October 30, 2026

Dear Chairman Lee and Ranking Member Heinrich

Thank you for your efforts on permitting reform through the Bipartisan American Affordability and Jobs Act. We appreciate a bipartisan bill of this complexity will necessarily include compromises to have any chance of passing and being signed into law. While recognizing this, we have serious concerns with numerous provisions currently included and are therefore unable to support the bill in its current form.

Below is a list of some of our most significant concerns and objections, focusing on those that are most relevant to our current place-based conservation campaigns in New Mexico and issue priorities. Thank you for the opportunity to submit these for your consideration.

- **NEPA**
  - **Section 1106** would limit the range of NEPA alternatives in favor of the project proponent's goals, reducing the ability of Tribes and the public to propose NEPA alternatives; and prevents agencies from considering new science or information that becomes available after the agency publishes an NOI to prepare a NEPA document. Locks in the current limitations on public participation (the only requirement is one comment opportunity in the scoping phase for an EIS; no public participation for EAs, drafts, etc.).
  - **Section 1110** would prevent litigation to challenge an agency's non-compliance with the NEPA process, would require plaintiffs to sue within 150 days (vs. 6 years), require plaintiffs to demonstrate "direct harm" for standing (creates a higher bar than the current threshold for getting through the courthouse doors), prevent courts from vacating (nullifying) illegal agency decisions or from issuing an injunction to stop/pause a project while the lawsuit is pending.
- **ESA**
  - **Section 1301** substantively and negatively changes the definition of best available science to the detriment of recovering species.
  - **Section 1302** would accelerate the ESA Section 7 consultation process, making it harder for Tribes to engage in the process to protect treaty-reserved wildlife resources and culturally significant species.
  - **Section 1303** would compound this by excepting a category of transportation projects from Section 7 consultation all together.
  - **Section 1304** would allow DOI to delegate Section 7 consultation duties to states, which would inhibit consultation between the federal government and Tribes (states are in a much different relationship to Tribes than the federal government is) and introduce state politics into the process.
  - **Section 1305** would narrow the window to obtain judicial review of a biological opinion to just 150 days.

- **Project Certainty**
  - **Section 1401** blocks the revocation, suspension, or alteration of a project permit, absent very narrow exceptions. It will be extremely expensive for the government to try to modify or revoke a permit, even if the permitting decision was illegal or excluded relevant information from Tribes or communities, and even if there is a new regulatory requirement such as to abate pollution or protect a newly imperiled species. Puts a very high burden on the government to prove the exceptions apply and provides huge damages awards to project proponents that win lawsuits (at taxpayer expense). This would prevent lawsuits challenging bad or illegal projects because "standing" includes the requirement that a court must have the authority to provide a remedy, yet the changes to NEPA and NHPA prevent courts from invalidating permits.
  - **Section 1402** allows project proponents to challenge permit denial by alleging "disparate treatment" of a project type, a concept borrowed from Civil Rights law, and provides legal remedies to proponents including injunctions, fees, and 50-100% of the construction costs. The standard for courts to review this is unclear, likely to result in lots of new litigation. When there is an administration change, this could entrench existing types of energy development, mining, logging, etc. for at least the 5-year look-back period, and agencies may be unwilling to deny permits due to the potential price tag.
- **NHPA**
  - **Section 2301** adds a definition of "property of traditional religious or cultural importance" to be the geographically identifiable location where a discrete event of continuing significance to a living community occurred, eliminating broader cultural landscape protections and Tribal definitions of what constitutes a traditional cultural property.
  - Creates narrower new definitions of "undertaking," "adverse effect," and "reasonably foreseeable," which would narrow the scope of projects subject to NHPA and remove consideration of indirect/visual/atmospheric effects.
  - Narrows legal remedies for Tribes and historic preservation community by making remand-without-vacatur the sole remedy (as with NEPA), allows only 150 days to sue, and other limits.
  - Agencies can decide that "other considerations" outweigh preservation and refuse to avoid, minimize, or mitigate harm.
  - Agencies would no longer consider historic properties identified after the undertaking is initiated; only previously identified or listed properties would be considered under NHPA.
  - Consultation with Tribal nations is no longer mandatory and is subject to a tight timeline.
  - Increases scrutiny of Tribal Historic Preservation Offices and allows that missed deadlines can allow feds to deny grants and programs and assume control of these offices.
- **Mining**
  - **Section 2215** - expands the 1872 Mining Law by authorizing more mill sites for dumping waste and tailings and other uses reasonably incident to mining,

including roads, pipelines, etc. Could drastically increase the footprint and impacts of mining projects.

- **CWA**
  - **Section 1201**. The administrative procedure changes in section a would require EPA issuing scientific guidance related to water quality criteria a rulemaking procedure. Currently, EPA's role is to synthesize the best available science and provide guidance for states to incorporate into their water quality criteria, then if the state does not act when they should EPA must do it for them. This change requires a rulemaking procedure to develop scientific guidance.
    - Impact on New Mexico: Given the high rate of emerging contaminants, in addition to growing state of the science related to known contaminants, EPA's role as a support in synthesizing the state of the science is important. This change would slow down and politicize the process, harming New Mexico's ability to sufficiently address water quality problems.
    - Amendment proposal: Remove the rulemaking requirement.
  - **Section 1202**. Definition of water quality requirements would fundamentally change the way section 401 works. Only state and Tribal law that specifically implement Clean Water Act programs is relevant under this new definition. All waters under that are not federally protected are irrelevant (in contrast to now where a discharge from a WOTUS would be evaluated in the entire scope of its project against a state's water priorities). This definition fundamentally changes states and Tribes as coregulators of water within their boundaries.
    - Impact on New Mexico: Because of the WOTUS rollbacks, functionally most of our waters and wetlands would not be eligible for 401 certifications.
    - Amendment proposal: Remove new definitions of water quality requirements.
  - Requirements on states and Tribes when they do deny certification under 401 or add conditions under the certification procedure would raise the bar significantly as to the evidence states need to provide. It would also limit their ability to require conditions that relate to state waters (e.g., a WOTUS discharge that is impacting fish passage or aquifer recharge could currently have conditions placed on it).
    - Impact on New Mexico: Severely limits the point of 401 and water quality nationwide will be worsened because of it.
    - Amendment proposals:
      - Preserve state and Tribal 401 certification authority and ensure that federal agencies cannot disregard certification decisions or conditions.
      - Clarify that states and Tribes retain authority to protect all waters within their jurisdiction, including non-WOTUS waters and groundwater.
      - Strike the requirement that state and Tribal conditions be the "least burdensome" option and instead provide for conditions that are reasonably necessary to comply with water quality requirements.

- It would significantly limit the CWA Section 401 certification process, which allows Tribes and States to deny or condition federal permits to discharge into Waters of the US. According to NARF's analysis, "the revisions to the Section 401 process limit Tribal Nations' review of water quality impacts of a proposed project in every direction—from the scope of what kinds of impacts can be considered, to the laws that can form the basis for a certifying authority's decisions, to the review timeframe, to the burden of imposing conditions, and to the availability of judicial review."
- **Section 1203**. Changing permit terms from 5 years to 10 years increases the amount of time a permittee would not have to account for new information on contaminants, changes to environment, etc.
    - Impact on New Mexico: Possibility of "zombie" permits, where permittees continue discharge under expired permits, which would be exacerbated.
    - Proposed amendment: Allow a 10-year permit extension only for permits that are low-risk stable discharges, while retaining a 5-year permit timeframe for impaired waters, facilities that have demonstrated compliance problems in the past, and major facilities.
- **Section 1204**. EPA veto authority ensures that the EPA can veto a permit issued by USACE when EPA determines there are unacceptable adverse impacts from a dredge and fill permit. Using this veto power already has a high bar and while used infrequently, when it is necessary it is a powerful tool (see Pebble Mine).
    - Impact on New Mexico: this removes an important backstop, particularly related to mining threats. The USACE is a far more conservative agency that frequently does the bare minimum to protect some of our most important resources.
- Nationwide permits are intended to be a streamlined permitting process for projects that have minimal impacts or are substantively the same impacts across projects, regardless of locations. This section codifies several new nationwide permits, including oil and gas pipelines. These new permits contradict the intent of NWP because they provide a permitting process that reduces consultation and analysis for projects that are often quite different project to project and will have substantively differing impacts depending on location. This section also allows unlimited fill of wetlands and other waters on sections that are 2-acres or less.
    - Impact on New Mexico: The 2-acre allowance will have serious impacts for portions of the state like the Lower Rio Grande. In these places, the best we can hope for in terms of habitat is a "string of pearls," with connected small areas that provide some mosaic for important species.
    - Amendment proposals:
        - Change unlimited fill allowance from 2-acres to ½ an acre.
        - Remove the requirement that USACE only consider effects on defined water quality requirements and preserve consideration of full range of environmental impacts.
        - Require review and subsequent consultation for new ESA species and historic sites.
- Would change the CWA Section 404 dredge and fill permit provisions in multiple ways, including by

        - removing EPA's ability to stop a permit decision with unacceptable adverse impacts (this is in response to EPA's action to reverse the Pebble Mine permit in Alaska);
        - making the permit inquiry all about water quality, meaning that the Army Corps of Engineers would no longer be required to consider aquatic ecosystem impacts, wetland loss, wildlife impacts, fisheries, etc.;
        - limiting the use of individual permits even if appropriate to protect ecologically or culturally sensitive places;
        - making it nearly impossible to obtain judicial review of a nationwide permits because these would be renewed every 10 years instead of five, and the window to challenge would be only 150 days instead of 6 years. Also waives requirements to apply the ESA and NHPA when reissuing nationwide permits, which only happens every 10 years.
    - **Section 1205 -** 150-limitation from the time of issuance of a 404 permit and any challenge must be "sufficiently detailed".
        - Impact on New Mexico: This significantly limits citizen suit, one of the prime components of the Clean Water Act. It is another function that has not actually been utilized to a huge extent, but when it is it is important.
        - Amendment proposals:
            - Sufficiently detailed is used in multiple places throughout the bill. Include a definition that retains ability for citizens suits to be brought.
            - Extend statute of limitation to 5 years.

Thank you again for your consideration. We are happy to provide additional information and to meet with you at your convenience to discuss these concerns and objections in more detail.

Sincerely,

Mark Allison
Executive Director

Wendy Brown
Chair, Board of Directors