



October 21, 2026

The Honorable Shelley Moore Capito, Chair
The Honorable Sheldon Whitehouse, Ranking
Member
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mike Lee, Chair
The Honorable Martin Heinrich, Ranking
Member
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Capito, Whitehouse, Lee, and Heinrich,

The Environmental Protection Network (EPN) deploys the expertise of more than 800 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

We value bipartisan efforts to provide clarity to EPA to further its mission of protecting human health and the environment. We also strongly support the need to build clean energy infrastructure that reduces pollution and protects public health. We therefore appreciate your efforts to take on the hard work of bipartisan compromise on permitting reform, and thank you for putting the resulting draft text forward for scrutiny and feedback.

EPN is [a proponent](#) of smart permitting reforms, especially measures that improve coordination among federal, state, and Tribal governments, avoid unnecessary duplication, improve community access to information, and improve health outcomes.

We write this letter not to stake out a position on the entirety of the bill, but to provide the added perspective of former agency staff who have experience with how laws are executed by federal agencies, how they impact stakeholders and the public, and how agency actions are litigated and reviewed by the courts.

In particular, we wish to flag two issues based on our experience implementing and enforcing environmental laws that we believe warrant further consideration.

First, we write to raise significant concerns about § 1401 in Title IV of Division A of S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), that may not have been fully evident when drafting the legislation. As currently drafted, the “project certainty” provisions of § 1401 potentially set BAAJA against the daily obligations of EPA to carry out the Clean Air Act, TSCA, the Clean Water Act, and other environmental laws without clarity on how to resolve those conflicts.

We are concerned that, although the permitting bill was not intended to address the Clean Air Act, as written it could significantly limit EPA's ability to issue regulations necessary to protect the public from air pollution. It also might limit EPA's ability to bring enforcement actions, which not only protect public health, but also ensure that companies that comply with environmental laws are not disadvantaged when other companies attempt to save money by violating them.

Section 1401 therefore jeopardizes EPA's future ability to provide the ongoing public health protection from harmful pollution and toxic chemicals that existing environmental laws require. Rather than reforming permitting to speed the building of abundant energy, § 1401 risks launching a wave of protracted litigation against EPA (and potentially other agencies) for doing the job Congress has asked it to do.

Second, streamlined and effective permitting cannot be achieved without adequate staff resources at federal agencies. EPA's current staffing levels are substantially below the levels needed to carry out its statutory responsibilities, despite Congress providing funding well above the administration's FY2026 budget request and explicitly directing EPA to maintain staffing sufficient to fulfill its mission. Existing staff may not have sufficient experience or numbers to do the work before the agency that has been mandated by Congress. We encourage you to expand the bill's existing capacity-building provisions, particularly the Permitting Improvement Fund in § 1133, to explicitly authorize funding for hiring and retaining additional qualified personnel at EPA and other agencies involved in environmental reviews and permitting, including agencies that are not the lead agency for a project.

The attachment provides our detailed concerns and suggested technical corrections to § 1401 for your consideration as negotiations continue. While not addressed in detail here, we have significant concerns with the impacts of certain other provisions in the bill, including section 1402 and those affecting the Clean Water Act.

We would be happy to discuss this further if you have any questions on any of the points raised here, and we invite you and all congressional offices to use our experts as a resource on these and other matters. Anytime you would like EPN to identify experts from our ranks of volunteers, please reach out to Marc Boom, EPN's Senior Director of Public Affairs, at marc.boom@environmentalprotectionnetwork.org.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Roos".

Michelle Roos
Executive Director

Attachment: EPN Concerns about BAAJA Title IV, and Suggested Corrections

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(1) Section 1401 creates unnecessary conflict with existing laws

Section 1401 calls into question EPA's ability to respond to new and changing information in the manner that Congress intended in other laws. Protecting public health is not a static exercise, frozen in time. America's environmental laws have successfully stood the test of time because they give EPA clear responsibilities and timelines to update standards as environmental and economic conditions change, new sources of pollution and new chemicals emerge, technologies evolve, and scientific research shines new light on environmental concerns and solutions.

Notably, §1401 appears untethered from the intent of the bill to, as Senator Lee put it upon introduction, "get America back to building."

Far removed from this intent to speed construction, § 1401 bars federal agencies from taking any action that interferes with a facility's "operation at full capacity", including (but not limited to) "any new action that would revoke, rescind, withdraw, terminate, suspend, amend, or alter a Federal authorization or permit in effect on or after September 16, 2026," except under exceptional circumstances.

As currently written, the "new actions" prohibited under this section are not limited to permit actions and related activities but rather cast a far-reaching net over the agency that could restrict its ability to update regulations and permits and take enforcement actions under the Clean Air Act and other laws, as further explained below.

BAAJA § 1401 potentially turns EPA permitting upside down. EPA issues permits to protect public health from pollution, but BAAJA could turn permits into shields that protect polluters from updated standards.

(a) Section 1401 could block or significantly limit EPA's, states', and Tribes' ability to issue regulations authorized by environmental laws.

We understand that your intent is to prevent Federal agencies from reversing course on a permit or authorization once it has been finalized. We are concerned that § 1401 inadvertently goes much farther than that and could block or limit broadly applicable rules authorized by other statutes. We recommend that you include language clarifying that rules of general applicability and approval of state plans and regulations are not prohibited by § 1401.

In particular, the prohibition on "tak[ing] any other action to interfere with operation at full capacity" could be interpreted as withdrawing or limiting EPA's ability to issue regulations that apply broadly across industrial sectors. For example, the Clean Air Act requires EPA to regulate existing sources under, among other provisions, CAA § 112 (governing air toxics, such as mercury emissions from power plants), and under §§ 126 and 110(a)(2)(D) (the good neighbor provisions, which EPA has used to limit emissions from sources in one state that are contributing to poor air quality in another state). A rule that sets limits on existing sources might be interpreted by a court as "interfer[ing] with operation at full capacity" if it imposes additional costs that may make the facility less economical to run. Additionally, § 1401 might be interpreted

as prohibiting EPA from issuing regulations that waive emissions requirements for facilities with limited remaining useful life or that voluntarily limit operations.

The bar on new rulemakings would likely be even more extensive if “Federal authorization or permit” includes state-issued permits (which we assume is not what is intended, but which the current language opens to litigation and court interpretation). While the defined term is “Federal authorization or permit,” the definition itself does not limit the covered authorizations to those issued by a federal entity or under federal law. If this term were interpreted to include state-issued permits (or permits issued by states pursuant to federal delegations or authorizations), we are concerned that the prohibition on any Federal action that would amend or alter a permit could also prohibit EPA from issuing any rule that would change *any* air pollution limits for major sources that already have permits, regardless of whether such change arguably interfered with operation at full capacity. The Clean Air Act requires all major air pollution sources to have Title V permits, which are issued by states and must contain all of the source’s state and Federal Clean Air Act requirements. Permits must be revised to incorporate any new state or Federal Clean Air Act requirements applicable to the source. Thus, any EPA rule revising standards for major sources of air pollution could be prohibited as a new action that would alter or amend a Federal permit if state-issued permits are considered Federal permits.

This language might also interfere with states’ abilities to regulate existing sources because many environmental laws require states to obtain EPA approval of their regulations, and § 1401 might prohibit EPA from issuing those approvals. For example, under the Clean Air Act’s cooperative federalism approach, states have primary responsibility for deciding whether or how to regulate existing sources to bring their areas into attainment with the national ambient air quality standards (NAAQS). Without EPA approval, however, the state could not get credit for the emission reductions it requires. We are concerned that a court might find that § 1401 prohibits EPA from approving state regulations that courts determine interfere with facilities’ operation at full capacity.

If a rule fell under the general bar in § 1401(b)(1), the deliberately limited exceptions listed in subparagraphs (A) – (E) would not allow EPA to proceed with necessary, statutorily authorized regulations of existing sources. Even if a rule were subject to one of the exemptions, it would be much harder to defend in court. Instead of the traditional arbitrary and capricious standard, EPA would have to defend the rule under a “clear and convincing evidence” standard.

(b) Section 1401 could interfere with enforcement of environmental laws.

We are concerned that § 1401 may alter EPA’s ability to bring enforcement actions when sources are not complying with environmental laws. Enforcement is important not only to ensure that our environmental laws’ public health protections are achieved, but also to create a level playing field so that companies that comply with environmental requirements are not economically disadvantaged by doing so.

Enforcement actions that would rescind or alter a permit seem to be allowed pursuant to § 1401(b)(1)(B), but judicial review provisions under § 1401(b)(4) would seem to change the way enforcement cases would proceed. Most significantly, it would impose a “clear and convincing evidence” burden of proof on EPA, rather than the preponderance of the evidence standard that currently applies. It would also seem to allow defendants to file an action challenging the enforcement action, perhaps in a different court.

We don't believe the intent of this bill is to give polluters the right to continue polluting at current levels in perpetuity or to violate environmental laws with impunity, but we fear that could be the effect. Accordingly, we recommend the addition of language exempting from § 1401 actions such as rules of general applicability, approval of state programs, and enforcement actions.

(2) Section 1401 lacks clarity on how to resolve conflicts between BAAJA and existing laws

The Transmission Permitting Title (BAAJA p. 205) provides specific language to clarify that nothing in that Title of BAAJA supersedes existing laws, particularly the Clean Air Act and Clean Water Act:

“Nothing in this subsection affects the applicability of any requirement under—
“(A) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) (commonly known as the ‘Clean Water Act’);
“(B) the Clean Air Act (42 U.S.C. 7401 et seq.); or
“(C) any other applicable Federal law not expressly addressed by this subsection.”

The absence of this clarifying language in § 1401 deepens the potential for confusion and conflict between BAAJA and existing laws, throwing the matter to agencies and the courts to resolve.

(3) Title IV creates unprecedented incentives to litigate, putting taxpayer money at risk

Section 1401 rewards litigation by rewarding each successful litigant with payments of potentially tens of billions of dollars of taxpayer funds from DOJ's Judgment Fund. That could result in cases where EPA faithfully follows the Clean Air Act or other laws but nevertheless exposes taxpayers to enormous payouts to corporations mandated under BAAJA.

[According to former DOJ Deputy Assistant Attorney General Matt Littleton](#): “A single claim under Section 1402 could top the total amount (~\$40b) the government has paid out in all Judgment Fund claims over the last decade.”

(4) Section 1401 could be interpreted as blocking changes to any Federal authorization or permit, regardless of whether it is related to construction projects

We also urge that the definition of “Federal authorization or permit” in §§ 1401, 1402 and 1403 be clarified to avoid what we believe are unintended consequences. As written, it is unclear whether “that is necessary . . . for the construction or operation at full capacity of a project” modifies only “any other approval or order” or whether it also modifies “authorization, permit, record of decision” and the other actions listed in § 1401(a). This distinction is critical – if it is read as modifying only “any other approval or order,” then any authorization, whether related to a project or not, would arguably be protected and § 1401 would seem to prevent EPA (and other agencies) from taking any action to change any authorization once granted, whether or not such authorization is necessary for construction or full operation, unless it falls within one of the narrow exceptions to § 1401(b)(1). We are concerned this could override the existing statutory schemes (including established judicial review provisions) for a broad swath of government authorizations (e.g., drug and medical devices, chemicals, pesticides). Below we have recommended modified text to avoid such an outcome.

Suggested Technical Changes to § 1401

To prevent a wave of unintended litigation and consequences under § 1401, we suggest the following revisions:

1. Ensure that § 1401 is focused on permits and related actions and does not limit EPA's or states' ability to issue rules of general applicability, bring enforcement actions, or establish voluntary or incentive programs, and retain the long-standing legal review standards for such actions:

- Strike the term "or operation at full capacity" from throughout § 1401 and § 1402, and
- Insert the following after § 1401(b)(1)(E):

“(F) the action is a rule of general applicability or approval of state regulation, plan or other action;

“(G) the action is an action authorized by Federal law and brought by the Federal department or agency alleging a violation of Federal law;

“(H) the action creates incentives that no one, including non-Federal sponsors or holders of a Federal authorization or permit, are required to take (including participating in voluntary programs); or

“(I) the Federal department or agency is required to take such action under applicable Federal law.”

- Insert *“that is not described in subparagraphs (b)(1)(F) through (I)”* after “under paragraph (1)” in each of the following locations:
 - 1401(b)(3) (page 160, line 24)
 - 1401(b)(4)(A) (page 161, line 16)
 - 1401(b)(4)(B) (page 161, line 21)
- Insert *“other than one described in subparagraphs (b)(1)(F) through (I)”* after “any new action” in 1401(b)(4)(D)(ii) (page 162, line 9)

2. To clarify that BAAJA § 1401 does not supersede the Clean Air Act, Clean Water Act, and other federal laws:

- Add the savings clause found on page 205 (Subpart B, Title I) to § 1401:

“SAVINGS CLAUSE —Nothing in this title affects the applicability of any requirement under—“(A) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) (commonly known as the ‘Clean Water Act’);

“(B) the Clean Air Act (42 U.S.C. 7401 et seq.); or

“(C) any other applicable Federal law not expressly addressed by this subsection.”

3. To protect taxpayers from potentially hundreds of billions of dollars of judgments against agencies under § 1401, and to limit financial incentives for litigation against federal agencies and taxpayers:

- Limit the financial awards to litigants to actual damages and court costs by deleting paragraph “(v)” on page 164 and paragraph (iv) on page 169, which entitle litigants to additional damages of up to 50% (in the case of § 1401) or 100% (in the case of § 1402) of the cost of a project.

4. To clarify that the Federal actions protected by § 1401 are those related to construction and operation of projects rather than all government authorizations and permits:

- Modify § 1401(a) as follows, and make the same changes to the definitions in §§ 1402 and 1403:
 - (a) **DEFINITION OF FEDERAL AUTHORIZATION OR PERMIT.**—The term “Federal authorization or permit” means—
 - (1) an authorization, permit, record of decision, right-of-way, finding of no significant impact, verification, extension, construction and operations plan, biological opinion, incidental take statement, concurrence, or any other approval or order ~~that is necessary, (including any final agency action, taken after public notice and comment, that determines action by a Federal department or agency that additional~~ authorizations or permits are not necessary),
 - (2) issued or taken by a Federal department or agency, and
 - (3) that is legally necessary for the construction ~~or operation at full capacity~~ of a project.