October 30, 2027

Dear Members of Congress,

Waterkeeper Alliance strongly opposes the Bipartisan American Affordability and Jobs Act of 2026. The proposed legislation would severely weaken longstanding protections under the Clean Water Act, Endangered Species Act, and National Environmental Policy Act, allowing dangerous industrial projects to move forward with less environmental scrutiny and more limited public input and legal recourse. Clean energy and grid investments must preserve safeguards for clean water, wildlife, and the communities affected by development –otherwise such projects fail to meet the standard of clean energy.

Preserve Clean Water Act Protections

Section 1201 of the proposed legislation would require the U.S. Environmental Protection Agency's (EPA) scientific recommendations for national water quality criteria to undergo formal rulemaking under the Administrative Procedure Act[1] and subject the recommended criteria to judicial review, adding unnecessary procedural hurdles to guidance that helps states protect their waters. These changes could delay updates based on the latest science, making it harder for states to respond to emerging threats to clean water and public health.

Section 401 of the Clean Water Act allows states and authorized Tribes to approve, condition, or deny certification of federally permitted projects to ensure compliance with applicable water quality laws, including state and tribal laws specifically designed to protect their water resources.[2] Section 1202 of the proposed legislation would dramatically weaken states' and Tribes' authority to protect their water resources through a narrow definition of "water quality requirements," and make their limited remaining authority more difficult to exercise by requiring "clear and convincing evidence" to justify a denial or protective condition, requiring conditions to be the "least burdensome" means of ensuring compliance, and limiting the scope of conditions to the requirements of the federal license or permit thereby precluding application of more protective state and tribal laws.

Waterkeeper Alliance has identified a drafting problem in proposed Section 1202 that would dramatically undermine federal clean water protections. Specifically, this section contains language that could be interpreted to prevent federal agencies from independently implementing and enforcing fundamental Clean Water Act requirements when issuing permits and licenses. Although the provision appears intended to streamline the Section 401 water quality certification process, its extraordinarily broad wording could have consequences extending far beyond Section 401, potentially undermining environmental protections across multiple federal permitting programs.

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[1] 5 U.S.C. §553.
[2] 33 U.S.C. § 1251.

Proposed Clean Water Act Section 401(e)(1)(A) provides that whenever a state or Tribe grants a Section 401 certification—or simply waives its right to provide certification—the federal agency responsible for issuing the underlying permit or license "shall consider water quality requirements satisfied" when reviewing the application. The bill then defines "water quality requirements" in proposed Section 401(h)(3) to include the substantive requirements of Clean Water Act Sections 301, 302, 303, 306, and 307, together with federal, state, and Tribal laws implementing those provisions. These are not merely procedural certification requirements. They include the fundamental federal laws that prohibit pollutant discharges without a permit and regulate pollutant discharges, effluent limitations, water quality standards, and toxic pollution controls. Read together, these provisions could be interpreted to require federal agencies to treat compliance with core Clean Water Act requirements as conclusively established whenever Section 401 certification has been issued or waived—even if the discharge would violate federal water pollution laws—without requiring that the federal agency issue a federal permit designed to ensure compliance with the Act. Most troublingly, a state or Tribe need not actually determine that a project complies with water quality requirements of the Clean Water Act. Simply failing to act before the certification deadline expires would trigger a waiver, potentially requiring the federal agency to consider substantive Clean Water Act requirements satisfied without any water quality review whatsoever and without incorporating any water quality requirements into the terms of a permit.

These changes would have major public health and environmental consequences across numerous federal permitting programs that we do not believe could possibly have been intended by the bill's sponsors. For example, in states and Tribal territories where EPA directly administers the National Pollutant Discharge Elimination System (NPDES), EPA must independently ensure that permits contain appropriate pollution limits, including limitations necessary to implement the Act's water quality requirements and protect water quality. Incorporating section 401 water quality certification conditions are a supplemental piece of that obligation, not the core of the Act's approach to regulating pollutant discharges or the limit of the permitting agency's obligation. Under the bill's language, an industrial or municipal discharger could argue that once the state or Tribe grants or waives Section 401 certification, EPA is legally required to consider the underlying Clean Water Act requirements satisfied, even though it is the NPDES permit itself that must be designed and required to ensure compliance with those requirements. This proposed language could be used to challenge EPA's authority to impose technology-based effluent limitations, water-quality-based effluent limitations, monitoring, and other core permit terms, even where those limits are necessary to prevent violations of effluent limitations, applicable water quality standards, national standards of performance, and toxic pollutant limitations. In the most extreme interpretation, a procedural certification waiver or minimal 401 certification by a state or Tribe could be invoked to prevent EPA from requiring compliance with all, or nearly all, of the very pollution-control requirements it is charged with enforcing under the Clean Water Act.

These unacceptable outcomes could also adversely affect other federal agency abilities to protect waters across the country. For example, the Army Corps of Engineers must independently evaluate applications to discharge dredged or fill material into jurisdictional waters, including compliance with applicable environmental requirements and the Section 404(b)(1) Guidelines. A developer seeking authorization to fill wetlands or streams could argue that a granted or waived Section 401 certification requires the Corps to treat applicable water quality requirements as satisfied, notwithstanding evidence that the proposed discharge would violate water quality standards. This could constrain the Corps' ability to require protective conditions or deny a permit based on water quality impacts, particularly when considered alongside the bill's separate restrictions on Section 404 permitting discussed below. Similar problems would affect permitting and licensing by every other federal agency that authorizes activities that may result in discharges to waters of the United States, such as the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission.

This is more than just a technical drafting issue. Section 401 certification serves an important but distinct function from the permitting action itself: it gives states and Tribes a role in ensuring that federally licensed activities comply with applicable water quality requirements. Certification has never been utilized, and was never intended, to serve as a permitting action designed to ensure full compliance with the Act and replace federal agencies' independent obligations to comply with and enforce the Clean Water Act through permits and other means. Yet the bill does not simply provide that the Section 401 certification requirement is satisfied. Instead, it directs federal agencies to consider the underlying water quality requirements themselves satisfied for the purpose of the actual federal permit. That difference in wording is critical. It potentially transforms a procedural step in federal permitting into a substantive legal determination that the project's discharge fully complies with federal pollution-control laws in the absence of requiring a permit that is designed to ensure compliance as has long been required by the Act. The problem is especially acute when certification is waived. A waiver ordinarily means only that the federal agency may proceed without certification—not that the proposed discharge actually satisfies all the requirements of the Clean Water Act. Nothing in the apparent objective of streamlining state and Tribal Section 401 certifications requires Congress to create this broad presumption of substantive compliance with federal law in the absence of a permitting agency designing and issuing a comprehensive permit designed to ensure compliance with the Clean Water Act.

Section 1202 would also narrow certification review for covered natural gas pipelines and interstate electric transmission projects to direct point source discharges into federally protected waters. These provisions would further undermine states’ and Tribes’ ability to address broader water quality impacts before federal approval.

Section 1204(b) would expand streamlined general permitting for dredged or fill material and require the Corps to consider the effects of discharges into less than two acres of waters "minimal." Yet even small disturbances can harm downstream water quality, disrupt habitat, and contribute to cumulative watershed damage. The provision would also extend maximum general permit terms from five to ten years, allowing longer intervals between mandatory reviews of permit safeguards. Section 1203 would also extend maximum pollution discharge permit terms under authorized National Pollutant Discharge Elimination System (NPDES) programs from five to ten years.[3] Longer terms could delay updates to pollution limits as science and technology changes. Regular review is particularly important for emerging contaminants such as PFAS, where existing permits may not adequately address newly identified risks.

Section 1204(a) would limit when EPA can exercise its Clean Water Act Section 404(c) authority to prohibit or restrict dredged or fill disposal that poses unacceptable harm to water supplies and ecosystems.[4] EPA could act only between submission of a complete application and permit issuance, losing its ability to protect areas proactively or intervene after approval, even if new information revealed serious risks. Congress should preserve this protection against unacceptable damage.

Protect Wildlife

The proposed legislation would shorten Endangered Species Act consultation timelines under Section 1302, allow eligible states to assume certain federal consultation responsibilities under Section 1304, and waive consultation when qualifying nationwide permits are reissued under Section 1204(b), subject to specified limits concerning preconstruction requirements.[5] These changes could allow projects to proceed without adequately assessing threats to protected wildlife, while creating inconsistent protections for species whose habitats cross state boundaries. Changes to scientific standards could make it harder for agencies to act on emerging evidence of harm, delaying protections until species and their habitats have suffered further damage.

The proposed legislation would also undermine the agencies' ability to protect wildlife, ecosystems, and the communities that depend on them after a project receives approval. Section 1401 of the measure broadly restricts federal agencies from modifying, suspending, or revoking existing permits, or interfering with the construction or full-capacity operation of fully permitted projects, except under limited circumstances. It allows permit holders to challenge these agency actions in court, places a clear and convincing evidentiary burden on the government, and exposes the government to substantial financial liability if the challenge succeeds. Together, these provisions could strongly discourage agencies from revisiting approvals, even when new information reveals threats to wildlife or important ecosystems. Waterkeeper Alliance opposes these restrictions, which would make it harder for agencies to strengthen protections as environmental conditions change and new risks emerge.

Data Center Expansion Requires Stronger Oversight

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[3] 33 U.S.C. § 1342.
[4] 33 U.S.C. § 1251.
[5] 16 U.S.C. §§ 1531–1544.

The proposed legislation is particularly troubling amid the rapid proliferation of data centers in the U.S. The Bipartisan American Affordability and Jobs Act of 2026 would further streamline the permitting for data centers and support infrastructure while weakening scrutiny of impacts on wetlands and waterways. Communities deserve opportunities to understand these projects, raise concerns, and secure protections before construction begins.

Waterkeeper Alliance urges Congress to reject legislation and pursue permitting reforms that support clean energy while preserving state and tribal authority, protect waterways and wildlife, and ensure communities can enforce environmental laws.

Preserve Public Participation and Access to Courts

Waterkeeper Alliance is concerned that the proposed legislation undermines public participation and judicial review, limiting community input and government accountability. Specifically, Section 1205 would establish a 150-day deadline for challenging specified Clean Water Act Section 404 decisions, down from the six year statute of limitations from the Administrative Procedure Act.[6] Communities would have limited time to identify problems, secure technical and legal assistance, and prepare a challenge. It would also generally prevent courts from stopping permitted activities or invalidating unlawful permits unless those activities posed an imminent and substantial danger to human health or the environment and no other equitable remedy was available. Section 1110 would separately impose a 150-day filing deadline for specified National Environmental Policy Act (NEPA) challenges and generally require authorizations to remain in effect while agencies correct NEPA violations.[7]

These restrictions could leave communities unable to prevent irreversible damage even after an approval is found unlawful. A wetland may be filled or a stream permanently altered while an agency completes the review that should have informed its original decision. Courts must retain meaningful authority to prevent that harm.

Ensure Meaningful Public Scrutiny Before a Vote

Waterkeeper Alliance is concerned about efforts to advance this sweeping measure without adequate public scrutiny from those most affected. Introduced on September 30, 2026 the more than 400-page package substantially rewrites and dramatically weakens longstanding environmental and public health protections, yet its sponsors have indicated that they plan to seek a Senate vote immediately after the election, as early as November 9, without a committee process. Changes of this significance and scale warrant public hearings and meaningful opportunities for affected communities and community-based organizations to provide input. Community members need a meaningful amount of time to examine the text, comprehend and explain its consequences, and inform revisions before a floor vote takes place. Congress should provide a transparent process that gives affected people who depend on these protections a meaningful voice in their future.

Sincerely,

Waterkeeper Alliance

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[6] 5 U.S.C. §§ 551 et seq.
[7] 42 U.S.C. §§ 4321–4347.