

BAAJA's path from a far-right think tank to Congress

The recent midterm election was a resounding rebuke to the GOP. But a handful of Democrats are in danger of fumbling this generational mandate for change before the new Congress is even seated. With help from just a few Democrats, Trump and the GOP are poised to deliver one more far-right victory before they lose control of Congress in the new year.

The so-called Bipartisan American Affordability and Jobs Act (BAAJA) is a permitting bill that would gut bedrock environmental laws – namely the National Environmental Policy Act, Clean Water Act, and Endangered Species Act – and lock in a new generation of fossil infrastructure. These bedrock laws work together to ensure that the federal government adequately assesses all the risks to people and the planet before permitting a major new project, keeping the public informed and involved every step of the way. Not only do these laws help the government make effective decisions, but they also provide accountability for unlawful actions and allow communities a direct pathway to stay informed and share feedback. Under BAAJA, much of this will be eviscerated.

The dangerous attacks on permitting in BAAJA did not appear from nowhere; it is a part of the broader, and deeply unpopular, conservative roadmap created years ago. Even before Trump had officially secured the Republican nomination for his 2024 presidency, a far-right think tank called the Heritage Foundation published a roadmap for the next president called Project 2025: A Mandate for Leadership. This sprawling list of conservative policy priorities spanned from gutting crucial government programs, boosting the fossil fuel industry, mass deportations, and government overreach into social liberties. Although Trump claimed no association with Project 2025 on the campaign trail, he subsequently brought authors of the blueprint into his Administration and has been steadily ticking off Project 2025's wishlist, in some cases overdelivering on them.

Unsurprisingly, the text of BAAJA tracks closely with many items on Project 2025's wishlist and in some places goes even further than the aspirational far-right agenda. Project 2025 demands that, "the President should work with Congress to establish a sweeping

modernization of the entire permitting system across all departments and agencies that is aimed at reducing litigation risk and giving agencies the authority to establish programmatic, general, and provisional permits."[1] And the permitting reform in BAAJA is nothing if not 'sweeping'. The bill guts NEPA, the CWA, and ESA, significantly restricts judicial review, and limits the ability of future administrations to amend or rescind permits for harmful projects.

The horror is that BAAJA goes above and beyond what the far-right brain trust dreamt up in Project 2025. In addition to granting their wishlist, as outlined below, BAAJA takes it a step farther in many regards. It silences and disempowers Tribes and First Nations by redefining what should receive heightened scrutiny under the National Historic Preservation Act, truncating the period of time for consultation, and limiting access to judicial review of projects under a law that is meant to protect, preserve, and mitigate the destruction of irreplaceable historic, culturally significant resources and places. The permitting changes in BAAJA also have harmful impacts beyond those caused by energy-related projects, as the bill will also streamline projects like detention centers and data centers despite local opposition.

Additionally, while Project 2025 largely calls for Administrative action that could be undone by future Administrations, BAAJA attempts to create forever permits by making it very difficult for future Administrations to amend or restrict permits for the reckless and harmful projects we are sure to see if BAAJA passes. This could permanently lock in the Trump Administration's decisions, removing authority for future administrations to amend or rescind problematic permits. BAAJA also impedes the effectiveness and power that the judicial system can (and should) wield against faulty or harmful permit decisions.

Project 2025 asks for:

Limit Access to Courts and Judicial Remedies

"[NEPA reforms] should frame the new regulations to limit the scope for judicial review of agency NEPA analysis and judicial remedies, as well as to vindicate the strong public interest in effective and timely agency action"[2]

BAAJA delivers:

Limit Access to Courts and Stop Judges from Blocking Illegal Projects

BAAJA restricts the public's ability to seek judicial review of unlawful decisions. It chops the timeline to file legal action from 6 years to 150 days. It limits the types of claims that can be brought before a judge by requiring all claims to be first raised in prior public comment, and requires all claims to have a direct harm.

Limit Access to Courts and Stop Judges from Blocking Illegal Projects (cont.)

It also ties the judiciary's hands by limiting a judge's ability to prevent a harmful project from proceeding during the pendency of a lawsuit and points final judicial remedies toward agency remand, rather than vacatur of the underlying, unlawful decision. In other words, even when a project is found to be unlawful, a judge can only tell an agency to go back to the drawing board and paper over the bad decision, with the underlying, unlawful project going forward the entire time, despite illegalities.

Limit the scope of NEPA analysis for gas pipelines

"Under Democrat leadership, FERC has proposed official policies to consider upstream and downstream GHG emissions from the use of the natural gas that would be shipped in the pipeline to be part of FERC's public-interest determination when deciding whether to approve a pipeline....[FERC should] Limit its NEPA analysis to the impacts of the actual pipeline itself, not indirect upstream and downstream effects."[3]

Exempt certain pipelines from NEPA

Although BAAJA doesn't explicitly address FERC's NEPA review, Section 2102 does exempt certain interstate pipeline expansions from NEPA and the National Historic Preservation Act if the construction is within its existing right-of-way footprint. In other words, under this new regime, certain pipeline projects could secure a permit without receiving NEPA's "hard look" or public input opportunities; and, as highlighted below, that permit could stay on the books permanently.

Expedite permits for gas pipelines

"ensure that the natural gas pipelines that are needed deliver more of the product to market, both for domestic use and export, and are reviewed, developed and constructed in a timely manner."[4]

Allow pipelines to sue if permits are denied or delayed

Section 1402 establishes a long list of projects that can sue the government if their permits are denied or delayed "unfairly". Pipelines are among the

Allow pipelines to sue if permits are denied or delayed (cont.)

projects that benefit from this 'permit or pay' treatment.

Weaken and shorten Clean Water Act review

Under the Clean Water Act, "the repeal and reissuance of new regulations should be pursued" including reducing assessment of all water quality factors and imposing time limits.[5]

Weakens and shortens Clean Water Act review, undermines court's ability to redress unlawful permits

BAAJA does this and more by removing CWA protections for certain pipeline discharges; curtailing the timeframe for EPA to issue a 404 Veto on projects that endanger sensitive areas; expanding the list of projects eligible for streamlined general permits (pipelines included), while doubling the timeline of those permits from 5 to 10 years; and limiting the ability of courts to issue adequate remedies for CWA violations. Section 1202 limits the ability of states and Tribes to use CWA 401 authority to protect waterways from pipelines.

Expedite and shorten NEPA analysis

"DOI should reinstate the Secretarial orders adopted by the Trump Administration, such as placing time and page limits on NEPA documents"[6]

Places strict timelines on NEPA analysis

BAAJA fast-tracks NEPA by slashing substantive requirements and agency timelines (ie Sec 1106 requires Environmental Assessments to be completed within 1 year and Environmental Impact Statements to be completed within 2 years).

Limit the Judge's authority to review Agency findings

"the new Administration should call upon

Limits the Judge's standard of review for Agency findings

Section 1110 requires the court to grant

Limit the Judge's authority to review Agency findings (cont.)

Congress to reform NEPA to meet its original goal. Consideration should be given, for example, to eliminating judicial review of the adequacy of NEPA documents or the rectitude of NEPA decisions."[7]

Remove important regulatory requirements for logging and timber sales

"Increasing timber sales could also play an important role in the effort to change the behavior of wildfire because there would be less biomass....[work] with lawmakers to promote active management of vegetation, reduce regulatory obstacles to reducing fuel buildup, and increase timber sales"[8]

Weaken ESA by removing reliance on species specialists and allowing states rather than federal experts to evaluate project risks for sage grouse

"Cede to western states jurisdiction over the greater sage-grouse, recognizing the on-the-ground expertise of states and preventing use of the sage-grouse to interfere with public access to public land and economic activity."[9]

Limits the Judge's standard of review for Agency findings (cont.)

"substantial deference" to agencies in evaluating NEPA documents.

Removes important regulatory requirements for logging and timber sales

Section 1110 restricts NEPA court review for every federal project, timber sales included. Section 1202 raises the evidentiary burden for States and Tribes to prove that projects, such as logging, affect water quality.

Weakens ESA requirements for all covered species by removing science from the process, allowing states rather than federal experts to evaluate project risk and limiting judicial remedies

Section 1304 changes ESA Section 7 consultation requirements, so that instead of requiring federal wildlife biologists to review environmental documents and report on the potential risks to endangered species, state agencies can make that determination, even though they may not have the resources or expertise to adequately make such a determination. It also attacks the reliance on science in the ESA

Weakens ESA requirements for all covered species by removing science from the process, allowing states rather than federal experts to evaluate project risk and limiting judicial remedies (cont.)

process, cuts the timeline for compliance, expands ESA exemptions, and severely truncates the timeline to seek judicial review (from 6 years to 150 days, standard throughout BAAJA).

Footnotes

1 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 61 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

2 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 60 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

3 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pgs 406-7 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

4 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 408 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

5 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT."pgs 428-30 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

6 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 533 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

7 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 533 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

8 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 308 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

9 The Heritage Foundation. 2023. "Project 2025 PRESIDENTIAL TRANSITION PROJECT." pg 534 https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.