Environmental Council of the States
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October 21, 2026

The Honorable Shelly Moore Capito
Chairman, Senate Committee on
Environment & Public Works
United States Senate
Washington, DC 20510

The Honorable Sheldon Whitehouse
Ranking Member, Senate Committee on
Environment & Public Works
United States Senate
Washington, DC 20510

The Honorable Mike Lee
Chairman, Senate Committee on
Energy & Natural Resources
United States Senate
Washington, DC 20510

The Honorable Martin Heinrich
Ranking Member, Senate Committee on
Energy & Natural Resources
United States Senate
Washington, DC 20510

The Honorable Brett Guthrie
Chairman, House Committee on
Energy & Commerce
United States House of Representatives
Washington, DC 20515

The Honorable Frank Pallone Jr.
Ranking Member, House Committee on
Energy & Commerce
United States House of Representatives
Washington, DC 20515

The Honorable Sam Graves
Chairman, House Committee on
Transportation & Infrastructure
United States House of Representatives
Washington, DC 20515

The Honorable Rick Larsen
Ranking Member, House Committee on
Transportation & Infrastructure
United States House of Representatives
Washington, DC 20515

The Honorable Bruce Westerman
Chairman, House Committee on
Natural Resources
United States House of Representatives
Washington, DC 20515

The Honorable Jared Huffman
Ranking Member, House Committee on
Natural Resources
United States House of Representatives
Washington, DC 20515

Dear Chairman Capito, Chairman Lee, Ranking Member Whitehouse, Ranking Member Heinrich, Chairman Guthrie, Chairman Graves, Chairman Westerman, Ranking Member Pallone, Ranking Member Larsen, and Ranking Member Huffman:

As Congress considers the U.S. Senate's Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), the Environmental Council of the States (ECOS) offers the following comments, questions, and concerns. ECOS is the national nonprofit, nonpartisan association of environmental agency leaders from states, territories, and the District of Columbia (hereinafter referred to as "states"). States appreciate the motivations driving this comprehensive legislation and share the broad goals of modernizing permitting processes, enhancing interagency coordination, and advancing resilient energy and water infrastructure to meet growing national demands. Our member agencies are also

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committed to ensuring that longstanding and successful regulatory safeguards remain in place and effective to protect public health and the environment in our communities.

BAAJA contains many provisions that would impact state and federal program implementation, permit review standards, and permitting operations under the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and other key statutes. As state regulators who collectively implement and enforce over 90 percent of the nation's delegated federal environmental programs, as well as the state environmental laws that are customized to meet state-specific needs, our member agencies have questions and concerns about the interpretation and implementation of several provisions of the bill. We offer the following comments and operational questions to better understand the impact and purpose of the proposed changes, focusing primarily on potentially significant changes to the CWA, cooperative federalism, and shifts in costs and litigation risks to states. ECOS also encourages Congress to consider the input and unique perspectives of our individual member agencies and partner state associations.

Section 1202 - CWA Section 401 Water Quality Certifications

Section 401, which was added to the CWA specifically as a safeguard for states and cooperative federalism in the context of federal permits and licenses, provides states with an important tool to review proposed federal permits and licenses in order to ensure compliance with state water quality requirements. States urge Congress to preserve this important state authority as established and defined by the CWA, and have a range of concerns and questions about the CWA Section 401 provisions in BAAJA.

States understand that section 401 certifications and conditions must be focused on water quality, but language in the bill referring to compliance with "water quality requirements" is vague and unclear. Additionally, some states have questions about the scope of protection through a 401 certification if there's a discharge (or "direct point source discharge" for gas pipelines and transmission lines) into "waters of the United States" (WOTUS) that affects state waters as well.

BAAJA language says that certifying authorities can deny applications based only on "clear and convincing evidence" that certification would violate applicable water quality requirements, and that no modification or reasonable condition could address the water quality issue. The bill also says that when reviewing challenges to certification conditions, courts shall require states to demonstrate by "clear and convincing evidence" that conditions are necessary and the least burdensome approach to avoiding violations of water quality requirements. What constitutes "clear and convincing evidence" and "least burdensome"? Additionally, consideration of different approaches to meet water quality standards is usually the purview of the applicant, not the state. This shift of burden from the applicant to the certifying authority to demonstrate compliance, coupled with the additional procedural changes proposed by BAAJA, creates a new burden on states.

One of the most consequential provisions in section 1202 restricts the scope of state CWA Section 401 reviews for certain federally permitted or licensed linear energy infrastructure (i.e. natural gas pipelines and interstate transmission lines) to "direct point source discharges." Because "direct point source discharge" is not a defined statutory term under the CWA, this provision could be

interpreted in such a way as to prevent states from using Section 401 to review this type of infrastructure and address significant construction-related sediment runoff or hydrological modifications along pipeline and transmission line rights-of-way, even when such runoff constitutes a point-source discharge under established CWA precedent. The use of "direct" could create uncertainty regarding discharges conveyed through drainage systems, ditches, or other pathways before reaching WOTUS, and appears to constrain the authority of states under established CWA precedent to consider the water quality impacts of a project taken as a whole. These provisions in the bill and uncertainty around their impact cause concern for some states that they could lose substantial authority to address the full range of water quality impacts associated with these projects.

Some states are also concerned about the effect on permitting for projects that create upstream diversions or other hydrological modifications that will impact water quality. While these may not be discharges, they can impact temperature and other pollutants in those water bodies, and are important instances where states use 401 authority to place conditions on federally permitted or licensed diversions and hydrologic modifications without regulating water quantity or interfering with water rights.

Some states also ask how this bill would affect the savings clause provision in existing section 401(b) of the statute providing that "nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements."

Section 1203 - CWA Section 402 NPDES Permit Terms

ECOS is generally in favor of extending the maximum permit duration for National Pollutant Discharge Elimination System (NPDES) permits from 5 years to 10 years. ECOS Resolution 24-2 from 2024 supports amending the federal CWA 33 U.S.C. 1342(b)(1)(B) to indicate NPDES permits "are for fixed terms not exceeding 10 years" to allow states greater flexibility, administrative efficiency, and permit authority discretion in setting an appropriate permit length up to 10 years.

Section 1204 - CWA Section 404 Permits for Dredged or Fill Material

BAAJA tightens the window on U.S. Environmental Protection Agency (EPA) veto authority under Section 404(c) so that it can only exercise its authority to veto or restrict a dredge-and-fill permit after a complete permit application is submitted and before the Army Corps of Engineers issues the permit. ECOS does not have a formal position on this change, but Resolution 24-1 emphasizes the need for communication and coordination from U.S. EPA on its use of this veto power, and also asks for greater clarity around the finality of decisions or standards to revisit or reopen decisions. ECOS appreciates the importance of clarifying the timing and use of 404(c), which is a valuable tool when the federal agencies are working in coordination with states and others to ensure consistency and predictability.

The bill also defines the scope of reviews for Section 404 General Permits, directing the Army Corps to only consider the impacts on "compliance with water quality requirements" when determining the environmental effects of an activity under a general permit. What is the intent of that provision

as it relates to flooding or the biological integrity of affected waters? It also sets a statutory standard that any discharge affecting less than 2 acres of navigable waters shall be considered a "minimal adverse environmental effect" and thereby eligible for coverage under a general permit. States request more clarity on whether or not in this instance it would be required to use a general permit, or if states retain the flexibility to use an individual permit. In addition, some states seek clarification on the ability to consider the cumulative impact of a project's multiple discharges of fill.

Section 1201 - CWA Water Quality Criteria

BAAJA includes a change in administrative procedure requiring U.S. EPA to promulgate new or revised water quality criteria via notice-and-comment rulemaking. ECOS is interested in learning more about the factors driving this change. While some states have also taken steps in this direction, others ask Congress to consider how this may impact water quality certifications, water-quality based permitting, calculation of total maximum daily loads, nonpoint source programs, or other efforts to reduce the risks of PFAS or other contaminants in water.

BAAJA also adds two categories of U.S. EPA actions to Section 509 judicial review: the finalization of Section 304(a) water quality criteria, and U.S. EPA actions defining the scope of WOTUS for purposes of the CWA. Was consideration given to the additional costs to states in implementing the new procedures and defending determinations under the new procedures given the change in judicial review standards?

State Role in National Environmental Policy Act (NEPA) Reviews

Sections 1105 and 1106 of BAAJA expand opportunities for formal state engagement in NEPA reviews. In particular, BAAJA authorizes a federal lead agency to determine that a NEPA Environmental Assessment (EA) or Environmental Impact Statement (EIS) is unnecessary if a proposed action previously underwent a functionally equivalent review under a state or tribal statute. ECOS supports efforts to bolster cooperative federalism and reduce duplicative analysis without compromising environmental protection. We would welcome deeper engagement to discuss appropriate criteria and procedures to ensure predictable, consistent lead agency determinations about state program equivalency.

BAAJA also requires federal lead agencies for a NEPA review to identify and invite relevant state agencies with jurisdiction or specialized expertise to serve as cooperating agencies within 30 days of issuing a notice of intent to prepare an EIS or determining if an EA is needed. States would need to accept or decline those invitations within 7 days. Given the shortness of that timeframe, states would benefit from getting as much information from the federal lead agency as possible to make an informed decision on whether to serve as a cooperating agency.

Data Center Development

Data centers supporting artificial intelligence and other digital services are driving unprecedented demand across energy, water, air, and land resources. BAAJA includes a range of provisions addressing data center energy generation, transmission, and data sharing–many of which may have important implications for state regulatory and permitting programs. States also seek to clarify

how BAAJA's provisions may influence data center choices about behind-the-meter generation, as shifts toward localized power generation may affect state and local air quality permitting and compliance strategies.

Section 1401 - Project Certainty

With limited exceptions, BAAJA prohibits federal agencies from taking action to "revoke, rescind, withdraw, terminate, suspend, amend, or alter" a permit in effect on or after September 16, 2026, or from taking "any other action to interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits." ECOS supports the principle of consistent and durable permitting decisions but has no position on section 1401.

In conclusion, ECOS members strongly support federal and state efforts to enhance coordination and modernize permitting for public health, environmental, and economic progress. We share a commitment to supporting resilient energy and water systems. However, imperative to these endeavors is protecting state authority under cooperative federalism to ensure that these critical projects can proceed sustainably and without creating undue burden for states or bypassing state water quality standards and authorities.

Thank you for your consideration of our written comments. ECOS encourages Congress to review the comments of our member state environmental agencies and partner state associations. We would welcome the opportunity as soon as possible to work with you and your staff on this important legislation.

Sincerely,

Ben Grumbles
Executive Director