Environmental Protection Network

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November 9, 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,

On October 21, 2026, we wrote to you to provide the perspective of former Environmental Protection Agency (EPA) staff to your initial public draft of S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA). We highlighted our concerns that the "project certainty" provisions (§ 1401) would prevent EPA from issuing regulations and bringing enforcement actions authorized by the Clean Air Act, Toxic Substances Control Act (TSCA), the Clean Water Act, and other environmental laws. We provided specific recommendations for addressing the issues.

We have reviewed changes to BAAJA in the "Manager's Amendment" package, released on November 7, 2026. While we appreciate that you have made efforts to address some of the concerns we raised, we remain strongly opposed to the project certainty provisions in § 1401 because the section does not sufficiently protect EPA's ability to issue regulations and bring enforcement actions authorized by the Clean Air Act, the Clean Water Act, and other environmental laws. We also have significant concerns with other sections of the bill and their impact on the Clean Water Act, Tribes, states, and communities. We believe that any rush to finalize the legislation without resolving these concerns and without legislative hearings will lead to harmful and unnecessary outcomes.

There is widespread consensus that § 1401 would create significant ambiguity about what agency actions are blocked by the section, ultimately leaving it to the courts to make that call. A November 6, 2026, report by the Congressional Research Service of the original draft bill (not the revised "Manager's Amendment") warns that § 1401 "could be read to conflict with" other environmental statutes and regulations. CRS notes that "a court might bar EPA from issuing new, more stringent regulations" or "construe Section 1401's prohibition on permit modifications to bar even those permit modifications that are expressly required under other laws."

The Manager's Amendment attempts to resolve these concerns about § 1401 by adding a potential exclusion for agency actions "taken pursuant to any applicable law or regulation," and by including a savings clause that reads: "Nothing in this section limits or modifies any authority under any applicable law, compact, or treaty."

We appreciate that these changes add an explicit reference to preserving existing authorities, but we do not believe these provisions adequately protect EPA's ability to issue regulations and bring enforcement actions that are authorized under existing environmental laws.

The fundamental problem remains: BAAJA § 1401's detailed bar on Federal agency actions that affect existing authorizations could interfere with EPA's authority to issue regulations and bring enforcement actions under the Clean Air Act and other environmental laws. Pursuant to Congressional direction, EPA protects public health and the environment by updating regulations based on scientific and technological advances and by enforcing existing pollution limits against violators. Both of these activities can require changes to existing authorizations or permits, which is barred by § 1401, absent an applicable exemption. The specified exemptions in § 1401, including the new additions, do not clearly preserve EPA's ability to regulate pollution from existing sources and enforce pollution limits.

We fear that § 1401 as currently drafted is ambiguous about whether Congress intends it to block statutorily-authorized regulations and enforcement actions that affect Federal authorizations – an ambiguity that we fear cedes Congressional authority to the courts. If courts give full weight to the exemption and savings clause, then any statutorily-authorized action would be allowed and all § 1401 would do is block agency actions that are not authorized by statute – in which case § 1401 would have no real impact. We fear that, instead of interpreting the provisions this way, courts would take it upon themselves to decide the boundary lines between the corporate certainty goals of BAAJA and the public health protection goals of existing environmental laws.

The results are entirely unpredictable, likely to vary across courts, and could potentially stall or eliminate EPA's ability to, for example, require existing sources to control emissions of greenhouse gases, or enforce against facilities contributing to smog. Further, even if and where courts uphold EPA's ability to act under existing law, applying the judicial review provisions to exemption (F) likely increases the legal hurdles for such action by applying new and more stringent standards when EPA issues rules or attempts to enforce environmental rules.

We are particularly concerned about how § 1401 could be used to lock in decisions protecting favored industries by limiting EPA's future ability to revisit a broad range of decisions and regulatory interpretations. The project certainty provisions of BAAJA favor the actions of the president who acts first over those who act subsequently. Exacerbating this, when a federal agency determines that additional authorizations are not

necessary for projects or actions, § 1401 gives such determinations the same protections as issued permits even if they are not legally required and have not been subject to public notice and comment.

This concern is heightened by recent EPA actions that have exempted certain facilities from applicable pollution limits. These actions include interpreting Acid Rain Program requirements as not applying to certain large power plants serving AI data centers, exempting coal-fired power plants from mercury limits, and exempting chemical facilities emitting carcinogens from toxic air pollution limits. Going forward, for example, EPA could potentially determine that existing sources do not need an authorization to emit greenhouse gases, given the repeal of the endangerment finding. Section 1401 could then prevent a future administration from revisiting such determinations and applying the applicable pollution requirements to facilities already operating in reliance on them.

In addition to providing our views on the updates to § 1401, we would like to point out our continued concerns with the Clean Water Act provisions of this bill. We call your attention to this Nov. 3, 2026, letter from the Association of Clean Water Administrators (ACWA), an independent, nonpartisan, national organization of state, interstate, and territorial water program managers who serve alongside the agencies as co-regulators of the CWA. The ACWA does not take a position on the original bill, but they provide important information questioning the need for the Clean Water Act reforms, including the following:

> *"Proponents of Clean Water Act § 401 reform describe it as necessary to stop states from abusing their authority by using the water quality certification process to delay or block federally permitted projects. A survey conducted by the Association of Clean Water Administrators (ACWA) does not support that premise....The available evidence indicates that delays are more commonly associated with incomplete applications or changes in project scope and federal permitting coordination than with misuse of state certification authority."*

Further, we want to call your attention to the letter from frontline, environmental justice communities and organizations across the nation opposing BAAJA. The letter states that "a corporation can go to court claiming the government treated its project differently, all while frontline communities still face enormous barriers to obtaining meaningful relief when pollution, contaminated water, toxic emissions, climate impacts, or other environmental burdens fall disproportionately on them." A core principle of environmental justice is to provide early and meaningful engagement with pollution-burdened and underserved communities before government actions. That standard appears not to have been met in the development of this far-reaching legislation, further suggesting that more time and input is needed.

In conclusion, as we stated in our initial letter, EPN supports the need to build clean energy infrastructure that reduces pollution and protects public health. 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

appreciate your efforts to take on the hard work of bipartisan compromise and thank you for putting the resulting draft text forward and your consideration of feedback from us and others.

However, we remain strongly opposed to the project certainty provisions in § 1401 because the section – including the changes in the Manager's Amendment – does not sufficiently protect EPA's ability to issue regulations and bring enforcement actions authorized by the Clean Air Act, the Clean Water Act, and other environmental laws. We also have significant concerns with other sections of the bill and their impact on the Clean Water Act, Tribes, states, and communities. We believe that any rush to finalize the legislation without resolving these concerns and without legislative hearings will lead to harmful and unnecessary outcomes.

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 hundreds of volunteers who once worked at EPA, please reach out to Marc Boom, EPN's Senior Director of Public Affairs, at marc.boom@environmentalprotectionnetwork.org.

Sincerely,

Michelle Roos

Michelle Roos
Executive Director