National Association of Wetland Managers

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

Executive Director
Portia Osborne
500 Washington Avenue, Suite 201
Portland, ME 04103
(207) 892-3399

Chair
Samantha Vogeler
KY Division of Water
300 Sower Boulevard, 3rd Floor
Frankfort, KY 40601
(502) 782-6995

Vice Chair
Open

Secretary
Amy Lounds
MI Dept. of Environment,
Great Lakes, and Energy
525 W. Allegan Street
Lansing, MI 48933
(517) 331-7966

Interim Treasurer
Andrew Robertson
Saint Mary's Univ. of Minnesota
700 Terrace Heights #7
Winona, MN 55987-1399
(507) 457-8746

Past Chair
Mark Biddle
DE Dept. of Natural Resources
and Environmental Control
285 Beiser Boulevard, Suite 102
Dover, DE 19904
(302) 670-4466

Members at Large

Stacia Bax
MO Dept. of Natural Resources

Denise Clearwater
MD Dept. of the Environment

Bill Ryan
OR Dept. of State Lands

Mary Ann Tilton
NH Dept. of Environmental Services

November 6, 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

Dear Chairman Capito, Chairman Lee, Ranking Member Whitehouse, and Ranking Member Heinrich:

The National Association of Wetland Managers (NAWM) submits the following comments regarding the U.S. Senate's bill S.5653, the "Bipartisan American Affordability and Jobs Act of 2026" (BAAJA). For the reasons highlighted below, we believe that the BAAJA may fail to achieve both the intent of the bill's sponsors as well as goals of the Clean Water Act (CWA).

NAWM is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland and aquatic resources protection programs. Since 1983, our organization and our member states and Tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing state and tribal co-regulators, NAWM understands the complexity of the CWA and the implementation challenges the Act poses.

We are not raising here all of our concerns about the BAAJA but instead focusing on issues of particular concern to our state and tribal members. We would welcome an opportunity to meet with you and your staff for further discussion.

An overarching concern we have about the BAAJA is that it severely impairs the cooperative federalism structure incorporated into the CWA. The CWA calls on federal, state, and tribal agencies to work cooperatively to achieve statutory goals with both authorities and responsibilities for numerous water quality protection provisions of the Act. By eliminating or limiting the state and tribal authorities, the BAAJA would make it less likely that the Act will attain its goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

Wetlands are unique aquatic resources capable of providing many benefits, such as flood control and storm surge abatement, drought

attenuation, recreation, habitat for commercial and other fisheries, along with functions that support many threatened and endangered species and many resources that are culturally significant to Tribes. Attached is a short summary of the many benefits that result from wetlands.

BAAJA Section 1202 – Amending CWA Section 401 Water Quality Certification

CWA section 401 provides that a federal agency cannot issue a license or permit that may result in a discharge to waters of the United States, unless the state or authorized tribe where the discharge would originate certifies the discharge would be consistent with the state or authorized tribes' water quality requirements or waives its authority to do so.[1] If a certifying authority denies a section 401 Water Quality Certification, then the federal agency can not issue a federal permit or license. The authority in section 401 is a direct grant from Congress to states (and Tribes with "treatment in a similar manner as a state" (TAS) status under CWA section 518) and does not require program approval by the Environmental Protection Agency (EPA).

Section 401 certification is a critical tool for many states and Tribes to protect their aquatic resources, including wetlands, and water quality. For example, NAWM data indicates that more than half of states rely on section 401 certification as their wetland protection program.[2] For states and Tribes without independent permitting authority, the BAAJA's restrictions on section 401 could leave significant gaps in their ability to address water quality impacts associated with federally authorized activities.

The CWA relies on section 401 to help ensure that federal licenses and permits are consistent with aquatic resources protection and goals of the Act.[3] As such, 401 provides that federally issued licenses and permits will be evaluated by the state and tribal authorities most familiar with the resource, and ensures that the proposed project would be consistent with CWA goals as well as with state and tribal requirements. Those goals cannot be met if statutory amendments or regulations inappropriately limit the section 401 certification process and narrow scope of review. The BAAJA would limit state and tribal certification analyses only to programs implementing the enumerated provisions listed in CWA section 401 and not allow consideration of other state and tribal laws to protect water quality.

The BAAJA would extensively amend CWA section 401, establishing significantly more detailed federal statutory standards for how states and Tribes use their section 401 certification authority. The goal of the BAAJA is to lessen the administrative burden of environmental permits for project proponents, federal agencies, and implementing states and tribes,[4] but the proposed bill actually would achieve the opposite result. BAAJA would *increase* administrative burden in a number of ways. For example, the legislation would require certifying authorities to explain the "clear and

[1] CWA section §401(a)(1), 33 U.S.C. §1341(a)(1).
[2] Association of State Wetland Managers, Inc., 2015. Status and Trends Report on State Wetland Programs in the United States. NAWM is in the process of updating the report and thus far is seeing a similarly heavy reliance on CWA section 401 to protect wetlands and other waters.
[3] Congress intended section 401 to help ensure that all discharge activities authorized by federal agencies would comply with "state law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." See S.Rep. 92-313 at 69, reproduced in 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973).
[4] See, e.g., Senate Environment & Public Works Committee press release, "What They're Saying: Bipartisan Permitting Reform Will Deliver Cheaper Energy, More Jobs, Responsible Growth," October 7, 2026, available at: What They're Saying: Bipartisan Permitting Reform Will Deliver Cheaper Energy, More Jobs, Responsible Growth - Majority News - U.S. Senate Committee on Environment and Public Works

convincing evidence" affecting their certification decisions, which may in practice contradict the limitations on information certifying authorities may request. Similarly, certifying authorities would be required to provide pre-application meetings with project proponents regardless of available administrative resources, distance to the project, potential impacts, and other factors.

Certifying authorities must have sufficient information to determine whether a proposed activity will comply with applicable water quality requirements. Without that information, states and Tribes may be unable to identify appropriate certification conditions or determine whether certification can be granted. Rather than streamlining the process, restrictions on information requests could create additional coordination, uncertainty, and delays, particularly where separate state or Tribal authorizations are also required. Mandatory procedural requirements may also place disproportionate demands on programs with limited staff and technical resources

The BAAJA would limit state and tribal certifying authorities' scope of certification analysis with a narrowed definition of "water quality requirements." The CWA calls on certifying authorities to consider "other appropriate provisions of state law," which by regulation EPA has defined as "water quality requirements." The bill would re-define "water quality requirements" as only CWA sections 301, 302, 303, 306, and 307 (that is, CWA effluent guidelines for new and existing sources, water quality standards, and toxics provisions) as well as any federal, state, or tribal laws and regulations implementing the listed CWA sections that are applicable to discharges into "waters of the United States" (WOTUS). This definition would substantially narrow the scope of considerations for the state or tribal certifying agency, excluding consideration of whether a proposed project would be consistent with provisions of state and tribal law that protect water quality but are not directly connected to the enumerated CWA provisions in the BAAJA. For example, nonpoint source provisions and tribal water quality standards not submitted to EPA for approval as CWA standards likely would be outside the scope of section 401, as would provisions to protect state or tribal waters and "fill the gap" in CWA jurisdiction that results from U.S. Supreme Court decisions or agency rulemaking.

In addition, the BAAJA would limit the information that a state or tribal certifying authority may request, even where the certifying authority determined that additional information is necessary to make an informed decision on whether or not the discharge would comply with water quality requirements. This could lead to inconsistency and delays if the state or tribe must certify a discharge under section 401 with limited scope and information, but then under state or tribal law must impose additional conditions or limitations.

<u>BAAJA Sections 1204-1205 – Changes to the CWA Section 404 Permitting Program</u>

The BAAJA would make several substantial changes to the CWA's section 404 permitting program for dredged or fill material both in terms of the scope of considering what the Army Corps of Engineers (Corps) might take into account when developing a permit and in terms of presumptions regarding environmental effects.

The BAAJA would limit the Corps' consideration of environmental effects to "only the effects on compliance with water quality requirements [in section 401] of any discharge of dredged or fill material resulting from the activity." The narrow scope of considerations here (in section 404) has the same problems as the provision does in section 401: ignoring other existing water quality requirements under state, tribal, or federal law. These narrow considerations would significantly hamper agencies' ability to achieve the goals of the CWA.

By limiting water quality requirements to the sections enumerated in section 401, the BAAJA would create another problem: a contradiction with past clarifying interpretations of CWA section 404 by

the U.S. Supreme Court, EPA, and the Corps. For decades, EPA and the Corps of Engineers have required compliance with the CWA section 404(b)(1) environmental guidelines developed by EPA in coordination with the Corps. In addition, the agencies have long adopted the position that section 404 permits are required for discharges of dredged or fill material into waters of the U.S., and section 402 National Pollutant Discharge Elimination System (NPDES) permits are required for discharges of waste and reflect the CWA's effluent guideline requirements. To avoid confusion about which permit is required, the agencies' position has been that effluent guidelines do not apply to section 404 permits.[5] Because the legislation's definition of "water quality requirements" would apply the effluent guidelines in CWA sections 301, 302, and 306 to CWA section 404 permit decisionmaking, it would recreate the permitting confusion that preceded Supreme Court clarifications.

The BAAJA would further change the scope of the Corps' environmental effects review by mandating that "any effects of a discharge of dredged or fill material into less than 2 acres of navigable waters to be a minimal adverse environmental effect" and, as such, allow a broader use of general permits without any notification to and approval by the Corps. This provision is likely to result in substantial negative environmental effects well above the CWA requirement that general permits result in only "minimal adverse environmental effects" both individually and cumulatively."[6] Corps review and opportunity to regionalize a threshold help strike a balance that would be unavailable with the BAAJA's threshold precluding review.

The significance of impacts to wetlands and other aquatic resources cannot be determined by acreage alone. The location, type, condition, and functions of the affected resource, along with its relationship to surrounding aquatic systems, are important considerations. Impacts affecting less than two acres of a high-quality wetland, headwater system, or other sensitive aquatic resources may have substantial ecological and water quality consequences. A uniform national threshold that does not adequately account for these factors could result in activities with more than minimal adverse environmental effects being authorized.

We also note that concerns over the effects of the BAAJA are amplified when viewed in conjunction with proposed changes to the definition of WOTUS. The proposed regulatory definition would limit jurisdictional waters, including wetlands, to nearly year-round cover by surface water. This approach fails to recognize shorter term inundation and surface and groundwater connections that occur at various durations seasonally, and can transport pollutants when the water is present. By further restricting review, the BAAJA increases the likelihood of damages from discharges to infrastructure and human health, water supply, recreation, and fish and wildlife.

The BAAJA indicates it does not affect the Corps' authority to develop nationwide general permits (NWPs) and individual permits. The bill does, however, limit necessary consultations in an effort to streamline the NWP development process, which disrupts CWA's cooperative federalism framework. Foregoing consultations also arguably violates other federal laws and federal agency obligations to comply with state and tribal consultation requirements. For example, when developing a NWP the Corps would no longer be required to consult with states, other federal agencies, or Tribes under the Endangered Species Act or the Historic Preservation Act, and requirements of the National Environmental Policy Act would be met by preparing a programmatic

[5] This position is spelled out in the U.S. Supreme Court decision in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council (557 U.S. 261, decided June 22, 2009)("Kensington Mine") addressed the relevance of an effluent guideline for a gold mining technique to a section 404 permit, and adopted the position of EPA and the Corps of Engineers that effluent guidelines apply to section 402 only and not to section 404.
[6] 33 U.S.C. §1344(e), CWA §404(e).

environmental assessment. As a result, the Corps would not have the benefit of input from states and Tribes regarding other federal statutory requirements that may be inconsistent with the action being considered.

The BAAJA would severely limit judicial review of several actions under CWA section 404. It would impose a 150 day statute of limitations for challenges to (1) EPA approval of a state section 404 permit program, (2) individual or general section 404 permits, and (3) Corps verifications that activities are authorized under a section 404 general permit. The bill also limits potential judicial remedies, such as when a permit will be remanded to the permitting authority. A 150 day statute of limitations could, for example, mean that a NWP would not be amended for another 10 years even in circumstances where unanticipated adverse environmental effects occur.

NAWM is also concerned that extending the duration of general permits from five to ten years could reduce opportunities to reevaluate conditions in response to changing environmental conditions, emerging scientific information, and cumulative impacts. Although individual activities may have relatively small impacts, the combined effects of multiple activities across a watershed can significantly affect aquatic resource functions and water quality. Periodic review provides an important opportunity to assess whether authorized activities continue to result in no more than minimal adverse environmental effects.

Closing

This letter has highlighted two areas of concern to NAWM and its state and tribal members, involving CWA section 401 water quality certification and the CWA section 404 permit program for dredged or fill material. We would welcome an opportunity to talk with you or your staff regarding these concerns and other issues raised by the BAAJA that may result in effects not anticipated by its sponsors.

We request that Congress not rush to a decision on permitting reform but instead carry over the issue for consideration early in the new Congress. This would allow time for discussions regarding implications and effects of the legislation's policies with states and Tribes who co-implement the CWA provisions. Such discussions would help ensure the resulting legislation avoids unintended consequences that run counter to the intent of the legislation's sponsors and with goals of the CWA.

Thank you for your consideration of these comments and please feel free to contact me at (207) 892-3399 or portia@nawm.org.

Sincerely,



Portia Osborne
Executive Director

Cc: NAWM Board of Directors
Senator John Thune, Senate Majority Leader
Senator Charles Schumer

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WHY WETLANDS ARE IMPORTANT

Wetlands provide multiple societal and economic benefits. While diverse in type and structure, the functions that wetlands provide collectively and individually are critical for supporting healthy and prosperous communities. Key among these functions are water storage, water filtration, and biological productivity.

Some of the goods and services provided by wetland functions include:

1. Fisheries production
2. Habitat for rare and endangered species
3. Water quality buffering and pollution control
4. Wave attenuation and erosion control
5. Production of forestry products and natural crops
6. Flood conveyance and flood storage
7. Carbon storage and sequestering
8. Groundwater recharge and drought risk reduction
9. Traditional foods from plants, fish, and wildlife
10. Plants used for medicinal, healing, and ceremonial purposes
11. Reeds and grasses for traditional uses such as weaving baskets and textiles
12. Cultural and spiritual ceremonies and practices

We estimate that each hectare of wetland loss between 2001 and 2016 increases NFIP claims by $1,840 to $1,900 per year when accounting for spatial spillovers. However, this value masks significant spatial heterogeneity in wetland benefits. For example, we estimate that one hectare of wetland loss in developed areas (those with >10% built-up area) costs society $8,290 in flood mitigation value. Using this range, the societal benefits from reduced flooding outweigh the cost of conserving wetlands (based on land price) within 6 to 22 years, on average. One interpretation of our results is that lifting federal protections for wetlands represents a transfer from taxpayers, who fund the NFIP, to private landowners, who profit from converting wetlands to other uses.

~ Wetlands, Flooding, and the Clean Water Act (2021). Charles Taylor and Hannah Druckenmiller, Resources for the Future Working Paper.

ECONOMIC IMPORTANCE

- The U.S. EPA estimates of commercially harvested fish and shellfish species indicate that up to 75% of these animals depend on wetlands at some point in their lifecycle; this percentage could be as high as 90% for recreational fish species. In 2017, NOAA Fisheries estimated that the US seafood industry supported 1.2 million jobs and added $69.2 billion to the gross domestic product.
- Estimates by the American Sportfishing Association indicate that recreational fishing may have an annual economic impact of $116 billion.
- A University of Vermont study found that wetlands and floodplains protected Middlebury, VT from as much as $1.8 million in flood damage during Tropical Storm Irene, saving the town up to 78% of potential damages.
- A 2018 study by the Delaware Dept. of Natural Resources and Environmental Control found that Delaware wetlands contribute over $1 billion in annual economic value from water quality, flood control, parks/open space, fish/wildlife, recreation, forested wetlands/carbon storage, and nonuse value (willingness to pay) functions and support 25,000 jobs with $568 million in wages.
- In South Carolina is has been estimated that the filtering effects of the Congaree Bottomland Harwood Swamp would cost $5 million dollars in treatment to remove the same pollutants.
- New York City's drinking water supply is the largest unfiltered water supply in the United States serving over 9 million customers approximately 1.2 billion gallons of water every day. Maintaining a healthy watershed which supplies the 19 reservoirs and major tributaries is essential to avoid the estimated $8 to $10 billion dollars to construct a treatment facility and the $1million dollars in daily operational costs.
- Research published in 2016 found that coastal wetlands prevented more than US$625 million in property damages during Hurricane Sandy, reducing property damages throughout the Northeast US by 10% on average.