November 13, 2026

The Honorable Sheldon Whitehouse
The Honorable Martin Heinrich
The Honorable Charles E. Schumer, Minority Leader
The Honorable Richard J. Durbin, Minority Whip
The Honorable Chris Van Hollen
United States Senate
Washington, DC 20510

cc: Additional U.S. Senators

Re: The Bipartisan American Affordability and Jobs Act of 2026 (S. 5653 / H.R. 2347): Twelve Provisions That Should Not Become Law

Dear Senator Whitehouse, Senator Heinrich, Leader Schumer, Whip Durbin, and Senator Van Hollen:

We write as scholars of environmental and energy law who have spent our careers studying how the nation's environmental laws work in agencies, in courts, and on the ground. We are not political advocates. We support building clean energy and transmission quickly.

But the Bipartisan American Affordability and Jobs Act (BAAJA) would inflict permanent, sweeping damage on the nation's core environmental laws (and on the people and environment they are designed to protect), and the public debate over it has been dangerously shallow.

Whatever modest emissions reductions its transmission reforms may deliver cannot justify the rollback that comes with them. And the threat posed by this lame-duck initiative provides a template and momentum for rollbacks far beyond environmental protections — potentially undercutting enforcement of public health protections, civil rights, public education, consumer finance, and more.

This S. 5653 rollback was written without a hearing, a markup, or a committee report, and the 494-page manager's amendment left it essentially intact.

The Core Tradeoff

BAAJA is sold as a climate compromise. It is nothing of the kind. It trades near-term, concrete, and often irreversible harms, borne first by low-income, Tribal, and frontline communities, for climate benefits that are distant, modest, and uncertain.

To be direct: this bill would make it easier to destroy wetlands that shield low-income Gulf Coast communities from storm surge, and harder for anyone to stop it in court. In exchange, decades from now, those same communities might be spared somewhat worse flooding from emissions we are only partially reducing.

The climate case does not rescue the bill. In the worst case of the most favorable modeling, the bill leaves emissions roughly where they are today. That modeling assumes liquefied natural gas

(LNG) exports 8 to 15 percent higher without counting their emissions, and it projects pipeline construction up to 34 percent above recent levels. It makes no attempt to price in the gutting of the National Environmental Policy Act (NEPA), the Clean Water Act, and the Endangered Species Act, or the gas-powered data centers that the bill's forever permits would protect, creating path-dependency that extends the period during which fossil fuel use will generate harmful greenhouse gas emissions. The climate benefits are backloaded and contingent. The harms would begin the day the bill is signed.

The Twelve Most Harmful Provisions

The following is a list of the twelve most harmful provisions included in BAAJA. More details on what each provision does, who it harms, and why it matters are included in an appendix to this letter.

1. "Forever Permits" (Section 1401)
2. A Taxpayer-Funded Windfall for Developers (Section 1402)
3. No Remedy for a Proven Violation (Section 1110)
4. Closing the Courthouse Doors (Section 1110)
5. Exempting Gas Pipelines from Review (NEPA Section 3)
6. Letting Developers Define the Question and Freezing the Science
7. Review by Exception: Categorical Exclusions and State Substitution
8. Hobbling State and Tribal Water Quality Authority (Clean Water Act Section 401)
9. Easier Wetland Destruction (Clean Water Act Sections 402 and 404)
10. Weakening the Endangered Species Act
11. A Fast Lane for Gas-Powered Data Centers
12. Sidelining Tribal Nations and Sacred Places (National Historic Preservation Act)

A Process Unequal to the Stakes

A bill that would permanently restructure judicial review, Tribal consultation, and state water quality authority demands a record. This one has none: no hearing, no markup, no committee report. It rides on H.R. 2347, an unrelated tax bill. The 575 federally recognized Tribal Nations and the public had roughly two days to absorb a 494-page substitute before the November 9 cloture vote. Courts, not Congress, will be left to decide what it means. A new Congress takes office on January 3, 2027. Waiting a few weeks costs little; enacting this text could cost a decade.

Our Request

The bill is now on the Senate floor, and final passage will require 60 votes. We urge you to offer and support floor amendments that eliminate the twelve problems identified above, beginning with Sections 1401 and 1402, the NEPA remedy and judicial review provisions, and the historic preservation title. If those amendments fail, vote no on cloture and on final passage. At a minimum, support returning the bill to committee for hearings and genuine consultation with Tribal Nations and affected communities.

Transmission reform is not worth this price, particularly when federal legislation already gives the federal government the authority to preempt state and local transmission line siting decisions. See 16 U.S.C. § 824-p.

We would welcome the opportunity to brief you or your staff on any of these issues.

Respectfully submitted,

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Appendix: Details on the Twelve Most Harmful Provisions

1. “Forever Permits” (Section 1401)

What it does. Agencies could not revoke, suspend, or materially alter almost any federal permit in effect on or after November 6, 2026, or otherwise “interfere with” a permitted project. The main exception requires an “immediate, specific, urgent, substantial, and proximate” harm based on information never considered in the original review.

Why it matters. A facility that proves far more dangerous than its permit assumed would be effectively untouchable. Former EPA staff warn that, even as amended, the provision could block Clean Air Act rules and enforcement against existing sources. NRDC concludes it would benefit fossil fuel, mining, and data center projects more than clean energy, and the amendment's new savings clause and catch-all exception only invite litigation. This is a “first president to act wins” rule: it locks in today's permitting choices and ties the hands of the next administration.

2. A Taxpayer-Funded Windfall for Developers (Section 1402)

What it does. Developers could sue the United States if permits for their type of project are delayed or denied more often than in the prior 10 years. A winning developer could recover up to 100 percent of expected construction costs from the Judgment Fund, plus damages and fees.

Why it matters. A single claim could exceed the roughly $40 billion paid on all Judgment Fund claims over the past decade. The baseline will include both Trump administrations' fossil fuel-friendly permitting records, so the provision is rigged against the clean energy projects those administrations stalled and toward a massive public subsidy for fossil fuel projects. The amendment's tweaks leave that structure intact. Facing such exposure, no agency will dare say no.

3. No Remedy for a Proven Violation (Section 1110)

What it does. Even when a court finds that an agency violated NEPA, it could not vacate the approval or halt the project, which would proceed while the agency redoes its work.

Why it matters. Communities could win in court and still watch the bulldozers arrive. A right without a remedy is no right at all, and it removes any incentive for agencies to comply. These limits go far beyond even the Supreme Court's *Seven County* decision. In 2021, a court forced FERC to reconsider the climate and environmental justice impacts of two LNG terminals near low-income communities in Brownsville, Texas. Under this bill, that victory would be meaningless.

4. Closing the Courthouse Doors (Section 1110)

What it does. The bill imposes a 150-day filing deadline, limits suits to commenters who can show “direct harm,” and requires courts to give agencies “substantial deference.”

Why it matters. Under-resourced communities and Tribal Nations, which often learn of a project's consequences late, would be shut out first. The premise that litigation drives delay is a

myth. Plaintiffs challenge roughly 1 in 450 agency NEPA actions, and the real causes of delay are inadequate financing, local opposition, and understaffed agencies. Deferring to agencies invested in a project regardless of its environmental impacts ignores the very reason Congress enacted NEPA.

5. Exempting Gas Pipelines from Review (NEPA Section 3)

What it does. The bill declares that agency actions associated with interstate gas pipelines are not "major Federal actions" requiring environmental review. It also exempts a wide range of federally funded projects.

Why it matters. Pipelines and compressor stations are routinely routed through environmental justice communities; in one review described by the Congression Research Service (CRS), 83.7 percent of a pipeline route crossed them. Pipelines are not a NEPA bottleneck. Their median review takes about 15 months, compared with about 34 months for transmission. Exempting the fossil fuel infrastructure that already moves fastest does nothing for clean energy and silences the communities most affected.

6. Letting Developers Define the Question and Freezing the Science

What it does. Agencies must drop any alternative that does not meet the developer's goals and may ignore science published after the very beginning of the review process.

Why it matters. Alternatives analysis is how agencies find a less harmful route away from a school, a water supply, or a neighborhood. This bill lets developers define it out of existence. Freezing the science means new evidence of health risks could lawfully be ignored. No evidence has been offered that either practice causes meaningful delay.

7. Review by Exception: Categorical Exclusions and State Substitution

What it does. The bill dramatically expands categorical exclusions as a means of avoiding meaningful NEPA review and lets agencies combine and borrow them. It also exempts projects reviewed under any state or Tribal process that the agency deems similar.

Why it matters. Categorical exclusions involve no public comment, so communities lose notice and a voice. About 95 percent of NEPA reviews are already categorical exclusions. Combined exclusions invite piecemeal approval of projects whose cumulative impacts are never reviewed. State substitution leaves residents of states with weak laws the least protected.

8. Hobbling State and Tribal Water Quality Authority (Clean Water Act Section 401)

What it does. States and Tribes could impose conditions only to meet water quality requirements. Each condition must be proven by "clear and convincing evidence" to be necessary and the "least burdensome" option.

Why it matters. States and Tribes are often the only governments positioned to protect local rivers and fisheries from federally licensed pipelines and dams. A clear-and-convincing burden

effectively bars precautionary protection whenever the science is still developing, and it shifts power permanently to project sponsors.

9. Easier Wetland Destruction (Clean Water Act Sections 402 and 404)

What it does. The bill expands nationwide dredge-and-fill permits and sets a 150-day deadline to challenge them. It bars courts from halting violations absent an "imminent and substantial danger," and it doubles discharge permit terms to 10 years.

Why it matters. For coastal and riverine communities, wetlands are a critical natural buffer against storm surge. Nationwide permits let projects destroy them without individualized review, and 10-year permits delay updating pollution limits to reflect new information. No evidence has been offered that any of this is needed for clean energy. Trading away wetlands guts the climate adaptation on which coastal states depend.

10. Weakening the Endangered Species Act

What it does. The bill redefines "best scientific data available" to end the practice of giving imperiled species the benefit of the doubt, eliminating the statute's precautionary and protective thrust. It also allows states — many of which have limited expertise and resources devoted to non-game species — to take over the consultation process from expert federal agencies. The bill also imposes strict consultation deadlines that are likely to yield superficial reviews.

Why it matters. Extinction **is** irreversible, and data on rare species are often incomplete, so demanding certainty before protection reverses the Act's precautionary logic. States may have a stake in proposed actions, so consultations delegated to states may result in less objective evaluations. The bill's harm to listed species extends to the ecosystems, fisheries, and Tribal subsistence practices that depend on these species. It comes just as climate change is accelerating the rate of species extinctions.

11. A Fast Lane for Gas-Powered Data Centers

What it does. Beyond making large data centers pay their own grid costs, the bill does nothing to regulate their local harms. Instead, its pipeline exclusions, broader wetland permits, forever permits, and bar on injunctions clear a fast lane for the gas plants that increasingly power them. Section 2108 also appears to open wholesale markets to on-site gas generation.

Why it matters. Neighbors bear the air pollution, water consumption, and round-the-clock noise. Earthjustice and the Better Data Center Project have identified 177 gigawatts of planned on-site gas generation for data centers, more than half of it using less efficient, more polluting generators. If the nine largest proposals are built, nine of the ten largest power plants in the country would be data center gas plants. None of the emissions analyses the sponsors cite accounts for them.

12. Sidelining Tribal Nations and Sacred Places (National Historic Preservation Act)

What it does. Agencies "may," but need not, consult Tribes when identifying historic properties. They may end review on their own by finding no adverse effects, or by deciding in their "sole discretion" that other considerations outweigh preservation. The bill also exempts most federally

funded projects, raises the threshold for finding adverse impacts on historic and cultural resources, and requires courts to defer to agencies.

Why it matters. Tribal sacred sites often lie far outside reservation boundaries and are known only through Tribal knowledge; early consultation is how agencies learn that a route would cross a burial ground. Making consultation optional, on deadlines Tribes did not set, treats sovereign nations as mere stakeholders and betrays the federal trust responsibility. The manager's amendment did not fix this. The National Congress of American Indians (NCAI) reports that it still lets the Advisory Council on Historic Preservation stand in for Tribal Historic Preservation Officers. The National Trust for Historic Preservation calls the title deeply flawed, and eleven Tribal organizations have asked Congress to strike it entirely.