NATIVE AMERICAN RIGHTS FUND

S. 5653, The Bipartisan American Affordability and Jobs Act of 2026

High-Level Takeaways and Tribal Impacts

Executive Summary:

The Senate Bipartisan American Affordability and Jobs Act of 2026 (BAAJA) is a permitting reform bill designed to drastically speed up federal environmental review and give project developers quicker, more secure project approvals. It does so through two sections, the first under the jurisdiction of the Committee on Environment and Public Works, the second under the Committee on Energy and Natural Resources. The first section rewrites critical elements of three bedrock environmental protection laws that Tribal Nations have long relied on to protect their lands, waters, important species, and sacred places: the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Endangered Species Act (ESA). The second section guts the National Historic Preservation Act (NHPA) and modifies on- and offshore-energy permitting, among other things. This summary document focuses on BAAJA's four titles addressing the above-named statutes, as well as one amendment to the Federal Power Act (FPA) with serious and direct Tribal implications in hydropower permitting and newly established general statutory protection for project certainty.

The BAAJA creates very difficult implementation frameworks and reduces critical federal oversight and federal participation in project permitting, essential elements for Tribal Nations to effectively participate in the permitting process. Tribal Nations have consistently been good partners through permitting, yet the BAAJA attempts to strip Tribes of the limited opportunities they currently have to engage as sovereign governments in project permitting, even going so far as to stripping cultural protection and Tribal participation in the NHPA.

Although the four titles address different subjects, they move in the same direction—shorter review timelines, narrower definitions of what triggers review, less room for Tribal consultation and participation, and far tighter limits on challenging a decision in court. The bill trades deliberate, thorough project review for fast approvals, and the weight of that trade falls heavily on Tribal interests. For Tribal Nations the message is consistent—less federal oversight and trustee engagement, fewer opportunities to participate, a narrower set of interests the law will recognize, and courthouse doors that are harder to enter and harder to stop harms within.

Updated 10/16/26

High-level issues from each title:

NEPA (pp 4-9)

- Rewrites the definition of major federal action to exclude a much broader range of projects from review and raises the NEPA review threshold for forms of financial assistance to only actions where there is "predominate" federal control, not just "sufficient." (Sec. 1102)
- Drops a "major federal action" carve-out previously included in the CEQ regulations for Tribally approved projects on trust or restricted land, meaning that rather than deferring to Tribal sovereign decision-making on Tribal lands, projects on Tribal lands would require federal environmental review. (Sec. 1102)
- Removes "special expertise" as a basis for serving as a cooperating agency—the very ground on which some Tribal Nations have earned a seat at the table. And where Tribes can still participate, input is confined to issues deemed reasonable. (Sec. 1106)
- Severely limits consideration of Tribal environmental and cultural analysis into NEPA process, thereby restricting Tribal participation. (Sec. 1106)
- Invites more – not less – litigation by changing standing requirements and injunction standards. (Sec. 1110)

CWA (pp 10-14)

- Guts the Section 401 certification process that States and Tribal Nations with "treatment as a state" (TAS) authority use to condition or deny federal permits affecting their waters by (i) taking determination of the "reasonable" review period out of state and Tribal hands, (ii) limiting the information certifiers can demand by requiring states and authorized Tribal Nations to define in regulation additional materials beyond the federal baseline that a project applicant must provide, rather than on a case-by-case basis, and (iii) forcing states and authorized Tribal Nations to prove by "clear and convincing evidence" that any permit condition is both necessary and the "least burdensome" option. (Sec. 1202)
- Shifts and significantly heightens the burden of proof for defending protective conditions or permit denials in court, requiring the federal agency to meet the "clear and convincing evidence" and "least burdensome" standards, inviting litigation over new standards. (Sec. 1202)
- Creates an easier certification track for gas pipelines and transmission lines, doubles NPDES permit terms from five to ten years, eliminates EPA's authority to veto dredge-and-fill permits after the Army Corps has acted, and further entrenches nationwide permits, sharply curtailing Tribal Nations' ability to review the impacts of individual projects affecting Tribal resources. (Secs. 1203, 1204, 1205)
- Underpinning all other CWA amendments, a new, narrower statutory definition of "water quality requirements" strips Tribal Nations of the ability to rely on their broader water quality-related laws, limits laws that Tribal Nations can rely upon for permit review to those implementing CWA programs that are directly applicable to discharges into "waters of the United States," and, in practical effect, overturns the Supreme Court's decision in *PUD No. 1*, which had upheld broader state and Tribal conditions. (Sec. 1202)

ESA (pp 15-17)

- By redefining the "best scientific and commercial data available" standard in favor of "prevailing" methods applied "without presumptions," the bill's language risks sidelining Tribal traditional knowledge as insufficiently objective, in tension with the recognition that Tribal Nations receive under Secretarial Order 3206. (Sec. 1301)
- Shortens Section 7 consultation deadlines, carves out an automatic exemption for right-of-way transportation projects that eliminates consultation entirely. (Sec. 1303)
- Provides States an option to assume federal Section 7 consultation duties, although many states disclaim the ability and willingness to incorporate Tribal rights when implementing federal statutes, like states assert in the CWA Tribal Reserved Rights Rule litigation. (Sec. 1304)
- Allows State-collected data to influence listing decisions while Tribal data receives no similar deference. (Sec. 1306)
- Potentially limits Tribal options to bring biological-opinion challenges, "may" bring challenges to the United States Court of Appeals for the District of Columbia on a 150-day clock beginning on the date in which the opinion is made public on the agency's website. (Sec. 1305)

BAAJA/Project Certainty (p 18)

- Creates availability of substantial damages to project applicants facing modified or denied permits, making it significantly less likely for federal agencies to modify or deny permits. (Sec. 1401 & Sec. 1402)
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Hydropower/Federal Power Act (p 19)

- Limits the mandatory conditioning power of federal land management agencies to only those conditions that are "reasonably related" to the effects of a proposed hydropower project. This introduces uncertainty and a higher barrier for imposing the important conditions that are protective of Tribal lands and resources. (Sec. 2232)

NHPA (pp 19-21)

- Cuts the NHPA substantially and reverses the deliberate choice Congress made in 1966 and 1992 to bring Tribal Nations into the national preservation program. (Sec. 2301)
- Mandatory Section 106 consultation is eliminated and becomes permissive and time-boxed, agencies no longer need to notify Tribal Nations before decisions are made, and Tribal input may be learned only after decisions are final. (Sec. 2301)
- Narrowed definitions of "undertaking," "adverse effect," and "property of traditional religious or cultural importance" shrink what can be protected—defining preservation's meaning for Tribal communities without consulting them—while agencies gain authority to let "other considerations" override preservation and are only required to consider previously identified National Register sites. (Sec. 2301)
- THPOs face heavier federal oversight, and although the bill commits substantial new funding, its competitive grant program would require comprehensive databases of sacred places that risk exposure under FOIA and may strain smaller THPO officers. (Sec. 2302)

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Detailed Review of BAAJA Titles

DIVISION A

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), TITLE I

- **Sec. 1101. Purposes; Procedure; Savings Provision**
  - ***Change:*** Adds language to 42 U.S.C. § 4321 to make explicit that environmental review is a purely procedural process with no substantive requirements.
  - ***Effect:*** Ensures that NEPA will not be interpreted by courts or agencies to allow new, protective review requirements or standards for Tribal resources, further limiting the usefulness of NEPA.

- **Sec. 1102. Definitions**
  - ***Change:*** Amends 42 U.S.C. § 4321 to add a definitions section, Section 3, which includes a new definition for what constitutes a "major federal action" (42 U.S.C. § 4321(3)(18)) that explicitly excludes proposed agency actions associated with a non-Federal project or undertaking "for which the only Federal involvement is a loan guarantee or loan," regardless of whether the Federal agency exercises sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action. The definition also excludes: decisions to provide a grant, regardless of what the grant application is for, or other forms of financial assistance where the Federal agency "does not exercise *predominant* control and responsibility over the subsequent use of such financial assistance or the environmental effects of the action; routine agency actions; and—critically—any proposed agency action associated with repair or replacement of "lifeline infrastructure" as defined under Section 4 of the Earthquake Hazards Reduction Act of 1977, a geothermal observation test project under section 30(a) of the Geothermal Steam Act of 1970, transmission activities under Section 216(A)(b) of the Federal Power Act or associated with a covered activities under section 7(i)(1) or the Natural Gas Act (15 U.S.C. § 717f).
  - ***Effect:*** This definition of "major federal action" makes statutory exclusions for a much broader swath of Federal agency actions than had been excluded under the CEQ regulations and changes a key measure of federal control from "sufficient" to "predominate" for actions where federal involvement is in the form of direct financial assistance which raises the threshold for actions to require environmental review. Moreover, the new statutory definition of "major federal action" drops a carve-out previously included in the CEQ regulations that excluded actions approved by Tribal Nations on Tribal trust lands with minimal federal involvement from further environmental review. *See* 40 C.F.R. § 1508.1(w)(2)(viii) (May 1, 2024) ("Activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in

trust or restricted status by the United States for the benefit of that Tribal Nation or by the Tribal Nation when such activities or decisions involve no or minimal Federal funding or other Federal involvement.”).

- **Sec. 1104. Cooperation of Agencies; Reports; Availability of Information; Recommendations; International and National Coordination of Efforts**
  - ***Change:*** This provision includes language that limits the methods used to consider environmental amenities and values to methods and procedures that are “consistent with the requirements for minimum functional requirements and data and technology standards for agency implementation of eNEPA technologies.” 42 U.S.C. § 4332(2)(B)(ii).
  - ***Effect:*** This provision may have the effect of limiting the type or form of data that can be used to assess environmental value to the exclusion of Indigenous Knowledge, especially if there are data sovereignty concerns with an agency’s implementation of eNEPA technologies.

- **Sec. 1105. Procedure for Determination of Level of Review**
  - ***Change:*** This provision amends 42 U.S.C. § 4663 procedures for defining the level of environmental review by adding, as a threshold determination, that an agency is not required to prepare any environmental document if the “proposed agency action relates to a project or action that has been reviewed pursuant to a State environmental review statute or a Tribal environmental review statute, ordinance, resolution, regulation, or formally adopted policy and the lead agency determines that the review serves a similar function as Federal agency compliance with this Act” or if the agency determines that compliance with another Federal law would serve as compliance with NEPA.
  - ***Effect:*** Opens the door for standalone Tribal environmental review, which bolsters Tribal sovereign environmental regulation. However, the same deference applied to State environmental review statutes may ultimately exclude Tribal Nations’ input from an environmental review if the state statute does not require Tribal consultation or otherwise operates to exclude Tribal input. There is a complete lack of clarity on what other Federal law could substitute for NEPA review, and there is no identified standard for these agency determinations, which signals a lack of transparency and accountability. Finally, this provision defers to non-federal law when approving federal projects, potentially allowing project permitting approvals that do not meet federal environmental review standards.

- **Sec. 1106. Timely and Unified Federal Reviews**
  - ***Change:*** Amends Section 107 to significantly limit the range of alternatives for NEPA review in favor of the project proponent’s goals, greatly reduces Tribal and public participation as cooperating agencies, and cuts requirements for agency review of new scientific or technical information:

- Purpose and Need: This amendment adds a subsection to 42 U.S.C. § 4336(a) that requires a lead agency to "eliminate from consideration any alternative (except for a no-action alternative) that does not . . . (II) meet the goals of an applicable non-Federal project sponsor." 42 U.S.C. § 4336a(a)(1)(C)(ix).
- Cooperating Agencies: Substantially restricts the role of cooperating agencies. This provisions in this section remove "special expertise" as a qualifying basis for a cooperating agency. 42 U.S.C. § 4336a(a)(2)(A)(i). The provisions also create a 7-day deadline for potential cooperating agencies to accept or deny the invitation to participate. The bill also creates specific requirements for cooperating agency submissions, including that comments submitted "shall be limited to matters relating to the jurisdiction by law of the cooperating agency with respect to—(I) the reasonably foreseeable environmental effects of the proposed agency action; and (II) any applicable authorization required of the cooperating agency." 42 U.S.C. § 4336a(a)(2)(B)(ii). Moreover, the cooperating agencies would be limited to analyzing "only those alternatives to the proposed agency action that the lead agency has, consistent with [the purpose and need] determined are reasonable." 42 U.S.C. § 4336a(a)(2)(B)(iv).
- Scope of Information Considered: The bill would eliminate the requirement that a federal agency must consider "any scientific or technical research that becomes publicly available after the date of publication of a notice of intent or decision to prepare an environmental document" for a proposed agency action. 42 U.S.C. § 4336a(b)(3)(A).
- Public Review: The amendments restrict public review of a notice of intent to a significantly shorter timeframe: 45-to-60 days for public comment unless the project sponsor agrees to up to 75 days. 42 U.S.C.§ 4336a(c)(2)(B).
- Timeline for EA and EIS: The bill creates maximum, but not minimum, timelines between publication of an EA or an EIS and the issuance of a Record of Decision and associated permit. The bill would enshrine the ability of an agency to publish an EIS and ROD at the same time, preventing any public review upon the final EIS even if changed substantially form the earlier draft. 42 U.S.C. § 4336a(g)(1).
- Dispute Resolution: The bill would insert a requirement that any delay in preparing an EA or EIS be approved by the project sponsor. 42 U.S.C. § 4336a(g)(2)(ii). It would also create significant and inflexible burdens and restrictions on agency staff and leadership that do not align with the reality of competing demands on agency time. 42 U.S.C. § 4336a(g)(3).

- ***Effect:*** Very significant and troublesome proposed changes for Tribal and public NEPA involvement. Heavily favors the project proponent's project articulation, which will narrow NEPA review and not allow the consideration of project alternatives that may better serve the public interest. Overall, the timing limitations and restrictions on agency discretion in completing environmental review prevent agencies from developing a holistic and scientifically up-to-date understanding of the environmental impacts of a

proposed action. For Tribal Nations, the removal of "special expertise" as a basis for participating in an environmental review process as a cooperating agency effectively directly prevents affected Tribal Nations from having a larger role in review. Even where Tribal Nations could continue to participate as cooperating agencies, their input would be severely restricted in scope to only the issues that the lead agency determines are reasonable. Allowing agencies to ignore or discount research that becomes available after the date of publication of a notice of intent to prepare an environmental document is completely arbitrary, prevents important issues from being considered in environmental reviews, and eliminates the requirements for supplemental review if substantial new information bears on the analysis of environmental impacts. This section creates a narrow environmental review tunnel that ignores critical fact finding and the broader project-impacts analysis that NEPA was created for.

- **Sec. 1107. Programmatic Environmental Document**
  - ***Change:*** Amends Section 108 to extend permitted reliance on programmatic environmental documents from 5 to 10 years without further review.
  - ***Effect:*** This allows agencies to rely on outdated analyses of actions during a period of time when there are increasingly significant ecological shifts occurring due to climate change.

- **Sec. 1109. Applications for Authorizations**
  - ***Change:*** Rewrites the NEPA authorization application process to impose firm timelines and front-load project information. Agencies must document receipt and tell a project sponsor whether an application is complete within 60 days, requesting any missing information in writing. Once an application is complete, the agency will have another 60 days to decide its path: categorical exclusion, no major federal action, an environmental assessment, or a notice of intent to prepare an EIS. Incomplete applications will reset the clock. Sponsors must list all required authorizations, document stakeholder engagement, and describe the project's purpose and need.
  - ***Effect:*** Acknowledges Tribal authorizations by requiring a sponsor to list "each known Federal, State, *Tribal*, or local authorization," which may give Tribal Nations earlier visibility into projects that affect their lands and resources. However, the compressed 60-day window for completeness and environmental decisions pressure agencies to move quickly, likely curtailing meaningful government-to-government consultation and cultural resource review. Specifically, the record of stakeholder engagement requirement does not mandate Tribal consultation or define what is adequate. Tribes who currently rely on robust NEPA review would see a thinner, faster process with weaker guarantees of their participation.

- **Sec. 1110. Judicial Review**
  - ***Change:*** Adds a new section that curtails litigation over environmental reviews, reshapes remedies, and narrows access to courts. The provision imposes a 150-day statute of limitations and creates strict standing requirements: plaintiffs must have submitted a "sufficiently detailed" comment and allege an "actual or imminent injury" amounting to "direct harm." Shifts jurisdiction to federal appeals courts as original and exclusive. The provision strips federal district courts of their usual remedial power, with the sole remedy for a NEPA violation being remand without vacatur nor an injunction. The challenged authorization may stay in effect, and the activity may proceed during remand. Narrow preliminary injunctions remain available only for non-NEPA legal violations. Courts are required to give agencies "substantial deference" on an environmental document's scope and contents, and certain omissions are entirely unreviewable.
  - Adds section to limit who could challenge a NEPA document prepared for a project related to use of Tribal trust resources. This provision was advanced by Tribes with the rationale that projects on a Tribe's land should not be subject to NEPA lawsuits from the general public. However, a challenge could be brought by the Tribe itself, or by other parties if there are reasonably foreseeable effects of the action that occur outside the Tribe's lands.
  - ***Effect:*** The prohibition on administrative or judicial review for a NEPA claim severely inhibits Tribes' protections from NEPA violations. The 150-day deadline, prior detailed comment requirement, "direct harm" standing, mandatory substantial deference to agencies, and remand only remedy makes meaningful NEPA enforcement by Tribes substantially harder by placing substantially higher barriers on Tribes' ability to have NEPA enforced. More broadly, the combination of the substantial deference standard, the limitation of available remedies, and the grant of original jurisdiction to appellate courts insulates the agency administrative record and fact finding from scrutiny, severely limited the enforcement of NEPA process.

- **Sec. 1121. Council on Environmental Quality**
  - ***Change:*** Advances a new mandate for the Council on Environmental Quality Chairman. The Chairman must publish government-wide "data standards" and "minimum functional requirements" for how agencies collect, store, and exchange authorization data, and each key permitting agency must inventory its systems and begin implementing. This provision would create an "ePermit" unified interagency data system and a public cloud-based "authorization portal" that consolidates application submission, document collaboration, geospatial tools, real-time status tracking, automated comment analysis, and AI-assisted review of past decisions, while providing Congress with direct oversight access. According to the savings provision, it will not create new regulatory requirements, and automated screening may not be used to unlawfully restrict activity on federal land.

- ***Effect:*** The digital modernization—through a public authorization portal, standardized engagement tools, geospatial data layers, and a mechanism to disseminate notices of intent and public meetings—may make it easier for Tribes to track projects and decide when to participate. But the automated project screening and AI-assisted review aimed at accelerating decisions and reducing "redundant" reviews could compress the timeline's meaningful consultation requirements. Sensitive Tribal cultural and location data may create problems if it is accessible within a broad public portal.

- **Sec. 1132. Environmental Review and Permitting Tracker**
  - ***Change:*** Adds an accountability layer to the existing review process. The Chairman, with GSA, must maintain a public, searchable online tracker. The provision is scoped to "transparency projects," i.e. every proposed action requiring an environmental assessment that remains incomplete 13 months past its NEPA deadline under 42 U.S.C. § 4336a(g). Each entry must disclose project scope and purpose, agency and sponsor contacts, quarterly schedule-compliance updates with delay explanations, and litigation status.
  - ***Effect:*** The Permitting Tracker offers Tribal Nations real-time visibility into projects that may affect their lands, treaty resources, and sacred sites, including the project scope and purpose, lead agency and sponsor contacts, quarterly schedule compliance updates with explanation for delays, and litigation status. This transparency will be useful for Tribal Nations monitoring and engagement.

- **Sec. 1133. Permitting Improvement Fund**
  - ***Change:*** Creates a treasury-held Permitting Improvement Fund aimed at accelerating the environmental reviews and authorizations that NEPA demands. The Chairman may transfer money to key permitting agencies for staffing details and rotations, professional development, project-manager support, process standardization across field offices, and expanded public engagement. This funding must not influence an agency's impartial decision making. Congress will authorize $20 million annually from 2027–2033.
  - ***Effect:*** Leaves NEPA's substantive and procedural protections untouched and expressly funds efforts to improve opportunities for public engagement. Yet the Fund's core aim is faster permitting, and compressed timelines can strain meaningful government-to-government consultation.

CLEAN WATER ACT (CWA), TITLE II

- **Sec. 1201. Water Quality Criteria**
  - ***Change:*** Currently, when EPA develops the science underlying their guidance recommendations to states on what water quality criteria states or authorized Tribal Nations should use, they are not required to undergo formal rulemaking. Later, if a state or Tribal Nation does not develop those criteria when they should, EPA then must develop the criteria for that state through rulemaking. Sec. 1201(a) would require EPA's development of scientific recommendations to become full blown rulemaking processes, while 1201(b) would make it subject to judicial review.
  - ***Effect:*** The provision would slow down and politicize EPA's responsibility to synthesize scientific knowledge and update information and guidelines, including for: secondary treatment of pollutants; identification and control of pollution from nonpoint sources of pollution; pretreatment of pollutants; and minimum procedural requirements for state or Tribal programs. As a result, this could make implementation of water quality criteria *easier, less up-to-date, and less rigorous for states*, and it would generally worsen the accuracy of water quality criteria by significantly burdening the process by which the EPA updates and disseminates its guidance. This could lead to poorly water quality because standards are less rigorous.

- **Sec. 1202. Clean Water Act Permitting and State Certification (401 certification)**
  - ***Change:*** Overall, the revised Section 401 certification process is curtailed significantly—narrowing definitions, shifting and heightening the burden of proof, letting federal agencies set shorter review periods, and carving out favorable treatment for natural gas and transmission projects—thereby constraining certifying authorities', including authorized Tribal Nations', discretion to deny or condition federal permits:
    - The proposed procedural provisions limit the discretion of federal permitting agencies to question state water quality determinations (33 U.S.C. § 1341(e)(1)(A)-B), and limits the discretion of all certifying authorities to obtain the necessary information for a particular permit on a case-by-case basis (33 U.S.C. § 1341(e)(3)).
    - The scope of certification provisions create a substantially higher standard for states and authorized Tribal Nations to meet to deny certification or impose protective conditions on federal permits. Specifically, denials and conditions must be directly related to water quality requirements—defined as only the state or Tribal regulations implementing the relevant CWA programs—and the certifying agency must prove it is necessary, or the least burdensome option, to prevent violation of the standard by "clear and convincing evidence" (33 U.S.C. § 1341(e)(2)).
    - Previously, Tribal certifications could account for Tribal laws relevant to the certification, not only Tribal laws implementing CWA delegated authority. Thus, specific Tribal interests codified into Tribal law may no longer be applicable to

Tribal certifications, potentially leading to clean water violations on Tribal lands due to newly permitted projects that are no longer influenced by Tribal law protections.

- The review period provision allows federal permitting agencies to unilaterally establish a "reasonable" period for certifying agencies to make their decisions that may be less than one year, and it only provides for an extension if the applicant requests it (33 U.S.C. § 1341(e)(4)).
- In actions challenging the certifying agency's decision to deny or grant with conditions, the certifying authority—as opposed to the applicant, who under the current 401 statutory text has burden of proof in challenges—must show by "clear and convincing evidence" that a denial or condition is necessary to prevent violations of water quality standards, is the least burdensome way to achieve that compliance, and is "consistent with the requirements of the Federal license or permit for which the certification application was made." (33 U.S.C. § 1341(f)). This shifts and significantly heightens the burden of proof for protective conditions or denials, and the consistency clause lacks clarity.
- The bill also creates a Section 401 certification carve-out for certain types of projects. It would require certifying authorities to approve water quality certifications for projects authorized under Section 7 of the Natural Gas Act and any transmission line project requiring federal authorization, unless the certifying authority can prove by clear and convincing evidence that project will cause discharges that violate promulgated effluent limitations. This essentially creates a separate, express 401 certification framework for interstate natural gas pipelines and interstate transmission lines. (33 U.S.C. § 1341(g)).
- This bill would establish a statutory definition of "water quality requirements" that would explicitly exclude what is currently included in 40 C.F.R. 121.1(j) as "any other water quality-related requirement of state or Tribal law." This definitional section radically narrows and defines "water quality requirements" for purposes of Section 401. Tribal Nations considered water quality impacts of a project would only be permitted to condition or deny a permit based on violations of specific federal CWA program requirements, or the Tribal laws implementing those federal requirements as applied to a WOTUS. The significantly narrowed definition eliminates Tribal Nations' ability to rely on and incorporate water quality-related requirements that do not directly implement certain CWA programs. Along with the broader restrictions placed on Tribal Nations, this eliminates the ability for Tribal Nations to participate in the Section 401(a)(2) neighboring jurisdiction process if the Tribal Nation does not have other TAS authority.

- ***Effect:*** <u>This is a critical, worrisome section</u>. Overall, the revisions to the Section 401 process limit Tribal Nations' review of water quality impacts of a proposed project in every direction—from the scope of what kinds of impacts can be considered, to the laws that can form the basis for a certifying authority's decisions, to the review timeframe, to

the burden of imposing conditions, and to the availability of judicial review. Underlying some of the most restrictive changes is the new statutory definition of "water quality requirements," which essentially abrogates the holding in *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), that 33 U.S.C. § 1341(d) is the basis for authorizing additional conditions and limitations on the activity as a whole, to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State [or Tribal] law."

- **Sec. 1203. Permit Term for NPDES Permits**
  - ***Change:*** Previously, NPDES permits lasted five years. This provision would make NPDES permits last ten years.
  - ***Effect:*** The provision would create longer periods between permit updates for communities. This could create longer lag times between contamination and responses.

- **Sec. 1204. Permits for Dredged or Fill Material**
  - ***Change:***
    - Currently, EPA may issue a veto "whenever" the Administrator determines there are significant unacceptable adverse impacts. This bill would remove EPA's veto authority once the Army Corps of Engineers has issued a permit.
    - In addition, contrary to existing 404(b)(1) guidelines that direct the Corps to consider the degree to which a proposed discharge of dredge and fill materials has "an adverse effect on the aquatic ecosystem," broadly defined, the Corps would, under the proposed language, be limited to considering only effects on "water quality requirements" as newly defined in Section 401(h) when assessing nationwide permits. The Corps would also be required to consider any discharges into less than two acres to be a minimal adverse environmental effect.
    - The amendments to Section 404 also statutorily mandate continued NWPs 12 (oil and gas pipelines), 14 (linear transportation projects), 43 (stormwater management facilities), 57 (electric utility lines), and 58 (utility lines for water and other substances, excluding oil, gas, and electricity); expand permitted discharges for those NWPs from ½ acre to 2 acres; and broadly remove consultation requirements for the reinsurance of nationwide permits.
  - ***Effect:*** Overall, the amendments to Section 404 both (i) remove a rarely used, but important, federal backstop that has recently gained national attention due to its use to revoke the Pebble Mine permit, and (ii) greatly expand nationwide permitting, which limits case-by-case review of the impacts of discharge of dredge-and-fill material, even where those impacts harm Tribal waters and wetlands and other Tribal resources.
    - The amendments would strip EPA of its authority to restrict an area from discharge where new information emerges after the issuance of a Section 404 dredge-and-fill permit by the Corps. EPA would be prevented from responding to permit decisions that later cause unacceptable adverse impacts.

- The Corps would no longer be bound to the Section 404(b)(1) guidelines that previously required consideration of aquatic ecosystem impacts, wetland loss, wildlife impacts, fisheries, and cumulative effects when assessing general permits—instead the amendments make the entire inquiry solely about water quality alone. Limiting the Corps' consideration of effects when evaluating a NWP only to compliance with water quality requirements completely eviscerates the general conditions currently required in regulation that each NWP must comply with. NWPs are currently required to comply with broader environmental requirements, including ESA requirements, NHPA requirements, and aquatic environment considerations under the Clean Water Act section 404(b)(1) Guidelines. This amendment strips the guardrails that the Corps has used to keep the NWP program "in check" for the last few decades.
- The language that the Corps shall consider a discharge into less than two acres a "minimal adverse environmental effect" would also eliminate many existing pre-construction notice (PCN) requirements in NWPs, meaning projects would qualify for automatic coverage under the NWP without any notice to inform affected parties. And practically speaking, because the bulk of general permits are for discharges into less than two acres (typically a *series* of one-acre discharges), consideration of adverse environmental effects for a general permit becomes essentially pointless.
- In addition, the bill also eliminates the Corps' discretion to require individual permits and may severely limit Corps' regional discretion. Right now, Army Corps regions can opt out of NWPs if the NWP will have bigger impacts within their region, or can add specific regional conditions to the NWPs. But, if the Corps cannot consider broader environmental impacts for a permit and must consider any discharge into less than two acres to have minimal adverse environmental effects, the Corps may lose the discretion or practical ability to require individual permits.
- Finally, read in conjunction with the judicial review provision below (Sec. 1205), the bill will eliminate the ability to challenge the NWPs at all. For a NWP, the amended statute of limitations would mean that there is a 150-day window every ten years to challenge the existence of the NWP, and any challenge would likely have to be a facial challenge because a project under the challenged NWP may not surface within that 150-day time frame.

- **Sec. 1205. Judicial Review Timeline Clarity**
  - ***Change:*** Judicial review for CWA Sec. 404 permits must be filed within 150 days of when a permit or verification was issued. Previously, the APA imposed a six-year statute of limitations. To seek judicial review, a filing party must have submitted a comment during the challenged administrative proceeding's public comment period. Such comment must have been "sufficiently detailed" to put the administrator/secretary/state on notice of the issue on which the party seeks judicial review, and the challenge must

be related to that comment. Courts may not vacate, enjoin, or revoke a permit unless there is imminent and substantial danger to human health or the environment for which no other equitable remedy is available.

- ***Effect:*** The provision limits the ability to challenge permits, reducing the time to 150 days from 6y. Potential plaintiffs must have previously articulated their specific concerns during an administrative proceeding's public comment period to put the agency on notice. The subjective standard of a "sufficiently detailed" comment would create a higher burden for complainants to demonstrate their concerns in a public comment. Remedies are limited as there is now a higher burden before equitable remedies are permitted to be triggered.

ENDANGERED SPECIES ACT (ESA), TITLE III

- **Sec. 1301. Definitions**
  - ***Change:*** The bill inserts a new definition for "best scientific and commercial data available" and "best scientific data available," which is the standard the Secretary uses to make determinations of endangered and threatened species and for consultation under Section 7. The definition is limited to all "relevant and objective" scientific and commercial information available at the time of an agency's action and includes "credible and reliable data," quantitative analysis, and models using "prevailing principles, methods, tools, and professional standards of practice," that account for known/potential sources of error, and are "impartially gathered and objectively applied without presumptions or policy prescriptions that bias the application."
  - ***Effect:*** Under current practice, Tribal data and traditional knowledge are considered best available data that agencies use. The new requirement that data be gathered and applied using "prevailing" principles, methods, and tools could be read to disfavor Tribal traditional knowledge which is not generated or validated through conventional Western scientific methods. This creates the risk that such knowledge may be discounted going forward or excluded as insufficiently "objective" or "prevailing." This creates tension with Secretarial Order 3206, under which the Department gives explicit recognition to Tribal priorities and deference in administering the ESA. Though, Tribal data that aligns with Western scientific methods is explicitly included within the definition. More broadly, the "without presumptions" language gives project proponents and courts a textual hook to exclude precautionary science – the population models, uncertain field data, and conservative assumptions agencies rely on precisely because imperiled species are data-poor.

- **Sec. 1302. Timeline for Section 7 Consultations**
  - ***Change:*** Accelerates the ESA Section 7 consultation process to speed up federal permitting. The provision compresses the core statutory deadlines: the initial consultation period drops from 90 to 60 days, and the outer limit for an extended consultation falls from 150 to 100 days. It also adds applicant protections and a hard backstop—if an agreed consultation period runs past 145 days without the required written update or consent, the applicant may seek relief under the APA for unreasonably delayed agency action. The provision also aligns ESA consultation with NEPA, requiring completion by the environmental document's deadline absent extraordinary circumstances, while preserving the shortened statutory timelines.
  - ***Effect:*** Compressing the consultation window could constrain Tribal Nations that depend on Section 7 to protect treaty-reserved resources and culturally significant species. By cutting the initial consultation period from 90 to 60 days, and the outer limit from 150 to 100 days, this leaves less time for the government-to-government coordination and submission of scientific and traditional knowledge that Tribal Nations often rely to shape outcomes. Tethering the schedule to the NEPA deadline adds further

pressure. The new relief mechanism and hard deadlines favor permit and license applicants but restrict Tribal Nations, further shifting the balance toward faster project approvals and away from deliberative protections.

- **Sec. 1303. Projects in the Operational Right-of-Way**
  - ***Change:*** Adds a new subsection to ESA Section 7 that creates a categorical exemption from the ESA's consultation framework. Any project that qualifies as a NEPA categorical exclusion under the operational right-of-way provision of the Moving Ahead for Progress in the 21st Century Act would be exempt from the core duties in Section 7—obligations to consult, to ensure actions do not jeopardize listed species, and to confer on proposed species and critical habitat. This exemption applies automatically, so projects bypass the Endangered Species Committee exemption process entirely. This removes a defined class of transportation right-of-way projects from Section 7 review.
  - ***Effect:*** Any transportation project within an operational right-of-way that qualifies for a Moving Ahead for Progress in the 21st Century Act categorical exclusion, i.e., highway and transit projects within an existing operational right-of-way, would be exempt from the duties to consult, to avoid jeopardizing listed species, and to confer on proposed species and critical habitats. Because no consultation occurs, Tribal Nations lose the procedural window through which they are typically able to raise concerns about treaty-reserved resources and culturally significant species. The exemption's automatic nature leaves Tribal Nations without a Section 7 mechanism to influence or challenge these projects that may harm species or degrade critical habitat.

- **Sec. 1304. State Assumption of Consultation Responsibilities**
  - ***Change:*** Adds a new subsection to Section 7, Section 7(a), that allows the Secretary of the Interior to hand off Section 7 consultation duties to states that qualify. Under a written agreement or MOU, capped at ten years and renewable, an approved state may assume the Secretary's consultation responsibilities within its borders, operating in lieu of the Secretary. To qualify, the state must certify adequate legal, financial, and personnel resources, waive sovereign immunity, accept federal court jurisdiction, and meet the same deadlines. The Secretary must issue an implementing rule within 270 days of the enactment of the bill, audit states for the first four years of participation, and terminate for noncompliance. Permit applicants may still elect to consult with the Secretary instead. The Director of US Fish and Wildlife is obligated to conduct outreach, education activities, and capacity building with states in the program.
  - ***Effect:*** This provision would inhibit consultation that would normally occur between federal agencies and Tribal Nations on critical fish and wildlife matters. Nothing within the provision's state participation requirements mandates consultation or accommodations for Tribal Nations.
  - Further, states in other contexts have argued they are unable to review Tribal rights as a part of federal law implementation, specifically disclaiming an ability to do so in the

CWA water quality standards process in the Tribal Reserved Rights Rule litigation. This is the exact position the states would be put in if they obtained Section 7 authority, as Tribes have significant interests in ESA reviews. This provision may be impractical to implement and lead to Tribal-state conflicts and litigation.

- **Sec. 1305. Judicial Review**
  - ***Change:*** Any person may obtain judicial review of a biological opinion only in the U.S. Court of Appeals for the D.C. Circuit, by petition filed no later than 150 days after the opinion is "made public"—publication in a single location on the agency's website.
  - ***Effect:*** All biological-opinion litigation—for projects in every region, affecting every listed species—is concentrated in a single circuit on a 150-day clock. Regional circuit courts have been an important venue for species litigation grounded in local facts; funneling everything to the D.C. Circuit raises the cost and distance of challenging a bad biological opinion, and the 150-day clock is unforgiving for Tribes.

- **Sec. 1306. Listing Determinations**
  - ***Change:*** In listing or delisting a species, the Secretary "shall accept and integrate State-collected data," provided the data meets the §1301 definition of "best scientific and commercial data available."
  - ***Effect:*** This gives state-collected data mandatory weight—not mere consideration—in listing and delisting decisions, expanding state influence over whether species receive or keep federal protection. States with political or economic incentives to avoid listings (or to secure delistings) gain a statutory lever in the listing process itself, to the detriment of Tribal Nations whose data is not explicitly given deference.

- **Sec. 1307. Authorization of Appropriations**
  - ***Change:*** The bill authorizes $150,000,000 for 2027-2031 for federal obligations under Section 7 and for state assumption of consultation responsibilities.
  - ***Effect:*** Authorization of substantial funds for state assumption of Section 7 consultation responsibilities will likely incentivize states to take on this role, to the detriment of Tribal consultation.

- **Sec. 1308. National Fish and Wildlife Foundation Coastal State Fund**
  - ***Change:*** This provision establishes a National Fish and Wildlife Foundation Coastal State Fund to award grants to coastal states to support programs and activities designed to "better understand and use coastal resources, coastal and natural infrastructure, and ecosystem services provided by natural systems."
  - ***Effect:*** This funding is explicitly directed toward states, to the exclusion of Tribal Nations, and it does not define what it means to fund activities designed to "use" coastal resources and ecosystem services, leaving open the possibility that a program established under the Endangered Species Act might fund activities that would take species or degrade critical coastal habitat.

PROJECT CERTAINTY, TITLE IV

- **Sec. 1401. Maintaining Federal Authorizations or Permits for Projects with Non-Federal Sponsors**
  - ***Change*:** This provision creates a new statutory prohibition, blocking agencies from revoking, suspending, or altering permits in effect on or after Sept. 16, 2026, or otherwise blocking a fully permitted project, except for a court order, permit violation, fraud, a national security or defense threat, or at the sponsor's request. The federal government bears a clear and convincing burden of proof that one of the exemptions applies. Winning non-federal sponsors will obtain reinstatement, fees, delay costs, and 25-50% of project costs to date, paid from the federal Judgment Fund (31 U.S.C. § 1304) without appropriation.
  - ***Effect:*** The most significant effect of this provision is that it becomes extremely expensive for the government to modify or revoke an existing permit, even if the underlying permitting process that led to the permitting decision was flawed and excluded or inadequately considered Tribal input and impacts to Tribal resources.
  - It would also create a potential standing problem for Tribal Nations bringing NEPA, NHPA and other procedural claims, because standing requires harm to be redressable, but unless the procedural flaw causes a "specific, urgent, substantial, and proximate harm or damage to life, property, national security, or defense that is based on new information that was not considered in the underlying environmental review process or final agency action" the outcome of judicial review will not change the validity of the permit or authorization.

- **Sec. 1402. Ensuring Fairness for Specific Types of Covered Projects**
  - ***Change:*** This provision establishes a framework where, if an applicant for authorization or permits required for an enumerated list of types of energy projects establishes a pattern of evidence based on raw statistical data, statements, policies, executive orders, or other guidance indicating that an administration has disproportionately delayed or denied one project type, the applicant can recover injunctions, fees, and 50-100% of expected construction costs from the federal Judgment Fund (31 U.S.C. § 1304).
  - ***Effect:*** This provision provides applicants with a separate pathway to challenge permit denial, by claiming that denial was part of a pattern of disparate treatment affecting that type of energy project. In addition to creating an unclear standard for judicial review, this practically entrenches existing types of energy development and makes it more unlikely that agencies will risk the potential price tag that could come with permit denial.

NATIVE AMERICAN RIGHTS FUND

DIVISION B

ENERGY PERMITTING, TITLE II

SUBTITLE D—HYDROPOWER

- **Sec. 2232. Certain Conditions on Issuance of Licenses.**
  - ***Change:*** Section 4(e) of the Federal Power Act (16 U.S.C. 797(e)) is amended, in the first proviso, by inserting "and are reasonably related to the effects of the project" after "of such reservation."
  - ***Effect:*** This amendment limits the discretion that the federal trustee of lands held in trust for Tribal Nations possesses to impose mandatory conditions of FERC hydropower licenses that operate on Tribal lands, making it harder for Tribal Nations to advocate for the federal government as their trustee to impose adequately protective conditions that address all Tribal concerns. The language "reasonably related" is vague and introduces uncertainty that will result in litigation over the degree of relation to the project. If the amendment is not struck altogether, a proposed revision would revise the inserted clause to read as follows: "and, for those federal lands not held in trust for Indian tribes, are reasonably related to the effects of the project."

HISTORIC PRESERVATION, TITLE III (NHPA/Section 106 Consultation)

- **Sec. 2301. Historic Preservation**
  - ***Change:***
    - Adds a new statutory definition to the NHPA of "property of traditional religious or cultural importance" to be the geographically identifiable location where a discrete event of continuing significance to a living community occurred.
    - Creates a Tribal evaluation regime mirroring the current state one (review every two years, SHPO/THPO timeliness is a condition of consistency, mandated suspension of contracts and Historic Preservation Fund grants on disapproval, Secretary takeover of SHPO/THPO functions for persistent noncompliance, a firm two-year cure window, and mandatory audits at least every four years). For the Tribal evaluation regime specifically, it incorporates undue-burden limits, substitution of Tribal audit systems, and Indian Self-Determination and Education Assistance Act audit reciprocity.
    - Creates narrower new definitions of "undertaking," "adverse effect," and "reasonably foreseeable", which would shrink what counts as a reviewable undertaking and what counts as an adverse effect, excluding most financial-assistance-only projects, minor and non-discretionary actions, and indirect/visual/atmospheric effects.

- The regulatory Section 106 process becomes statutory with 30/60/90-day milestones synchronized to NEPA, permissive and time-boxed consultation, and a reduced advisory-only role for the Advisory Council.
- Remand-without-vacatur becomes the sole ordinary remedy, and substantial deference to agencies, a 150-day limitations period, comment-exhaustion requirements, exclusive court of appeals jurisdiction, and a jurisdictional bar on non-signatory challenges to agreements all limit preservation-side litigation and gives applicants an affirmative right to sue over missed deadlines.
- Federal agencies are no longer required to notify the public or seek their views before making decisions about historic properties. Consultation is no longer mandatory under Section 106. Federal decisions would only be known after they are final.
- Agencies can decide that "other considerations" outweigh preservation and may refuse to consider ways to avoid, minimize, or mitigate harm.
- Agencies are no longer required to consider historic properties identified after an undertaking is initiated, so only previously identified or listed properties can be considered.

- ***Effect:***
  - Overall, this is a hatchet job to the process, the NHPA, and the values Congress articulated in both 1966 and 1992 when it expressly made the choice to bring Tribes into the fold of the National Preservation program.
  - These changes significantly weaken Tribal Nations' ability to protect traditionally and culturally important properties or landscapes. These provisions would purport to define what historic preservation means to Tribal communities without any consultation with Tribal Nations, and it substantially limits Tribal leverage in the historic preservation process.
  - The provision subjects THPOs and SHPOs to increased federal review and oversight, including authority for the Secretary to assume their functions outright if in the Department of the Interior's sole discretion, it determines that they are no longer meeting timelines or following in line with the Administration's priorities.
  - The narrowing of definitions such as "undertaking," "adverse effect," and "reasonably foreseeable" substantially shrinks the set of federal actions on which Tribal Nations and states must be engaged. The new definition for "property of traditional religious or cultural importance" tightens what qualifies for the National Register and what can be protected through a Section 106 process.
  - Consultation with THPOs, Tribal Nations, and Native Hawaiian organizations is no longer mandatory and would now largely be permissive and time boxed. A database is not consultation. An agency cannot learn about ancestral places, burial grounds, sacred landscapes, and treaty rights from a database.

- New litigation limits increase the resistance Tribal Nations would face in challenging undertakings. Court challenges will be limited to issues raised in public comment even though there is no established comment period.

- **Sec. 2302. Funding for Historic Preservation Fund; use and availability; grants for THPOs; additional funding**
  - ***Change:***
    - Replaces the funding mechanism of the NHPA with an authorization of $200 million for deposit in the Historic Preservation Fund for each fiscal year 2027–2036. Amounts deposited for FY2027 and each year thereafter become available for expenditure beginning FY2028 without further appropriation or fiscal year limitations—effectively converting the Fund to a mandatory no-year spending source rather than one controlled by annual appropriations.
    - Creates a competitive grant program for awarding grants to THPOs to build an online database record of a Tribal Nation's assumption of SHPO functions and for creating a comprehensive list of properties of traditional religious or cultural importance. Requires THPOs to coordinate with federal agency heads and SHPOs so that the database may be used for Section 106 consultation, but explicitly retains a confidentiality carve-out allowing nondisclosure of sensitive locations when disclosure may "cause significant harm or risk to the integrity of the property" or "impeded the use of the property by practitioners" for cultural or religious purposes.
    - THPOs must submit to the Secretary a report describing the use of funds and the status of developing the online database no later than 90 days from the end of the fiscal year in which funds are provided to a THPO.
  - ***Effect:*** Grants would require comprehensive lists of sacred places, which would be accessible to federal and state officials and would create a risk of exposure under FOIA. Even with the confidentiality carve out, this may expose certain sacred places to unwanted disclosure where Tribal Nations cannot show "significant harm or risk" or that cultural and religious use would not be "impeded." Grants are competitive rather than guaranteed, so participation requires coordinating with agencies and SHPOs, subjecting Tribal Nations to greater oversight and compliance measures. The changes to the grant process and annual reports may create capacity issues for smaller THPO offices as they exert additional resources competing for and administering funds.