



Bipartisan American Affordability and Jobs Act (BAAJA)

Analysis of the Senate's Permitting Reform Legislation for MPOs

On Sept. 30, the leaders of the Senate EPW and Energy and Natural Resources (ENR) Committees introduced the [Bipartisan American Affordability and Jobs Act \(BAAJA\)](#). Led by EPW Chair Shelley Moore Capito (R-WV) and Ranking Member Sheldon Whitehouse (D-RI), and ENR Chair Mike Lee (R-UT) and Ranking Member Martin Heinrich (D-NM), the bipartisan legislation was a highly anticipated reform to existing permitting and environmental review practices.

While text has been released, the legislation has a long road ahead before it becomes law. Both chambers of Congress are currently out until November, but leadership on the relevant committees expressed optimism that the legislation could receive dedicated floor time during the lame duck period. How the legislation will fare in the House is uncertain, with some Republican Members of Congress expressing support, while House Natural Resources Committee Ranking Member Jared Huffman (D-CA) [said many House Democrats currently oppose the legislation on the grounds that it weakens environmental protections](#), and that they could produce more favorable legislation given a shift in party control in the next Congress. Nevertheless, the introduction of the legislation will keep permitting reform high on the agenda heading into the lame duck period and the next Congress. Given EPW's involvement with permitting reform and surface transportation reauthorization, the introduction of the legislation will likely delay the introduction of the Senate's version of surface transportation reauthorization and the reauthorization timeline in general.

How BAAJA Could Impact MPOs:

- **Potentially faster project delivery:** Changes to Federal environmental review and permitting requirements could shorten project development timelines for some transportation projects.
- **Greater emphasis on early coordination:** MPOs could help project sponsors identify potential environmental, community, and permitting issues earlier through long-range planning, stakeholder engagement, and coordination with state and local partners.
- **Changes to environmental review requirements:** Expanded categorical exclusions and exemptions could reduce or eliminate NEPA review for certain qualifying projects, particularly those involving existing infrastructure or limited Federal involvement.
- **Greater certainty following federal approval:** Changes to judicial review and existing authorization requirements could reduce uncertainty for some projects after Federal approvals are issued.
- **Changes to water quality, endangered species, and historic preservation permitting and reviews:** Revisions to Clean Water Act permitting, Endangered Species Act consultation, and historic preservation requirements could streamline some transportation projects while changing timelines and processes for environmental coordination.
- **Implementation questions remain:** The practical effect for MPOs will depend heavily on agency implementation, particularly how agencies interpret "predominant control," apply new categorical exclusions, coordinate with State and local agencies, and implement the new timelines.



Breakdown of BAAJA – Key Section Overviews

1. NEPA Reform

The legislation includes significant streamlining provisions surrounding the NEPA review process. Found both in the EPW and ENR divisions of the legislation, NEPA reform is centered around additional categorical exclusions, shorter review timelines, NEPA process transparency, and shorter judicial review windows.

Major Federal Actions [Section 1102 – pg. 16]

Projects that are considered “Major Federal Actions” need to enter a NEPA process. BAAJA would revise NEPA’s existing definition of “Major Federal Actions” and expand the categories of actions that are excluded from that definition – subsequently excluding them from NEPA review:

1. **Non-federal projects where a federal agency has little involvement** or where federal agency involvement cannot control a project’s outcome or where the only involvement is a loan or loan guarantee
2. **Grants, cost-share awards, or other financial assistance where a federal agency does not have predominant control** over the use of funds or the environmental effects.
3. **Projects that repair, reconstruct, restore, retrofit, or replace lifeline infrastructure.** Conditional in that:
 - a. The work is in the immediate vicinity
 - b. Does not increase capacity by more than 20% or alter the function of the infrastructure
 - c. For highways and bridges, does not add through travel lanes

Lifeline Infrastructure:

Public works and utilities such as transportation facilities and infrastructure, water supply and sewage treatment facilities, or oil and gas pipelines

MPO Consideration:

This could benefit larger highway and bridge projects where the goal is to rehabilitate, replace existing infrastructure or improve resiliency – all of which could be excluded from NEPA under this provision given it satisfies the given conditions.

Note: The bill does not define “predominant control and responsibility,” leaving an important implementation question for USDOT and other federal agencies. Existing NEPA law considers whether a project is subject to “substantial Federal control and responsibility,” while BAAJA would apply the higher “predominant control” standard to determine whether certain grants, cost-share awards, and other forms of financial assistance trigger NEPA review.

For transportation projects, this distinction could make the level of federal oversight and decision-making authority retained by FHWA or FTA more important than the presence of federal funding alone. As a result, some federally funded projects may not trigger NEPA review, depending on the extent of federal control over project decisions.

Alternative Forms of Environmental Review to Satisfy NEPA [Section 1105 – pg. 28]

Similar to how BAAJA changes what is defined as a Major Federal Action, the legislation would also alter when alternative forms of environmental review satisfy the need for the NEPA review process. Specifically, an existing state environmental review process could be used in place of NEPA or,



under specific scenarios, project sponsors can request exemption from an environmental assessment (EA) and proceed directly to an environmental impact statement (EIS). This is further reflected in the legislation where now NEPA can be bypassed given project compliance with other federal laws, where NEPA compliance would otherwise be redundant.

Similarly, BAAJA would create a process by which federal agencies identify and publish publicly established agency categorical exclusions [Section 1108 – pg. 62]. Other federal agencies would then have the ability to adopt categorical exclusions where appropriate.

Note: States with established environmental review processes, such as California’s CEQA, could see less duplicative state and federal review if the lead federal agency determines that the state process serves a similar function to NEPA. For MPOs, this could be beneficial in streamlining project development by reducing duplicative review processes and improving state, federal, and local level coordination.

NEPA Process Reform [Section 1106 – pg. 31]

BAAJA would subsequently make significant changes to the NEPA review process. Specifically, the legislation would adjust how agencies are currently organized, process timelines, and accountability currently found in Sec. 107 of NEPA.

First, BAAJA makes clarifications on who a lead agency is in the NEPA process, identifying the lead agency as the one that proposed an action. This also includes clarifications for multi-federal agency environmental review processes, so that in instances when there are two or more federal agencies involved, the agencies must go through an official designation process to determine the lead agency, supported by an expedited designation window, where federal agencies would have 21 days to make a decision.

Additionally, states and local governments could be designated as joint agency leads or cooperating agencies.

Lead Agency	Cooperating Agency
Defined: States, tribes, or local agencies can be appointed as joint leads. Joint leads supervise the preparation of environmental documents when more than one federal agency is involved.	Defined: A federal, state, tribal, or local agency (including counties and cities) that has jurisdiction over an environmental effect of a proposed action. Established within a 30-day window when an environmental impact statement or environmental assessment is necessary. Cooperating agencies that are invited would have 7 days to accept.
Responsibilities: The lead agency defines purpose, need, and alternatives (screening out those that don't meet the sponsor's goals), sets the schedule with cooperating agencies and the sponsor, engages cooperating agencies early, and coordinates a single, concurrent review.	Responsibilities: Cooperating agencies comment within their jurisdiction on the lead agency's schedule, may help prepare the document if invited to, must accept the lead agency's purpose, need, and alternatives, and gain no new authority by participating.

Note: MPOs are not explicitly identified as potential lead or cooperating agencies under BAAJA. Clarifying or amending the legislation to specifically recognize MPOs could help ensure their regional planning expertise is incorporated into federal environmental review. The bill's definition includes entities with jurisdictions directly affected by a proposed action, which could be relevant to MPOs' role in coordinating transportation planning across jurisdictions.

Second, BAAJA tightens both environmental review deadlines and documentation practices for timelier reviews. This includes:

- **EIS comment periods will be 45-60 days** with extensions up to 75 days given lead agency and project sponsor agreement.
- Allows, at the request of a project sponsor, a lead agency to consider or **adopt state or tribal environmental analyses in place of NEPA.**
- **EAs must be completed and published within 1 year** of the applicable statutory trigger.
- **EISs must be published within 2 years** of the applicable statutory trigger, with a decision required within 45 days.
 - Following an EIS, relevant federal agencies will need to issue an authorization within 90 days (nonparticipating agencies will have 120 days).
- **Interagency disputes will require intermediation by the Chairman** and if unresolved after 30 days, a resolution must be made within 14 days and is not subject to judicial review.
- **Federal agencies that miss deadlines will be required to devote at least 50% of their work week to accommodate for the delay.** If there are 60 days of noncompliance by the federal agency, the head of the respective agency will not be able to travel more than 25 miles from their place of official business until all requirements are complete.
- **Federal agencies must also report all missed deadlines and completion rates** for environmental reviews.

Authorization:

Can be a license, permit, approval, finding, determination, or administrative decision issued by a federal agency (either required or authorized) to implement a proposed action

Chairman:

Chairman refers to the Chairman of the Council on Environmental Quality (CEQ)

Such expedited timelines will now also apply to the authorization application process that helps determine what level of environmental review is needed for a specific project.

- A federal agency must document receipt and notify the project sponsor that the application is complete within 60 days.
- A federal agency must tell the sponsor whether the action is covered by a categorical exclusion, not a major federal action, whether it requires further agency action, needs an EA, or EIS within 60 days.
- If the agency requests more information, the 60-day determination clock begins when it receives that information.



- Sponsors seeking authorization for an action that requires environmental review must also submit a list of federal, state, tribal, and local authorizations, a record of stakeholder engagement, and a brief statement of purpose and need that includes the projects location and project alternatives (unless otherwise required by law).

Lastly, what is required for stakeholder engagement is also revised with local/MPO involvement potentially providing early benefits to projects. Specifically, records of stakeholder engagement will be revised to not exceed 20 pages and will need to detail preapplication engagement with local governments, tribes, and community entities.

Note: MPO planning and coordination could help support the bill's preapplication engagement requirements. This could elevate the value of MPOs' preliminary planning, corridor studies, and public engagement efforts by helping project sponsors identify regional priorities, coordinate across jurisdictions, and inform project purpose, need, and alternatives earlier in the development process.

Judicial Review of NEPA [Section 1110 – pg. 67]

In brief, BAAJA would narrow the ability to challenge authorizations under NEPA.

- **Claims generally must be filed within 150 days after an authorization is made public** and can only be brought by someone who was directly affected and submitted a substantive comment on the issue during the public comment period.
- **Claims go directly to the federal appeals court** for the circuit where the project is located. The court must act quickly and generally give the agency substantial deference when reviewing the environmental document.
- **If a court finds that an authorization does not comply with NEPA, it generally can send the issue back to the agency for correction but cannot cancel the authorization** or issue an injunction. The court must set a deadline of no more than 180 days for the agency to address the issue.
- **The authorization remains in effect while the agency makes corrections**, and preliminary injunctions are generally limited to cases where there is a likely violation of another federal law.

Digital Tools, Data, Performance, and Transparency [Sections 1121, 1132, & 1133]

BAAJA has three new provisions that would help enhance transparency and modernize the environmental review process:

1. **BAAJA would establish new federal data standards, technology requirements, and a unified digital system** to modernize environmental reviews and authorizations. This includes a unified authorization portal, allowing project sponsors to submit documentation through an ePermit platform to track reviews, collaborate with agencies, and access project information and geospatial data.
2. **BAAJA would establish an online tracker to provide public information on the status of Federal environmental reviews and authorizations** for designated transparency projects. This includes a tracker with an up-to-date list of all projects, a list of projects subject to EIS, and updates on federal agency compliance with existing schedules.
3. **BAAJA would establish a fund to improve the performance of key permitting agencies and support more timely environmental reviews and authorizations.** Authorized at \$20



million annually from FY2027 through FY2033, the fund would help permitting agencies complete timely environmental reviews and can be used for professional development, additional support for agency project managers, improving public engagement, and standardizing processes.

Note: The public tracker could give project sponsors and regional partners greater visibility into which federal review or authorization is driving project delays and whether agencies are meeting established schedules. This aligns with AMPO's priority of promoting transparency in the project development process and could help MPOs and local governments better understand permitting timelines and better coordinate with project sponsors and federal agencies.

Permitting Project Certainty [Section 1401 – pg. 158]

BAAJA would include additional provisions aimed at ensuring the predictability of federal permits in addition to protections once they receive all required federal authorizations. Specifically, BAAJA would prohibit a federal agency from revoking, suspending, amending, or interfering with authorizations such as permits, records of decision or rights-of-way unless a project sponsor breaks the law, commits fraud, a project sponsor requests it, or interference is needed to avoid or prevent harm based on new information.

Project certainty is also supported by making federal agencies responsible for providing sufficient burden of proof to contest well established projects. For example, to interfere with federally authorized projects, a federal agency would need to provide a written notice with an explanation, statutory authority, and evidence for their decision. If litigated, agencies would need to provide clear and convincing evidence, and, given a federal agency challenge fails, the court must reinstate the authorization and award injunctive relief, attorney fees, and delay costs, plus additional damages of 25 to 50 percent of the sponsor's project costs to date.

Separately, project certainty is extended specifically for energy and infrastructure projects [Section 1402 – pg. 166] through a new one-year federal permitting deadline and enhanced remedies for a defined group of energy and infrastructure projects that need Federal authorizations, but do not need an EA or EIS. Such projects would require federal agency authorizations within a year and allow applicants to sue a federal agency that was improperly denied or delayed more than 60 days past a deadline. In cases of litigation, federal agencies would again see higher thresholds for burden of proof, having to provide statistical data. If the applicant is successful in their litigation, they may receive injunctive relief, fees, economic damages, and additional damages of 50 to 100 percent of expected construction cost but must show the ability to build the project and must complete it or repay the remedies.

Applicable Energy and Infrastructure Projects that produce electricity from:

- Onshore Wind
- Solar
- Energy Storage
- Coal
- Natural Gas
- Oil
- Geothermal
- Nuclear fission reactor

2. Clean Water Act [Title II – pg. 102]

BAAJA would make significant permitting changes to the Clean Water Act, particularly the Section 401 state water quality certification and Section 404 permitting processes. The bill would limit Section 401 reviews to applicable water quality requirements, establish more detailed application



and review procedures, and require states and tribes to support certification denials and conditions with clear and convincing evidence. It also reinforces deadlines for certification decisions, including a nine-month review period for interstate transmission and natural gas pipeline projects, after which certification authority could be waived.

BAAJA would extend National Pollutant Discharge Elimination System (NPDES) permit terms from five to 10 years, limit EPA's ability to veto certain Section 404 permits to the period before a permit is issued and expand nationwide permitting for certain linear infrastructure projects. Challenges to certain Section 404 permits would generally have to be filed within 150 days and would be limited in scope. If a court finds a permit unlawful, it will send the permit back to the agency for correction rather than cancel it, unless the activity poses an imminent and substantial danger to human health or the environment.

Note: Although these provisions are not limited to transportation, they remain relevant to MPOs and regional infrastructure planning. Changes to Clean Water Act Section 401 and 404 permitting could affect transportation projects involving stormwater runoff or other potential water quality impacts, as well as municipal stormwater and wastewater systems and other local infrastructure. These changes could influence project timelines, water quality review, and coordination among local governments, utilities, and federal or state agencies.

3. Endangered Species Act [Title III – pg. 133]

BAAJA would make significant changes to the Endangered Species Act (ESA) consultation process, specifically by shortening Section 7 consultation timelines and aligning species reviews more closely with federal environmental reviews. The bill would reduce the initial consultation period from 90 to 60 days and shorten biological opinion deadlines, while requiring ESA consultation for projects undergoing NEPA review to be completed within the applicable NEPA timeline. BAAJA would also allow certain states, subject to federal approval and oversight, to assume certain Section 7 consultation responsibilities currently completed by federal agencies and require federal agencies to consider qualifying state-collected data in listing and delisting decisions.

For transportation projects, BAAJA would exempt certain activities within operational transportation rights-of-way from core Section 7 consultation requirements, potentially reducing review requirements for routine work within existing corridors.

Note: Projects that qualify for the MAP-21 categorical exclusion for activities within an operational transportation right-of-way would also be exempt from certain ESA Section 7 consultation requirements. This could streamline maintenance, repair, replacement, and similar work within existing transportation corridors by reducing duplicative environmental review and consultation requirements.

5. Historic Preservation [Title III – pg. 372]

BAAJA would make significant changes to the historic preservation review process, particularly by narrowing the scope of review and establishing more defined timelines for identifying historic properties and consulting on project effects. The bill would narrow the definitions of “undertaking” and “adverse effect,” limit consideration of certain effects, expand the use of programmatic agreements, and align historic preservation consultation more closely with NEPA schedules. Local governments would also have a formal role in the consultation process. Local governments, if applicable, would have 30 days to respond to reports or findings, and the federal agency could



move forward if they do not respond or do not submit substantive objections within that timeframe. If substantive objections are submitted, the federal agency would be required to explain how it considered them.

The bill would also establish a 90-day period for the federal official, in consultation with relevant organizations, local governments, and project applicant, to make a determination or reach an agreement on how adverse effects will be addressed. If an agreement is not reached, additional consultation and a formal advisory process could follow.

BAAJA would also set a 150-day deadline for most challenges to historic preservation decisions and require courts to send decisions back to agencies for correction rather than canceling the decision or issuing an injunction. The bill would provide \$200 million annually for the Historic Preservation Fund through FY2036 and \$20 million annually through FY2030 for Tribal Historic Preservation Officer database grants.

Note: Shorter consultation timelines could make project reviews faster and more predictable, but they could also place greater pressure on local governments and other consulting parties to respond within prescribed deadlines. If they miss those deadlines, they may have fewer opportunities to provide input or influence decisions about potential impacts on local resources.

6. ENR Jurisdictions – Electric Transmission, Energy Permitting, Historic Preservation [Division B – pg. 185]

The Energy and Natural Resources (ENR) portion of BAAJA applies the bill's broader permitting approach – including faster reviews, firm deadlines, and more limited litigation – to energy and electric grid infrastructure. From a regional planning perspective, the most significant provisions would affect transmission planning, existing rights-of-way, and the infrastructure costs associated with growing electricity demand. The bill expands the role of the Federal Energy Regulatory Commission (FERC) in interstate transmission permitting, establishes regional and interregional transmission planning requirements, promotes greater use of existing rights-of-way for grid upgrades, and requires large data centers and other high-demand computing facilities to bear more of the costs associated with the infrastructure needed to serve them.

Regional Transmission Planning: BAAJA would require transmission planning regions to develop regional and interregional planning processes using common assumptions and criteria related to reliability, congestion, capacity, and consumer benefits. The bill would also establish a consolidated process for coordinating generation and transmission planning over a 20-year forecast and require cost allocation to generally reflect which customers benefit from new infrastructure. These changes could increase the importance of coordination among States, utilities, regional planning organizations, and other stakeholders as regions identify future transmission needs and determine how infrastructure costs should be allocated. The bill also promotes upgrades within existing rights-of-way, including reconductoring and other grid-enhancing technologies, by expanding categorical exclusions for certain projects and reducing associated environmental review requirements.

Electricity and Regional Infrastructure: BAAJA would establish new protections for existing ratepayers as electricity demand from data centers and other high-density computing facilities grows. Facilities with electricity demand of 20 megawatts or more would generally be required to bear the embedded and incremental costs associated with transmission infrastructure needed to



serve them, while states would retain authority to establish separate rates, interconnection requirements, and service conditions. These provisions could affect regional infrastructure planning in areas experiencing rapid growth in large electricity loads by linking new development more directly to the costs and capacity requirements of the electric system.

Other ENR provisions would streamline permitting for renewable energy, grid, and storage projects, particularly on existing or previously disturbed sites, and establish shorter timelines for challenges to federal energy permits. While these provisions are primarily focused on energy development, they could affect regional planning where new generation, transmission, and storage projects intersect with transportation infrastructure, land use, economic development, and other regional planning activities.