy and infrastructure projects** that require an EIS[6]. Of those major projects, **28% faced pre-development litigation** [6, 7]. **However, only 1% of all approved major projects received vacatur orders** [6] (20% vacaturs of 20% plaintiff prevails of 28% of cases filed) due to recent Court trends not to issue them, so the bill's restrictions on those are unnecessary.

Preliminary injunctions affected **less than 4%** (14% of 28% of cases filed) of all major energy and infrastructure projects [7]. Additionally, **plaintiffs prevailed** fully or partially prevail only in about 20% [8,9] of cases filed, or on **5 to 6% of all approved major projects** (20% x 28%).

Therefore, **plaintiffs** already face an uphill climb in the courts and ultimately **do not impact a large percentage of major projects.** It does not seem necessary or appropriate for the Congress to make that hill even steeper for some of its constituents with further restrictions on their ability to prevail in court.

<u>The 150-day Deadline for Filing</u>

The bill establishes 150-day deadlines for filing litigation from each individual authorization date for the project, which can vary by 90 to 120 days of each other,

While the Administrative Procedure Act allows 6 years for a plaintiff to file, in practice the great majority of cases are filed promptly because it is in the plaintiff's interest to do so

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[6] Breakthrough Institute, Understanding NEPA Litigation July 11 2024, https://thebreakthrough.org/issues/energy/understanding-nepa-litigation

[7] Environmental Law Reporter, NEPA Litigation over Large Energy and Transport Infrastructure Projects, October 2023, https://www.elr.info/sites/default/files/files-general/53.10836.pdf

[8] Wilmer-Hale, One year after Seven County: Trends in NEPA Review and Litigation Risk, June 5th 2026, https://www.wilmerhale.com/en/insights/client-alerts/20260604-one-year-after-seven-county-trends-in-nepa-review-and-litigation-risk

[9] NAEP, NEPA Case Law-2020, P.E. Hudson, Esq, https://www.naep.org/assets/webinars/2021_Webinars/NEPA_Cases_Law_Update_2020_Annual_Report.pdf

before environmental harm occurs. For example, for renewable energy projects, 81% of complaints have been filed within 120 days of project approval [10] so it is unclear whether this change is necessary at all.

The changes in the bill would force plaintiffs to file multiple fragmented lawsuits on each authorization for the same project. it severely restricts plaintiffs from filing a single cogent lawsuit because when they file they will not see all of the authorizations which are inter-related, or potential inconsistencies among those authorizations. In practice, it will not expedite judicial review because the Court, for purposes of judicial efficiency, will likely wait for the last relevant lawsuit to be filed and consolidate all the related complaints for the project into one for one judge to hear. The bill itself should foster that same efficiency of judicial review, and be revised to run a single clock, perhaps a year versus 150 days, from the last relevant authorization.

The Timeframe for Filing

The time allotted should preserve access for affected communities, entities, individuals, organizations of the public, and exceptions for issues that could not reasonably have been identified during the comment period. The bill should clarify that its direct harm requirement does not exclude otherwise valid NEPA claims concerning reasonably foreseeable indirect effects or a project's contribution to cumulative environmental harm, where the claimant otherwise satisfies established standing requirements.

A short and clear deadline can provide certainty. But the practical effect of these restrictions depends on the complexity of the project and the ability of affected parties to identify a defect, understand its consequences, and obtain legal assistance within the permitted period.

A coastal community may not immediately recognize the implications of a proposed turbine layout. A technical conflict with a radar system may emerge only after further agency analysis. A new wildlife study or a more complete assessment of cumulative effects may reveal a problem after the initial comment period. Residents and small businesses may also lack the technical and legal resources to prepare detailed comments on every issue that could later become significant.

To accommodate these concerns, a **single time frame of one year** Is recommended, starting from the last project authorization.

Commentor Requirements, New Information & Deference

[10] Resources for the Future; Taking Green Energy Projects to Court, https://www.rff.org/publications/reports/taking-green-energy-projects-to-court-nepa-review-and-court-challenges-to-renewable-energy/

Requiring a commenter to have raised a sufficiently detailed objection can also make it difficult to challenge a defect that could not reasonably have been identified from the information available during the comment period.

Section 111(c)(7)(B) also limits challenges following court ordered supplemental review to newly included information. The bill should clarify that courts may consider earlier information (including earlier environmental documents) necessary to determine whether the agency corrected the defect.

Section 111(d)'s deference requirement should expressly preserve independent judicial interpretation of law.

Why this is counterproductive: Judicial review is not simply an additional source of delay. It is a mechanism for ensuring that agencies follow the law and that material errors can be corrected. If review becomes difficult to obtain and remedies become less effective, the incentive to identify and resolve problems before approval is weakened.

The better approach is prompt judicial review with clear filing deadlines, adequate access to relevant information, and remedies proportionate to the violation. Where a defect is immaterial, it should not derail a project. Where a defect concerns a fundamental siting error or a serious legal requirement, an effective remedy should remain available.

II. Clean Water Act Provisions: Protect the ability to address water-quality impacts

The bill proposes some of the most severe rollbacks to the Clean Water Act (CWA) since its enactment in 1972. While framed as an initiative to lower energy costs and accelerate infrastructure development, an examination of the legislative text reveals that these changes are excessive, degrade environmental protections, and create regulatory bottlenecks that undermine sound, science-based decision-making.

Section 1201 — Water-quality criteria

Water-quality criteria provide a scientific and regulatory basis for evaluating whether proposed activities may affect water quality. Changes to the framework governing those criteria should not make it harder to account for the characteristics of the receiving waters, the pollutants or disturbances involved, and the uses those waters support.

For coastal infrastructure, water quality is directly relevant to fisheries, recreation, shellfish resources, wetlands, and the health of nearshore ecosystems. Construction and associated activities can disturb sediment, affect wetlands, or create risks that require project-specific analysis and mitigation.

Why this matters for siting: A location that appears convenient for construction may be less suitable when its effects on a sensitive estuary, coastal water body, or other

receiving water are considered. Sound review should identify whether a different route, landing point, construction method, or location could avoid or reduce those impacts.

Section 1202 — Clean Water Act permitting and state certification

Section 1202 changes aspects of Clean Water Act permitting and Section 401 state certification. The bill establishes a defined period for certification decisions, permits a certifying authority to waive certification during that period, makes a waiver unreviewable, and places a demanding evidentiary burden on a state authority defending a denial or conditions.

The bill drastically restricts the scope of Section 401 water quality certifications. Historically, states and Native American Tribes possessed the authority to review any federally permitted project—such as a pipeline or hydroelectric facility—to ensure it complied with broad local water quality laws. The bill limits this review strictly to point source discharges and specific numeric water quality requirements, effectively codifying previous administrative rollbacks.

States have an important role in evaluating whether federally permitted activities may comply with applicable water-quality requirements. Their expertise can be particularly valuable where a project affects coastal waters, wetlands, estuaries, or local water uses.

A deadline can help prevent applications from languishing indefinitely. But if a state needs additional information to understand a project's effects, a strict deadline can create pressure to act before the relevant questions have been resolved. The ability to waive certification without judicial review also raises concern that a waiver could become difficult to challenge even when affected parties believe significant water-quality issues remain unaddressed.

The requirement that a state demonstrate by clear and convincing evidence that a denial was necessary, or that conditions were the least burdensome way to avoid a water-quality violation, could also discourage reasonable protective conditions. A condition that reduces risk may be appropriate even if it is not the least burdensome option imaginable.

For example, a cable landing or other coastal facility may require construction timing restrictions, erosion controls, sediment management, or adjustments to the proposed route. These measures can add near-term cost but avoid greater environmental damage and later disputes.

Why this is counterproductive:

By isolating Section 401 certifications to a narrow subset of water quality standards, the bill strips states and Tribes of their sovereign right to protect local water systems from non-point source pollution, altered water flows, and broad environmental degradation.

A rushed or inadequately supported certification decision may leave water-quality issues unresolved, increase conflict between state and federal authorities, or produce an authorization that is more difficult to defend. The result may be delay later rather than efficiency now.

Section 1203 — Permit term for NPDES permits

National Pollutant Discharge Elimination System (NPDES) permits address discharges of pollutants into waters covered by the Clean Water Act. Changes to permit terms and renewal processes should not weaken the ability to respond to changing conditions, new information, or updated regulatory requirements.

NPDES permits regulate point-source pollution entering American waterways. Currently, these permits must be reviewed and renewed every five years to account for newer technologies and updated water quality science. The bill doubles the maximum permit term to ten years, allowing polluters to operate under outdated standards for a decade.

The key concern is not that every longer or more predictable permit term is inappropriate. It is that permit certainty should not become a reason to overlook changed conditions or delay necessary updates. Infrastructure projects can operate for decades, and their effects may vary with operating conditions, maintenance, surrounding development, and the condition of the receiving waters.

Why this is counterproductive: Extending both NPDES and Section 404 dredge-and-fill permits to ten years ignores the reality of modern ecological science. Water ecosystems fluctuate rapidly due to shifting climate patterns, industrial runoff, and localized pollution. Locking in pollution allowances for ten years means that emerging contaminants, toxic chemicals, and new scientific data regarding public health cannot be incorporated into active permits in a timely manner. This creates a prolonged shield for industrial polluters at the expense of downstream drinking water and aquatic habitats.

Section 1204 — Permits for dredged or fill material

Section 1204 changes the framework for permits involving dredged or fill material, including aspects of general permits and preconstruction requirements.

The bill extends the maximum lifespan of Section 404 general and nationwide permits—which govern the dredging and filling of wetlands and rivers—from five years to ten years. Furthermore, it imposes highly compressed timelines for federal agencies to review these applications and introduces structural ambiguities into the EPA's historic Section 404(c) project veto process.

Dredging and filling can affect wetlands, waterways, coastal habitats, sediment movement, and aquatic resources. For infrastructure, the precise location and

construction method can determine whether these impacts are minor, manageable, or substantial.

A general permit can efficiently cover activities with predictable and limited impacts. But the availability of a general permit should not substitute for closer examination where a proposed activity presents unusual site-specific concerns. Preconstruction requirements can be important because they allow agencies to identify those concerns before the work begins.

Why this is counterproductive: If the applicable framework reduces the information or preconstruction review required for a project that presents meaningful site-specific risks, agencies may lose the opportunity to adjust a route, change a construction method, or avoid a sensitive area before the disturbance occurs.

Congress should preserve efficient general permitting for appropriate activities while ensuring that projects with potentially significant effects receive the level of scrutiny their location and design warrant.

Section 1205 — Judicial review of Clean Water Act permits

Section 1205 establishes short filing deadlines for certain challenges to state program approvals, individual and general permits, and verifications under general permits. It also limits the ability of courts to provide relief in specified circumstances.

Water-quality effects are sometimes difficult to identify immediately, particularly where they depend on seasonal conditions, complex hydrology, or the cumulative effects of several activities. A short deadline may expire before affected parties can reasonably understand the full significance of a decision.

Where a court determines that a permit decision is legally deficient, restrictions on vacating, enjoining, or otherwise limiting a permit may also make it harder to correct a problem before the relevant activity causes harm.

Why this is counterproductive: A deadline that improves finality can also reduce the opportunity to correct a consequential error. The appropriate goal is to prevent meritless or dilatory challenges while preserving meaningful review when a permit may violate the law or fail to protect water quality.

Conclusions: The Clean Water Act amendments within the bill are counterproductive. Proponents argue these changes are necessary to eliminate bureaucratic red tape. However, the mechanism used—restricting the scope of reviews and forcing arbitrary deadlines—will achieve the opposite effect.

By preventing state and federal regulators from conducting thorough, comprehensive environmental evaluations upfront, the bill forces agencies to make hasty decisions based on incomplete data. When agencies are rushed and prohibited from examining

reasonable alternatives or new science, they are far more likely to issue legally flawed permits. Instead of accelerating construction, these changes just shift the problem from the regulatory arena to the courtroom.

Shortening the statute of limitations to 150 days and restricting judicial remedies to "remand without vacatur" will not stop litigation; it will result in fragmented and rushed legal filings and prolonged uncertainty and risk for developers as flawed permits are repeatedly sent back to agencies for correction, and potentially rejected after the developer has expanded considerable resources on project construction. As discussed above in the section on judicial review under NEPA remands with vacatur and preliminary junctions are already rare and these changes are unnecessary.

Rather than modernizing the permitting process through increased agency funding, technological upgrades, or better interagency coordination, the bill simply dismantles core ecological safeguards. By sacrificing water quality and undermining cooperative federalism for the sake of artificial speed, the legislation ensures that the projects that do move forward will face intense local resistance and severe legal vulnerabilities. True permitting efficiency relies on robust, transparent, and legally defensible reviews; by removing these tenets, the bill guarantees dirtier water and a more chaotic, unpredictable environment for developers and communities alike.

III. Endangered Species Act provisions: Timelines Should Not Replace Adequate Biological Review

Section 1301 Definitions

Section 1301 defines the best available scientific data to include “relevant, objective information” and “credible” models that account for known or potential error and are applied without biased presumptions or policy prescriptions. This definition, if it is retained, should apply equally to agency and applicant models and to evidence submitted by the general public.

Congress should clarify that the definition does not exclude reliable emerging research, observations, or scientifically justified conservative assumptions merely because uncertainty remains. It should also preserve the duty to explain why contrary evidence was rejected. A demand for objectivity should not become a reason to disregard evidence of risk or dilute ESA’s substantive provisions.

There is substantial risk that this definition can be utilized as a pretext to discard biologically/mechanistically/physically plausible science under the guise of pursuing “objectivity.” As such, Congress should strongly consider discarding this proposed definition.

Section 1302 — Timeline for Section 7 consultations

Section 7 consultation is intended to help federal agencies assess the effects of their actions on protected species and designated critical habitat. The bill's timeline changes should be examined in light of the complexity of some projects and the need for sound biological and impact information.

Section 1302 reduces the basic consultation period from 90 to 60 days and lowers the threshold for extensions requiring applicant consent from 150 to 100 days. It also makes APA relief available in the specified circumstances when a proposed consultation period extends beyond 145 days without the required written statement or applicant consent. For actions requiring a NEPA environmental document, consultation must be completed by that document's completion, unless the Secretary approves an extension for extraordinary circumstances beyond the consulting parties' control and not caused by them. These changes compress the time available to resolve biological concerns and make necessary extensions more difficult.

Offshore wind projects can involve several distinct stages: surveys, construction, cable installation, vessel operations, operation and long-term maintenance. Their potential effects may vary by species, season, location, and activity. Important considerations can include underwater noise, vessel traffic, habitat disturbance, migration patterns, and the cumulative effects of multiple projects. These activities can harm and disturb marine mammals and demand appropriate siting, monitoring, and mitigation if available to address identified risks.

A deadline cannot guarantee that the necessary biological and noise exposure information will be available or that every relevant agency will have enough time to assess it. The proposed deadlines are too short to perform the complex underwater noise modeling to assess impacts on marine mammals, Additionally the timelines are imposed on the wrong party because this analysis is currently being done by consultants under the direction of the developer. **Consequently, these deadlines are not workable and should be discarded.**

In addition, where data are incomplete or a species' use of an area is seasonal, the appropriate response may require additional surveys, consultation, or adjustments to the construction schedule. The statute should permit documented extensions needed to satisfy the ESA's substantive requirements and assess material information, without conditioning those extensions solely on applicant consent or circumstances outside all consulting parties' control.

Why this is counterproductive: If a consultation is completed before material issues are resolved, a project may proceed with inadequate exposure modeling and mitigation or face later operational restrictions, disputes, or redesign. A reasonable schedule should encourage timely consultation without making the calendar a substitute for an adequate biological assessment. For example, even under current procedures agencies have not adequately considered the impacts of offshore wind operations but rather have focused only on the pile driving construction. This is a matter that should be left to agency management not the Congress.

Section 1303 — Projects in an operational right-of-way

Existing rights-of-way can be appropriate locations for some infrastructure improvements because they may reduce the need for new land disturbance. But an existing corridor is not automatically free of environmental constraints.

Section 1303 exempts projects unequivocally excluded under section 1316 of MAP-21 from ESA section 7(a)(2), (3), and (4). This is a specific transportation right of way provision, not a general exemption for every existing utility corridor or offshore wind project. For qualifying projects, however, it removes the duties addressed by those paragraphs, including section 7(a)(2)'s consultation and no jeopardy requirements.

A project that expands capacity, changes its footprint, or introduces different activities can create impacts that were not present when the original right-of-way was established. An existing transmission corridor may cross habitat used by protected species; construction within that corridor may require additional clearing; and new construction methods may affect wetlands or waterways.

Why this is counterproductive: If eligibility for this NEPA categorical exclusion also eliminates specified ESA duties, agencies may overlook new impacts associated with the proposed change. The appropriate standard should reflect the actual scope and effects of the new activity, not just the history of the corridor. Congress should delete this automatic ESA exemption and retain species specific consultation where the ESA otherwise requires it.

Section 1304 — State Assumption of Consultation Responsibilities

States can bring valuable local knowledge and expertise to species protection. But transferring consultation responsibilities requires adequate scientific capacity, consistent standards, access to data, and clear accountability.

Protected species may cross state boundaries, and their habitats and migration routes span large regions. Different approaches among jurisdictions can make it difficult to evaluate cumulative effects or maintain consistent protections, including the continuity necessary for migrations.

Why this is counterproductive: State assumption can produce inconsistent review if the safeguards do not ensure effective scientific scrutiny in practice. Congress should strengthen the provisions by requiring independent scientific review for material disagreements, regular audits beyond the first four years, and prompt federal intervention where a deficient state consultation threatens protected species. The bill should ensure that any transfer of responsibility includes adequate capacity, federal oversight, transparent methods, and the ability to address effects beyond a single state's borders.

Section 1305 — Judicial Review under the Endangered Species Act

Section 1305 establishes a petition for review procedure in the D.C. Circuit for biological opinions under ESA section 7(b), with a filing deadline of only 150 days after the opinion is made public. The inherent disadvantage of this is the general public is therefore compelled to challenge a biological opinion before the related project approval and full administrative record are available for a coordinated, coherent challenge.

Judicial review can help ensure that consultation requirements are followed and that decisions are supported by the required analysis. Restrictions on review make it harder to correct a material defect in a biological opinion or related decision.

This is especially important where the consequences of a siting decision may be difficult to reverse. Once a sensitive habitat is disturbed, a construction season is missed, or a project is built in an unsuitable location, a later correction may be incomplete or extremely costly.

Why this is counterproductive: A short filing period tethered to publication of a biological opinion can force premature or fragmented litigation and foreclose review before affected parties can extensively assess the opinion alongside the final project decision. As presented in the cover letter this will not expedite judicial review because the court, for purposes of judicial efficiency, will likely wait for the complaint filed relative to the last project authorization and consolidate all those complaints into one for one judge to hear. Therefore, these timeline requirements should be revised to create a single deadline of a recommended one year starting from the issuance of the last project authorization.

Congress should preserve existing causes of action and available remedies, protect pending cases, and ensure that the deadline permits meaningful access to the relevant record. Section 1305 should also clarify its relationship to review of the associated Marine Minerals Administration approval and to later reinitiated consultation.

Section 1306 — Listing determinations

Decisions about whether a species warrants protection should remain grounded in the best available scientific information and the standards established by law.

Changes to listing procedures can have consequences for project planning if they make the assessment of species status less responsive to relevant scientific evidence. Species populations, habitat conditions, and threats can change over time. Sound infrastructure planning depends on accurate and current information about the species and habitats that may be affected.

Why this is counterproductive: If listing decisions become less responsive to relevant evidence, agencies and developers may plan around an incomplete understanding of the species potentially affected by a project. That can lead to unexpected consultation requirements, conflict, and redesign later.

IV. Project Certainty Provisions: Certainty Should not make Mistakes Permanent.

Section 1401 — Maintaining Federal Authorizations or Permits

Section 1401 significantly limits the circumstances in which federal agencies may revoke, rescind, withdraw, terminate, suspend, amend, or alter authorizations in effect on or after September 16, 2026, or interfere with the construction or operation at full capacity of a project that has secured its necessary federal permits. The definition expressly includes records of decision, construction and operations plans, biological opinions, and incidental take statements. It can therefore protect approvals issued before September 2026 that remain in effect.

One exception involves urgent and substantial harm based on new information that was not considered in the underlying review or final agency action. The other exceptions cover action required by a court order, a permit holder's material breach or violation of law, fraud or material misrepresentation in obtaining the permit, and action requested by the holder or sponsor. There is no general exception for an agency's reasoned determination that its original approval failed to comply with governing law. Reassessing information already in the record may also fall outside the exception requiring new information.

Developers should be protected from arbitrary or unexplained changes to permits. Investors need predictable rules, and agencies should not casually reverse properly made decisions. But there is a difference between preventing arbitrary revocation and making it difficult to respond when a material problem is discovered. New information about environmental effects, radar interference, protected species, or the feasibility of associated infrastructure may emerge after an authorization has been issued. Not every such issue will meet the proposed narrow threshold for urgent and substantial harm.

Consider an offshore wind project whose approved layout is later found to create a significant radar conflict that was not adequately addressed. Or suppose new information identifies a serious problem with a cable route, protected habitat, or water-quality effect. If the government has limited ability to modify the authorization, the practical choices may be expensive retrofits, prolonged litigation, operational constraints, or leaving the problem unresolved.

The provisions in Title IV under project certainty will prevent agencies and the courts from correcting flawed permits and project approvals. From a public policy perspective, the restrictions on agencies seeking remands, and on court review are undemocratic because they elevate the interest of the private developer above the national interest, which, like it or not, can properly change, especially following presidential elections. Agencies should not be prevented from reconsidering a prior project approval if it believes that it did not comply with the law, becomes aware of significant new environmental or safety information, or it finds it inconsistent with new national policy. Certainly, there are equities to be assigned to the developer based on how far they have gotten with the project, and those are properly decided in court. So, a request for a

remand of a project may be denied, but an agency should not be precluded from making such, or why the political party in control at the time should be denied the opportunity to pursue its policies.

Such remand requests by agencies have been rare and this entire section should be reconsidered.

The court order exception should expressly preserve agency initiated voluntary remands and lawful corrective action on remand.[11] An order returning a matter for reconsideration does not necessarily require a particular permit amendment or suspension. The bill should not force an agency that identifies a legal defect during reconsideration to obtain another court order before correcting it. Section 2201(e) contemplates agency requested remands; section 1401 should clearly preserve their practical effectiveness. Moreover, Section 2201(e) should **not** fetter a Court's discretion by requiring agencies to consummate their remand determinations within 180 days. That verbiage should be deleted in 2201(e).

Why this is counterproductive: A provision intended to create certainty can reduce the ability to manage legitimate risks. It may encourage a false choice between honoring a permit and correcting a serious mistake, even though a carefully designed amendment could protect the public while allowing most of the project to proceed.

Congress should expressly preserve pending challenges, existing remands, and lawful corrective action concerning previously issued approvals, and remove the percentage of project cost award for corrective action supported by a lawful reason.

Section 1402 — Ensuring fairness for specific types of covered projects

Section 1402 creates a process for addressing alleged patterns of disparate treatment and delays involving covered projects. The bill also includes restrictions on representative actions and limits on when certain claims may be brought.

Fair and consistent treatment of applicants is an appropriate goal. However, a process focused on whether a project has been treated differently from other projects may not adequately answer whether the project is correctly sited or whether the environmental analysis is sufficient.

Different projects can present materially different conditions. A project near a sensitive coastline may raise visual and tourism concerns that do not arise at an inland site. A proposed wind farm near a radar installation may require analysis that is unnecessary

[11] For example, recent agency-initiated remands were efforts to reconsider approvals and address identified legal deficiencies. Many of those agency-initiated remands were already acknowledged and approved by Courts, including Save Long Beach Island, Inc. v. U.S. Dept. of Com., No. 25-cv-2211 (JMC), 2026 WL 2294613 (D.D.C. Aug. 10, 2026), Town & Cnty. of Nantucket v. Burgum, No. 25-cv-906, 2025 WL 3120419 (D.D.C. Nov. 4, 2025).

elsewhere. A project affecting an important wildlife area may require more extensive consultation than one with fewer biological constraints.

A difference in review time does not necessarily establish unfair treatment; it may reflect differences in the complexity, location, or completeness of the applications.

Restrictions on representative actions can also make it harder for dispersed communities to address common concerns. The effects of a project may be spread among many residents, businesses, or users of a coastal area, none of whom individually bears the entire impact.

Why this is counterproductive: If the pressure to avoid claims of disparate treatment causes agencies to process materially different projects as though they presented the same issues, site-specific scrutiny may suffer. A fair system should require consistent standards while allowing review to reflect the actual risks and complexities of each project. Congress should remove the construction cost-based award and expressly protect reasonable, documented distinctions based on project specific environmental and legal requirements.

Section 1403 — Avoiding unreasonable delays in permitting

Section 1403 provides a process through which applicants can seek judicial review of agency compliance with the one-year deadline in section 1402(c) for covered applications that do not require an environmental impact statement or environmental assessment. That deadline should run from the date the latest covered application is determined complete, not simply from an initial filing. Section 1403 requires expedited litigation, ordinarily a decision within 120 days, and, if relief is granted, an agency decision within 60 days of the court's order.

The objective of preventing unreasonable delays is legitimate. But a permit decision may involve several related authorizations, technical issues, and consultations. A deadline should encourage agencies to work efficiently, not pressure them to conclude that no further authorization or review is needed simply to complete the process.

Per the language, the agency must establish an excuse by clear and convincing evidence. The listed grounds include specified disasters or emergencies, fraud or material misrepresentation, an applicant's withholding necessary information after a reasonable and timely request, and a lapse in appropriations exceeding 14 days. They do not provide a general extension for example, for material scientific issues or additional consultation needed to comply with another federal statute. A complete application does not guarantee that every legally necessary issue can be resolved within a fixed period. We cannot expedite permitting to the detriment of, and at the expense of, compliance with environmental statutes/regulations and associated rigorous review.

Why this is counterproductive: If the consequences of missing a deadline are substantial while the consequences of an inadequately supported decision are limited, the system can create an imbalance. Agencies may face greater pressure to close a file than to resolve every material question. A better approach is to preserve enforceable deadlines while allowing reasoned, reviewable extensions necessary to satisfy substantive legal obligations or resolve identified technical issues. Congress should also state expressly that an order compelling a decision does not excuse compliance with ESA or other applicable environmental requirements.

Section 2251 Offshore Energy

Section 2251(a)(1) would amend OCSLA section 8(p)(4)(I), 43 U.S.C. §1337(p)(4)(I), by replacing "prevention of interference with reasonable uses" with "prevention of unreasonable interference with other uses." This alters a substantive approval criterion. It shifts the inquiry from protecting reasonable uses toward deciding how much interference with those uses is reasonable.

For offshore wind, the change would afford the Marine Minerals Administration great latitude to approve interference with fishing, navigation, or other uses it considers reasonable. However, the project siting and approval criteria in 43 U.S.C. §1337(p)(4)(I), are not that prescriptive to begin with, and have resulted in offshore wind projects sited in the most inappropriate locations, e.g. in the line of sight of and obstructing onshore military radars, and in the migration paths of critically endangered whales. The injection by the bill of another subjective interpretation by the agency to determine what constitutes unreasonable interference with an ocean use would weaken these criteria even further. To our knowledge, to date, no project has been stopped based on violation of these criteria, so for the purposes of this bill we see no reason to change them.

Congress should therefore retain the existing statutory wording and expressly preserve the duty to satisfy each applicable criterion, rather than allow compliance with one criterion to excuse failure to satisfy another. This proposed language attempts to revert OCSLA to a balancing regime where the mandatory factors in 1337(p)(4) can be traded away in exchange for approving offshore wind projects. Courts have cautioned that this approach is unfaithful to the statutory text. See Seafreeze Shoreside, Inc. v. U.S. Dept. of the Interior, 123 F.4th 1 (1st Cir. 2024).

Section 2251(a)(2) changes facilitate routes through protected marine areas and may reduce opportunities for periodic reconsideration through permit renewal. Congress should retain the existing OCSLA exclusion or, at a minimum, require a demonstrated lack of practicable routes outside sanctuaries and preserve periodic review and authority to revise protective conditions.

The savings clause in section 2251(b) should state expressly that any amendment to the approval standard does not validate previously unlawful approvals or impair pending challenges to those approvals.

Section 2301 — Historic Preservation (National Historic Preservation Act

Section 2301 rewrites Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, which requires federal agencies to "take into account the effect of the undertaking on any historic property" before approving or funding it. Section 106 has never given preservation interests a veto. It requires agencies to look before they leap: identify the historic resources a project will affect, consult with State and Tribal Historic Preservation Officers (SHPOs and THPOs), local governments, and others who know those resources, and consider ways to avoid or reduce harm. Some of what Section 2301 does is sensible, including designating a single lead agency, coordinating the Section 106 report with the NEPA document, using programmatic agreements for routine and repetitive activities, and (in Section 2302) providing stable Historic Preservation Fund authorizations. The core changes are not streamlining, however. They redefine what counts as harm, which projects are reviewed, how consultation works, and whether anyone can enforce the result.

Visual and cumulative effects are defined away. New § 306108(a)(1) limits an "adverse effect" to a consequence that "directly alters the characteristics of a historic property," and it excludes "any visual, atmospheric, or audible element" unless that element "would have a direct impact on a historic property that would significantly diminish" its eligible characteristics. The current regulations, by contrast, find an adverse effect when an undertaking may alter a property's qualifying characteristics "directly or indirectly." They expressly include the "introduction of visual, atmospheric or audible elements," and they reach effects that "occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(1), (a)(2)(v). The bill also drops "feeling" from the list of integrity attributes. It excludes effects on any part of a property other than its "character-defining features" and limits the agency's report to "only the portion of the property within the area of potential effects." Through a new definition of "reasonably foreseeable," it also excludes any effect "relating to an unrelated prior, separate existing, or potential future undertaking," which in practice eliminates cumulative-effects analysis.

For coastal communities, this is the central issue. The most significant effects of offshore turbines, transmission towers, and similar tall infrastructure on historic lighthouses, historic districts, and maritime landscapes are often visual. The BOEM finding of adverse effect from the Atlantic Shores South project included the entire Beach Haven Historic District, the Barnegat Lighthouse and a number of distinct historic buildings on the Island The D.C. Circuit addressed a closely related question in *National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019). There, the Army Corps of Engineers argued that transmission towers across the James River did not "directly" affect the Carter's Grove National Historic Landmark because the towers were only visible from it. Construing the word "directly" in NHPA Section 110(f), 54 U.S.C. § 306107, the court held that "nothing in the statute's text" limits the term to physical effects. It also noted that the National Park Service and the Advisory Council on Historic Preservation both understand "directly" to "refer[ ] to causation and not physicality." *Id.*

at 1088–89. Section 2301 would reverse that understanding legislatively for every federal undertaking.

Fewer projects would be reviewed at all. For Section 106 purposes, the bill defines an "undertaking" as a project that both requires a federal permit, license, or approval and is "subject to substantial Federal control and responsibility." It strikes "indirect" jurisdiction from § 306108, and it excludes projects whose only federal involvement is a loan, loan guarantee, grant, or other financial assistance. Current law defines an undertaking to include projects "carried out with Federal financial assistance." 54 U.S.C. § 300320(2). The bill also excludes the "continuation, operation, maintenance, or post-approval implementation" of a project and any act or omission under an executed agreement. New § 306108(d) provides that if a property is identified for, nominated to, or listed on the National Register after review begins, the agency is not required to reopen, supplement, or otherwise revisit its review.

Consultation becomes a countdown, not a conversation. Consulting parties would have 30 days to respond to any report or finding. A party that misses the deadline cannot require reconsideration when it re-enters the process, and the agency may consult with the Advisory Council in its place. Once the agency responds to substantive objections, its obligation to consult "shall be considered to be fulfilled." The agency may decline mitigation when, "in the sole discretion of the applicable Federal official," other considerations outweigh historic preservation. Its report need not identify mitigation outside the area of potential effects unless the applicant requests it. Section 2301(d) also strikes the sentence in 54 U.S.C. § 306114 providing that "the head of the agency may not delegate the responsibility" to document a decision to proceed with an adversely affecting undertaking without an agreement. Staff could therefore make the decision to override preservation concerns.

At the same time, the bill penalizes the officials who do this work. A State or tribal program cannot be considered consistent with the Act if its officer "does not regularly comply with timelines for consultation." A disapproved program faces mandatory suspension of Historic Preservation Fund grants and, after two years, federal assumption of the SHPO's or THPO's functions. If consultation runs past the NEPA deadline, the SHPO or THPO and supervising Senior Executive Service officials must spend "not less than 50 percent of the workweek" remedying the failure. Applicants get a cause of action to enforce consultation deadlines; affected communities get no comparable right. The bill also narrows the definition of tribal properties of traditional religious and cultural importance to locations "at which an event of continuing religious or cultural significance to a living community occurred." That definition could exclude cultural landscapes and places significant for reasons other than a discrete event.

Judicial review is reduced to a remand that changes nothing. New § 306108(c)(9) directs courts to "afford substantial deference to the agency." It makes remand without vacatur or injunction the only remedy for a Section 106 violation, and it permits a preliminary injunction only on a "substantial likelihood" that the action violates a federal law other than the NHPA or NEPA. A Section 106 violation alone, however serious,

could therefore never pause a project while the defect is corrected. The bill adds a 150-day filing deadline, a comment-exhaustion requirement, and original jurisdiction in the courts of appeals. It also bars anyone who did not sign a programmatic agreement from challenging how that agreement is implemented, even though programmatic agreements govern phased identification and mitigation on many large energy projects and local governments and community groups are rarely signatories.

Semonite shows the consequence. The towers in that case were completed and energized the week before the court issued its decision, after the Corps and the developer had assured the courts that the towers could be removed if the challengers prevailed. The developer and the Corps then cited the completed construction, and a reported $400 million investment, to argue against vacatur. The court found that "more than a little troubling." *National Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 501–02 (D.C. Cir. 2019) (per curiam). If remand without vacatur is the only available remedy, that outcome becomes the rule.

Why this is counterproductive: Section 106 consultation is the least expensive point in a project's life at which to move a turbine string, reroute a cable landfall, or change a tower design. Defining visual and cumulative effects out of the statute does not make those effects disappear. It moves the disputes to later and costlier forums: state siting proceedings, local land-use fights, tourism and property-value claims, and litigation under other statutes. Sanctioning SHPOs and THPOs for missed deadlines will slow reviews rather than speed them, because delay often stems from incomplete applicant submissions (see Enclosure 1). These rules are also not specific to any technology. The same definitions would govern pipelines, LNG terminals, transmission lines, highways, and every other federally permitted project under every future administration.

Congress should:

- retain the current regulatory definition of adverse effect, including indirect, visual, atmospheric, audible, and cumulative effects, and the integrity attribute of "feeling";

- keep federally assisted projects and "indirect" jurisdiction within the definition of undertaking;

- allow documented extensions of consultation deadlines when an applicant's information is incomplete or new historic properties are identified, and delete the 50-percent-workweek and grant-suspension sanctions;

- restore the non-delegation requirement in § 306114, and require a written, reviewable explanation whenever an agency declines prudent and feasible mitigation;

- preserve vacatur and injunctive relief for Section 106 violations, and allow consulting parties that took part in developing a programmatic agreement to enforce it; and

- retain the constructive provisions (lead-agency designation, NEPA coordination, programmatic agreements for routine actions, and Historic Preservation Fund funding), which would speed reviews without sacrificing them.

V. Why these provisions can compound one another

The concern is not limited to any single section. The combined effect of the provisions is especially important.

Imagine an offshore wind project proposed in an area that offers attractive construction economics but also has several potential conflicts: turbines would be visible from a heavily visited coastline; seasonal whale use requires careful construction timing; turbine operation impairs essential marine mammal migrations; the turbine layout may affect onshore radar coverage; and the export cable must cross a sensitive coastal area.

Under a sound planning process, agencies would identify these issues early, compare reasonable locations and layouts, coordinate with the military and other affected agencies, consult on protected species, and evaluate the cable route and water-quality impacts. If a better location or design is available, the developer could adjust the proposal before making its largest investments.

Under a weaker process, several things could happen:

- **A narrower review could leave a connected facility or impact inadequately examined.** The cable landing, transmission connection, or other associated development might be treated separately from the main project even though it affects the overall siting decision.
- **A restricted alternatives analysis could favor the sponsor's preferred site.** A different location that would better protect coastal views, wildlife protection, or radar performance could receive less meaningful consideration.
- **A compressed schedule could leave important questions unresolved.** Agencies might have insufficient time to obtain data, complete consultation, or reconcile conflicting technical assessments.
- **A narrow opportunity for judicial review could make it harder to correct an error.** Affected communities or other parties might be unable to challenge a problem before the project advances too far.
- **Limits on changing an authorization could make later corrections more difficult.** Once the project is approved, new information may be costly or legally difficult to incorporate.

These are not inevitable outcomes for every project. They are foreseeable risks created by the interaction of the proposed procedures. Their significance is that the consequences of poor siting can be long-lived and difficult to reverse.